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Said Kigozi v R

[1958] 1 EA 1 (HCU)

Division: HM High Court for Uganda at Kampala

Date of judgment: 14 February 1958

Case Number: 3/1958

Before: McKisack CJ

Sourced by: LawAfrica

[1] Criminal law – Receiving stolen property – Meaning of possession – Penal Code, s. 298 (1) (*U.*).

Editor's Summary

The appellant was convicted by a magistrate of receiving a bicycle knowing it to have been stolen contrary to s. 298 (1) of the Penal Code. Evidence was led to show that the bicycle had been taken to the appellant for repairs and had been found in the appellant's house in a dismantled condition. Further evidence showed that the appellant had removed the small part which bears the number of the bicycle and had substituted another such part with a different number. The resident magistrate drew the inference of guilty knowledge from the manner in which the appellant dealt with the bicycle. It was argued on appeal that the appellant did not have possession of the bicycle of the nature that must be proved to establish a charge of receiving.

Held – although mere manual possession of a stolen article, without having control of it, does not amount to possession in law, in this case the resident magistrate had considered this question and had rightly inferred from the evidence that the appellant had at least joint possession and had, at the least, joint control over the article.

Appeal dismissed.

Case referred to in judgment:

(1) *Hobson v. Impett*, 41 Cr. App. R. 138.

(2) *R. v. Shaw*, [1942] 2 All E.R. 342.

Judgment

McKisack CJ: The appellant was convicted of receiving a bicycle knowing it to have been stolen, contra s. 298 (1) of the Penal Code. He was sentenced to three years' imprisonment with hard labour. He has appealed against conviction and sentence.

The facts found by the magistrate were that the bicycle was stolen from a cycle shed at a factory where the owner was employed. He made enquiries which led him to question one Asadi, who worked at the same factory. From

information given by Asadi, one Amisi Kigozi was questioned and he, in turn, made a statement which led to appellant's house being searched. In the house were found various parts, including the frame, of the bicycle, which had been dismantled.

Amisi Kigozi was jointly tried with the appellant for having received the bicycle. As two separate receivings were alleged against the accused, there were two counts–one in respect of each accused. The man Asadi had disappeared at the time appellant's house was searched and, apparently, has not been traced.

At the trial the accused Amisi Kigozi gave evidence that Asadi (his clan brother) gave him the cycle telling him to repair it but, as he (the witness) had a sore hand, he took the cycle to appellant and told him what repairs were required. This accused denied knowing that the cycle was stolen when he received it from Asadi.

At the trial appellant neither made a statement nor gave evidence, and he called no witnesses.

The accused Amisi Kigozi was acquitted by the learned trial magistrate, who found that there was not sufficient evidence that this accused was ever in possession of the bicycle in the sense of having control of it.

As regards the appellant, the magistrate found that when the bicycle came into his possession he knew that it was stolen. The magistrate inferred this knowledge from the fact that appellant had not only completely dismantled the bicycle but had removed the small part which bears the number of the bicycle and had substituted another such part with a different number. The appellant gave no explanation at his trial, but a statement he had made to the police (exhibit 5) was put in evidence. In that statement he said that his co-accused had brought the bicycle to him to be mended. From the manner in which appellant dealt with the bicycle I consider that the magistrate's inference as to guilty knowledge was fully justified. It is argued that the fact that the part of the bicycle bearing the original number was found in the appellant's shop, and had not been concealed or destroyed, is an indication of the appellant's innocence. I am unable to agree. The magistrate thought this fact pointed to stupidity and not to innocence, and that seems to me a reasonable inference. It is also possible, of course, that appellant may have retained this part of the bicycle for future use.

The main ground on which the conviction is attacked by Mr. Bhatt is that the appellant did not have possession of the bicycle of the nature that must be proved to establish a charge of receiving. It is true that mere manual possession of a stolen article, without having control of it, does not amount to possession for this purpose; see, for example, *Hobson v. Impett* (1), 41 Cr. App. R. 138. It is also clear that in a receiving case a jury must be directed as to the meaning of possession in law; see *R. v. Shaw* (2), [1942] 2 All E.R. 342. In the instant case it is quite clear from the judgment that the learned magistrate carefully directed his mind to this question in respect both of the appellant and of the other accused. In respect of appellant, having considered this question he concluded by saying

> "I am satisfied that the possession was in him and did not remain with the thief or accused 1 exclusively."

The fact that the appellant took the bicycle almost completely to pieces, and was making up a new bicycle from some of those parts and parts from another source, was, in my opinion, quite sufficient to justify the inference that he was–at the least–in joint possession of the bicycle with the thief (or the other accused) and had, at the least, joint control over it. Mr. Bhatt referred to *R. v. Shaw* (2), in which a person who had altered the number plates on a stolen car, and had helped in the sale of the car, was convicted at quarter

sessions of receiving, but the Court of Criminal Appeal quashed the conviction. This decision, however, was not that the acts alleged against the appellant in that case did not amount to receiving, but that the deputy-chairman had failed to direct the jury as to the meaning of possession.

The facts necessary to prove the offence with which the appellant was charged were adequately established and this appeal, therefore, fails. As regards sentence, it is true that the appellant has no previous convictions, but the deliberate disguising of a stolen bicycle is not a matter to be lightly regarded and I consider that a severe sentence was justified. Accordingly, I do not propose to alter it.

Appeal dismissed.

For the appellant:
JH Bhatt
JH Bhatt, Kampala

For the respondent:
HSS Few (Crown Counsel, Uganda)
The Attorney-General, Uganda

Ratilal Shah v R
[1958] 1 EA 3 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	3 March 1958
Case Number:	28/1958
Before:	Sir Ronald Sinclair CJ and MacDuff J
Sourced by:	LawAfrica

[1] Criminal law – Judgment – No clear findings and insufficient reasons – Findings written after judgment and not delivered in court – Whether defects fatal to conviction – Criminal Procedure Code, s. 169 (*K.*).

[2] Appeal – Proceedings at trial irregular – Whether appellate court should order new trial.

[3] Criminal Law – Receiving stolen property – Evidence establishing theft – Whether conviction of theft competent on charge of receiving.

Editor's Summary

An African salesman driver employed by a brewery altered an invoice for five cases of beer to show that he had delivered fifteen cases and made out another invoice showing that he had delivered fifteen cases

of beer to a customer to whom no beer had been delivered. He then drove to the appellant's shop and offered the appellant twenty cases of beer. The appellant accepted the beer which was off-loaded at his store. The appellant was subsequently charged with receiving or retaining stolen property. After hearing the evidence and addresses, the magistrate adjourned and a few days later delivered a short written judgment in which he convicted and sentenced the appellant, finding that the salient facts were unchallenged but adding that he would give his reasons in writing later. Subsequently he recorded his full reasons in a document headed "Findings," which was put with the record but never read out in court. On appeal from his conviction and sentence, the appellant's counsel contended that the procedure of the magistrate did not comply with s. 169 of the Criminal Procedure Code and that even if the evidence of the witnesses for the prosecution were accepted, that evidence established that the appellant was not a receiver as charged but a party to the theft.

Held –

(i) the judgment of the magistrate did not comply with s. 169 of the Criminal Procedure Code since there were no clear findings of fact, and except on one point, no reasons for the decision; an appellate court cannot look at

reasons written by a magistrate after the conclusion of a trial but the procedure adopted by the magistrate did not necessarily invalidate the conviction and an appellate court is entitled to entertain an appeal on the merits if no injustice to the parties is thereby done and the record contains sufficient material for the purpose.

Samwiri Senyange v. R. (1953), 20 E.A.C.A. 277 and *Desiderio Kawunya v. R.* (1953), 20 E.A.C.A. 281 followed.

(ii) since the prosecution case depended mainly on the evidence of accomplices or witnesses in a similar position, it was essential to have clear findings from the magistrate as to their credibility; moreover, the short judgment did not disclose whether the magistrate acted on the evidence of the accomplices without corroboration or whether he found sufficient corroboration of their evidence or whether he directed himself properly or at all on the danger of acting on their evidence; in consequence, the Supreme Court could not reach any conclusion whether the appellant was rightly convicted on the evidence.

(iii) a re-trial should not be ordered unless the Supreme Court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence a conviction might result.

Pascal Clement Braganza v. R., [1957] E.A. 152 (C.A.) followed.

(iv) there are exceptions to the general rule that a person charged with receiving stolen property cannot be convicted of receiving if the evidence establishes that he was the thief or a party to the theft, for instance *Wessel v. Carter Paterson & Pickfords Carriers Ltd.*, [1947] 2 All E.R. 280, but s. 179 of the Criminal Procedure Code was not in this case of assistance since the particulars required to establish the major offence of receiving stolen property, do not contain also those particulars required to establish the minor offence of theft.

Wachira s/o Njenga v. R. (1954), 21 E.A.C.A. 398 applied; *R. v. Daniel Kamau* (1946), 22 K.L.R. (Pt. 1) 38 doubted.

(v) the court was unable to hold that there was no evidence to justify the magistrate's finding that the salesman driver formed the intention to steal when he "fiddled" the invoice and that asportation occurred at the latest when he set off for the appellant's shop; accordingly, there was evidence to support a conviction for receiving and there must be a re-trial.

Appeal allowed. Conviction and sentence quashed. Order for a re-trial.

Case referred to in judgment:

(1) *Samwiri Senyange v. R.* (1953), 20 E.A.C.A. 277.

(2) *Desiderio Kawunya v. R.* (1953), 20 E.A.C.A. 281.

(3) *Pascal Clement Braganza v. R.*, [1957] E.A. 152 (C.A.).

(4) *Wessel v. Carter Paterson & Pickfords Carriers Ltd.*, [1947] 2 All E.R. 280.

(5) *R. v. Daniel Kamau* (1946), 22 K.L.R. (Pt. 1) 38.

(6) *Wachira s/o Njenga v. R.* (1954), 21 E.A.C.A. 398.

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court: The appellant was charged with receiving or retaining stolen property, namely, twenty crates of large Tusker beer the property of the East African Breweries Ltd., contrary to s. 317 (1) of the Penal Code. He was convicted of receiving the beer and sentenced to pay a fine of Shs. 1,000/-. He now appeals against conviction and sentence.

The procedure adopted by the learned trial magistrate was as follows. On September 20, 1957, after the conclusion of the evidence and addresses, he

postponed judgment until September 24. On September 24 he delivered a short written judgment in which he convicted and sentenced the appellant as stated above. In that judgment he said:

> "To all intents and purposes the facts, i.e. the salient ones, are unchallenged and I find events took place substantially as described by the three principal witnesses. I will give my reasons in writing at a later stage, both on the facts and the question of corroboration, if any. For the moment I will confine myself to Mr. O'Brien Kelly's final submission, which is really his first one carried a stage further."

He then went on to consider and reject the submission referred to, which was that, even if the whole of the evidence for the prosecution were accepted, the appellant was a party to the theft of the beer and not a receiver. This judgment is signed and dated September 24, 1957. Next in the record follow full reasons for the decision. These reasons are headed "Findings" and are signed and dated by the trial magistrate as on September 30, 1957. It appears from the record that these reasons were never delivered in court.

In *Samwiri Senyange v. R.* (1) (1953), 20 E.A.C.A. 277 and *Desiderio Kawunya v. R.* (2) (1953), 20 E.A.C.A. 281, where a similar procedure was adopted, the Court of Appeal for Eastern Africa held that an appellate court cannot look at reasons written by the presiding officer of a criminal court after the conclusion of the trial. The Court of Appeal was there considering s. 168 and s. 169 of the Uganda Criminal Procedure Code which are in the same terms as s. 168 and s. 169 of the Kenya Criminal Procedure Code. In the instant case the trial clearly concluded on September 24 and we are therefore precluded from taking into consideration the reasons written subsequently on September 30.

It is common ground that the judgment delivered on September 24 does not fully comply with the provisions of s. 169 of the Criminal Procedure Code. There are no clear findings of fact as to the appellant's part in the offence and, except on one point, no reasons for the decision. In the two decisions of the Court of Appeal for Eastern Africa cited above, it was held that failure to comply with s. 169 does not necessarily invalidate a conviction and that an appeal would be entertained on its merits if there was sufficient material on the record to enable the court to do so without injustice to the parties. In our view that principle should be followed by the Supreme Court in the exercise of its appellate jurisdiction.

The question for decision, therefore, is whether there is sufficient material on the record to enable us to consider the appeal on its merits or whether we should order a re-trial. In the circumstances of this case it is impossible for us to come to any conclusion as to whether the appellant was rightly convicted on the evidence. The case for the prosecution depended mainly on the evidence of accomplices or witnesses who should be regarded as being in the same position as accomplices, and in particular on the evidence of the thief, Pius Ouma. The appellant made an unsworn statement denying receiving or retaining the beer the subject of the charge, and two of the witnesses for the prosecution gave evidence which was in conflict on material points with other witnesses for the prosecution. It was essential, therefore, to have a clear finding as to the credibility of the witnesses and the facts which the learned magistrate found proved. But there is no such finding. It is impossible for us to come to any conclusion as to the credibility of the witnesses without seeing and hearing them. Furthermore, the judgment does not disclose whether the magistrate acted on the evidence of the accomplices without corroboration, or whether he found sufficient corroboration of their evidence or whether he directed himself properly, or at all, on the danger of acting on the evidence of accomplices.

A re-trial should not, however, be ordered unless we are of opinion that on a proper consideration of the admissible, or potentially admissible, evidence, a conviction might result. *Pascal Clement Braganza v. R.* (3), [1957] E.A. 152 (C.A.). On the aspect, Mr. O'Brien Kelly repeated the submission he made in the court below that, even if all the evidence on which the prosecution relied is accepted, that evidence established that the appellant was a party to the theft and, as a party to the theft, he could not be convicted as a receiver.

We agree that, as a general rule, when a person is charged with receiving stolen property, he cannot be convicted of receiving if the evidence establishes that he was the thief or was a party to the theft. There are exceptions to that general rule: see, for instance, *Wessel v. Carter Paterson and Pickfords Carriers Ltd.* (4), [1947] 2 All E.R. 280. In *R. v. Daniel Kamau* (5) (1946), 22 K.L.R. (Pt. 1) 38, however, this court held that having regard to the provisions of s. 179 (2) of the Criminal Procedure Code, a conviction for theft is competent on a charge of receiving stolen property since the former is a minor offence to the latter, being punishable with three years' imprisonment as against seven years. If that decision is still good law, the fact that the appellant was a party to the theft would not be a bar to our ordering a re-trial, since the appellant could be convicted of theft on the charge of receiving.

Section 179 of the Criminal Procedure Code provides:

> "179. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
>
> "(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

The section is, word for word, the same as sub-s. (1) and (2) of s. 238 of the Indian Code of Criminal Procedure. In *Wachira s/o Njenga v. R.* (6) (1954), 21 E.A.C.A. 398, which was decided after *Kamau's* case (5), the Court of Appeal for Eastern Africa accepted the following passage from an Indian case cited in Sohoni, (12th Edn.), at p. 592 as being the correct construction to be put on s. 179:

> "This section (i.e. s. 238) applies to cases in which the charge is of an offence which consists of several particulars, a combination of some only of which constitutes a complete minor offence. The graver charge in such a case gives to the accused notice of all the circumstances going to constitute the minor one of which he may be convicted. The latter is arrived at by mere subtraction from the former. But where this is not the case, where the circumstances embodied in the major charge do not necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also, the principle no longer applies, because notice of the former does not necessarily involve notice of all that constitutes the latter."

The decision in *Wachira's* case (6) is, of course, binding on this court and, applying the interpretation of s. 179 as laid down in that case, we are compelled to hold that the several particulars required to establish the major offence of receiving stolen property do not contain also those particulars which are required to establish the minor offence of theft. In other words the particulars required to establish the offence of theft cannot be arrived at by mere subtraction from the particulars or necessary elements that constitute the offence of receiving. As a corollary notice of the circumstances embodied in the major charge of receiving does not involve notice of all the circumstances constituting the minor charge of theft.

In *Kamau's* case (5) the only consideration taken into account by the learned judges was that theft, being punishable by a term of three years imprisonment, was a minor offence in relation to the charge of receiving which was punishable by a term of seven years imprisonment. The interpretation of s. 179 as now adopted in *Wachira's* case (6) was apparently not brought to their knowledge. Now in view of the decision of the Court of Appeal for Eastern Africa in that case we are of opinion that *Kamau's* case (5) is no longer authoritative and should not be followed.

We return now to the submission that even if the evidence of the witnesses for the prosecution is accepted, that evidence established that the appellant was a party to the theft and was not a receiver. Pius Ouma was a salesman driver employed by the East African Breweries Ltd. According to him, on July 25, 1957, he set out from Nakuru on his round with sixty cases of large Tusker beer and four cases of small Coast beer. On his return to Nakuru he had left twenty-three cases of large Tusker beer and two cases of small Coast beer. He stopped the lorry on the outskirts of Nakuru and made out an invoice to show that he had delivered fifteen cases of large Tusker beer to one customer, whereas in fact, he had delivered no beer to that customer. He also altered another invoice to show that he had delivered fifteen cases of beer to another customer, whereas, in fact, he had delivered only five cases to that customer. He then drove the lorry to Club Road where the appellant's shop is situated. He drew up outside Baker's Radio Shop in Club Road and walked across to the appellant's shop. He went there because the appellant had previously asked him if he could get extra beer. He met the appellant at the back door of the shop and said to him "Concerning the beer you keep asking me about, I have twenty cases now". The appellant agreed to accept the beer and told his father to show him, Pius, the store where the beer was to be deposited. The appellant's father then went with Pius to the appellant's store where twenty cases of beer were offloaded.

The trial magistrate found that Pius formed the intention to steal when he "fiddled" the invoices and that asportation occurred at the latest when he turned off the main road to go to the appellant's shop, instead of returning to the East African Breweries Depot or the African Location.

Mr. O'Brien Kelly contended that the "fiddling" of the invoices constituted only preparation for theft, that there was no evidence that when Pius turned off the main road to go to the appellant's shop he was not taking a legitimate route either to the depot or the African Location and that asportation, and accordingly a completed theft, did not occur until Pius moved off from the appellant's shop to take the beer to the appellant's store. He submitted that as the beer had not been stolen when Pius saw the appellant at the back door of the shop, the appellant either counselled or procured the theft, or aided and abetted its commission, by agreeing to accept the beer and by sending his father with the lorry to show Pius where the beer was to be deposited.

We find it impossible to say that the evidence could not justify a finding that there was asportation with animus furandi, and therefore a completed theft, when Pius, after "fiddling" the invoices, moved off in the lorry to go to the appellant's shop. In arriving at his finding the trial magistrate may well have been able to take judicial notice of the situation of Club Road, where the appellant's shop was situated, in relation to the depot and the African Location.

In our opinion there was evidence which could reasonably support a conviction for receiving and, for the reasons given, there must be a re-trial. The appeal is allowed and the conviction and sentence are quashed. We order that the appellant be re-tried by another magistrate having jurisdiction.

Appeal allowed. Conviction and sentence quashed. Order for a re-trial.

For the appellant:
JO'Brien Kelly
JO'Brien Kelly, Nairobi

For the respondent:
DS Davies (Crown Counsel, Kenya)
The Attorney-General, Kenya

Karisa Thuri v R
[1958] 1 EA 8 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	17 January 1958
Case Number:	166/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya at Mombasa–Connell, J

[1] Criminal law – Trial – Counsel for accused not given opportunity to attend preliminary enquiry – Inquiry held in magistrate's office – No compliance with Criminal Procedure Code, s. 233 (4) (*K.*) *– Whether defence of accused prejudiced.*

Editor's Summary

The appellant, an ignorant African, had been convicted by the Supreme Court of an offence under s. 38 (1) of the Penal Code. He was in custody after his arrest on June 18, 1957, until the end of the preliminary inquiry by a magistrate. Although the advocate for the accused informed the magistrate on July 8, that he was so acting and also so informed the police investigating officer, he was not notified of the date of the preliminary inquiry and did not attend. The accused, accordingly, was unrepresented during those proceedings, which were held in the magistrate's office with the latter and the prosecutor sitting at the same table. At the conclusion of these proceedings the accused made a statement which he would probably have been advised not to make had he been represented. At the subsequent trial this statement was put in despite an objection by defence counsel. On appeal it was contended that the circumstances in which the preliminary inquiry was held with the accused unrepresented caused grave prejudice to the appellant's defence.

Held –

(i) whilst there is no hard and fast rule that a court is required to notify the date of proceedings to a prisoner's advocate when the prisoner himself has been notified and has an opportunity to notify the advocate himself, in the present case the circumstances surrounding the holding of the

preliminary inquiry had prejudiced the defence.

(ii) the procedure of holding the preliminary inquiry in the office of the magistrate was most unfortunate.

Appeal allowed. Order for a new trial.

Case referred to in judgment:

(1) *Galos Hired v. R.,* [1944] 2 All E.R. 50; [1944] A.C. 149.

(2) *Robert Confait v. R.,* [1957] E.A. 555 (C.A.).

(3) *R. v. Mary Kingston,* 32 Cr. App. R. 183.

January 17. The following judgment was read by direction of the court.

Judgment

The appellant was convicted on October 12, 1957, by the Supreme Court of Kenya of defilement, on June 17, 1957, of a girl under 16 years of age, contrary to s. 38 (1) of the Penal Code, and was sentenced to three years' imprisonment with hard labour and fifteen strokes. Against this conviction and sentence he appeals to this court.

The only ground of appeal argued before us was that the advocate for the appellant was not given an opportunity to attend the preliminary inquiry held under the provisions of Part VIII of the Kenya Criminal Procedure Code, although the learned magistrate knew that he had been instructed. The following appear to be the facts.

The appellant was detained by the police on June 18, and remanded in custody until the end of the preliminary inquiry. On Thursday, June 20, the appellant was remanded in custody till Wednesday, July 10, when the preliminary inquiry was due to start. On Monday, July 8, a conversation took place between Mr. Shackleton, an advocate, and the third class magistrate, Malindi, who was to conduct the preliminary inquiry two days later. On that occasion Mr. Shackleton informed the third class magistrate that he (Mr. Shackleton) was acting for the appellant.

When, however, the preliminary inquiry was commenced two days later, that is on July 10, the third class magistrate had forgotten this intimation. Notwithstanding that Mr. Shackleton had informed both the magistrate and the police officer in charge of the investigation that he was acting for the appellant, he was not notified of the date of the preliminary inquiry and did not, therefore, attend. No doubt, the appellant should have objected to the preliminary inquiry proceeding without his advocate being present and should have applied for an adjournment. He did not do so. Africans are not always aware of their rights in court, and the appellant was never, apparently, asked whether he was, or wished to be, represented by an advocate. The preliminary inquiry proceeded in the absence of a defending advocate. At the end of the evidence for the prosecution the appellant made a statement which he would almost certainly have been advised not to make had he been defended by an advocate. That statement was afterwards (notwithstanding an objection by the defence) put in at the trial in Supreme Court and may well have contributed to the appellant's conviction.

We were referred by Mr. Gledhill, for the appellant, to *Galos Hired v. R.* (1), [1944] 2 All E.R. 50; [1944] A.C. 149 and *Robert Confait v. R.* (2), [1957] E.A. 555 (C.A.). Both these cases were decided on express provisions of enactments conferring on poor persons charged with offences a right to legal aid. In *R. v. Mary Kingston* (3) 32 Cr. App. R. 183, counsel who had been briefed for the trial of the appellant was not present in court owing to a misunderstanding. Other members of the Bar were present and available. The judge declined to postpone the trial or to accede to a suggestion made by counsel for the prosecution that one of the other counsel available should be asked to hold the brief of counsel who had been briefed for the defence. In the result, the appellant was tried as an unrepresented person. It was held that the course adopted was tantamount to depriving the appellant of the right, which she had, to be defended by counsel, and the conviction must be quashed. The learned deputy public prosecutor has sought to distinguish that case from the present case on the ground that an application for an adjournment to enable the prisoner to be represented by her counsel was there made and refused. The Court of Criminal Appeal thought, however, that the assistant recorder (having regard to the fact that a jury had been summoned and to the waste of time involved) would have been right to refuse an adjournment; but that, notwithstanding that no application to that effect had been made by the prisoner, he should have acceded to the suggestion that one of the other counsel present should be asked to hold the brief. It does not appear that an application by the prisoner was considered to be of great importance. The present case is stronger than *Kingston's* case (3), for in *Kingston's* case (3) there was no suggestion that counsel who was supposed to appear for the defence had not been notified of the day and hour of the trial. In the present case it is not disputed that the advocate acting for the appellant was not notified of the date and time of the preliminary inquiry, notwithstanding that he had informed the magistrate and the police officer in charge of the investigation that he had been instructed.

We do not wish to lay down any hard and fast rule imposing upon a court an obligation to notify the advocate for the prisoner when the prisoner is

himself warned and has an opportunity of notifying his advocate himself. Each case must be considered on its merits. But we think that in this case the court cannot entirely divert itself of responsibility for what occurred. The preliminary inquiry was apparently fixed at very short notice: the prisoner was an ignorant African in custody: and the defending advocate's office is said to be seventy miles away. The advocate had informed the magistrate that he was instructed; but the magistrate had made no note of this fact on the case file and proceeded to forget it, so that the advocate was not notified. The appellant was not, apparently, asked if he wished to be represented by an advocate. As a result of all these circumstances his defence was considerably prejudiced. As was said by Lord Maugham in the *Galos Hired* case (1), [1944] A.C. at p. 155,

> "The importance of persons accused of a serious crime having the advantage of counsel to assist them cannot be doubted . . ."

There were other respects in which the preliminary inquiry was unsatisfactory. It was, apparently, conducted in the third class magistrate's office, with the third class magistrate and the prosecutor sitting at the same desk. Section 233 (4) of the Criminal Procedure Code was not complied with. We will assume in favour of the Crown that the court was open and that the public were not denied access to it. If they were, the proceedings were illegal. Even if they were not actually denied access, members of the public would not think that they could freely enter the office of the third class magistrate. The procedure of holding the preliminary inquiry in his office was unfortunate.

We think that the circumstances surrounding the holding of the preliminary inquiry in this case were unsatisfactory and that substantial prejudice was caused to the appellant in the conduct of his defence.

We allow the appeal and, following the order which the Court of Criminal Appeal said, in *Kingston's* case (3), that they would have made if they had had the power, we order a new trial.

Appeal allowed. Order for a new trial.

For the appellant:
J Gledhill
Gledhill & Oulton, Nairobi

For the respondent:
JP Webber (Crown Counsel, Kenya)
The Attorney-General, Kenya

R v Philletous Mallo

[1958] 1 EA 11 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	14 February 1958
Case Number:	382/1957
Sourced by:	LawAfrica

Before: McKisack CJ

[1] Criminal law – Appeal by Crown against acquittal – Omission from judgment of points for determination and reasons for the decision – Whether content of judgment acquitting accused must be as comprehensive as in case of conviction – Criminal Procedure Code, s. 169 (*U.*).

Editor's Summary

The attorney-general appealed against the acquittal of the respondent, who had been prosecuted on seven charges of theft by a servant contrary to s. 252 and s. 258 of the Penal Code. The accused, a clerk in the service of the Railways Administration, was alleged to have received money for the Administration from consignees of goods, which he had converted to his own use without accounting for it. The consignees gave evidence of the payments but the accused in evidence blamed his superior officer, a pier clerk, for ordering him to release consignments of goods without making proper entries or receiving the cash for the transport charges. He also alleged that the pier clerk himself dealt with some of the consignments. The magistrate, whilst recognising that the evidence against the accused was strong, found on the evidence that there was a reasonable doubt whether the accused committed the offence alleged. On appeal it was contended that the magistrate did not consider the evidence tendered by the prosecution relative to the payments mentioned in the seven counts and whether the money alleged to have been stolen had in fact come into the possession of the accused.

Held – whilst s. 169 of the Criminal Procedure Code requires every judgment to contain the point or points for determination, the decision thereon and the reasons for the decision, a magistrate is not required in the case of an acquittal to deal with every point which would have to be decided in the case of a conviction, but when a judgment acquitting the accused fails to deal at all with one of the main ingredients constituting the offence, that is a substantial error of law.

Appeal allowed. Case remitted for re-trial before another magistrate.

No cases referred to in judgment

Judgment

McKisack CJ: This is an appeal by the attorney-general against the acquittal, in the Mengo District Court, of a railway goods clerk named Philletous Mallo, who had been prosecuted on seven charges of theft by servant, contra s. 252 and s. 258 of the Penal Code. The grounds of appeal are that the learned trial magistrate made the following errors of law:

(*a*) that he made no proper or sufficient finding on the facts;

(*b*) that he acquitted the accused wholly or partially on the ground that the accused was inadequately supervised.

The respondent to the appeal, although duly notified of the hearing, did not appear and was not represented by counsel.

The prosecution case was that the accused, in the course of his duties as a clerk employed by the Railway Administration, received money paid to him on behalf of his employer by the consignees of

goods, transported carriage forward by the railway, for the transport charges; and that he converted these sums to his own use and never accounted for them to his employer. Evidence was given by four consignees of goods that they had paid transport

charges to the accused in respect of certain goods. The railway "invoices" (i.e., particulars of and charges for the goods, prepared at the sending station, a copy of which goes to the receiving station) relating to those consignments were produced in court, and there was evidence that there were no entries of the invoices, or of cash paid in respect of them, in the books which it was accused's duty to keep.

The accused gave evidence which, in effect, put the blame on his superior officer, the pier clerk, for making him (the accused) release some consignments of goods without making proper entries or receiving the cash for the transport charges. He also alleged that the pier clerk himself dealt with some consignments instead of leaving them to the accused.

In his judgment the magistrate summarised the evidence for both sides and then continued as follows:

> "If what the prosecution alleges is true then clearly the accused was not adequately supervised. These offences spread out over a period of months. The prosecution have not alleged that the accused concealed the 'outstanding list' from Nairobi. Why then was the fact that the invoices were never entered in the delivery book not discovered by the accused's superiors? The pier clerk was in charge of the store where goods were kept pending delivery. On the evidence I am asked to believe that the accused kept his own private delivery book in which consignees signed for goods.
>
> "On the face of it the evidence against the accused is strong, particularly as regards his writing 'paid' on the arrival advice (exhibit A), but his explanation as to how this happened is reasonable, and looking at the case as a whole I find myself in a reasonable doubt as to whether the accused did commit the offences. It should not be assumed that I am casting any doubts on the integrity of the pier clerk-he is not on trial. I am considering only the case of the accused. I acquit the accused of the offences charged."

Mr. Few, for the appellant, points out that the magistrate has failed to consider the evidence of the payment of the money specified in the seven counts to the accused by the four consignees. I agree with Mr. Few that this is a serious omission. One of the questions–and a very important one–which the magistrate had to decide was whether it was proved that the money alleged to have been stolen had in fact come into the accused's possession. Section 169 of the Criminal Procedure Code requires every judgment to

> "contain the point or points for determination, the decision thereon and the reason for the decision."

In the case of an acquittal, I do not think that this section is to be read as requiring the magistrate to deal with every point which would have to be decided in the case of a conviction; for example, a decision in favour of the accused on one ingredient of the offence charged may make it unnecessary to reach a decision on the others. But in the present case the judgment does not deal at all with the question whether accused received the money as alleged by the prosecution. I think that was a substantial error of law, and on that ground alone the appeal must be allowed. I am less certain of the validity of the second ground of appeal, but it is now unnecessary for me to deal with it.

The case must go back to the District Court, Mengo, for re-trial before a different magistrate.

Appeal allowed. Case remitted for re-trial before another magistrate.

For the appellant:
HSS Few (Crown Counsel, Uganda)
The Attorney-General, Uganda

The respondent did not appear and was not represented.

R v Rootes (Kenya) Limited and BS Dobbs

[1958] 1 EA 13 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	6 January 1958
Case Number:	412/1957
Before:	Sir Ronald Sinclair CJ and Rudd J
Sourced by:	LawAfrica

[1] Criminal law – False pretences – False statement of year of make of new vehicle – Trade-in of old car – Whether purchaser induced to sell old car by false pretences as to year of new vehicle – Whether hire-purchase company induced to pay for new car by false statement made to hirer.

Editor's Summary

The respondents to this case stated, R. (K.) Ltd. and D, had been acquitted on a submission that they had no case to answer on two counts of obtaining money or goods by false pretences, whereupon the Crown appealed. B had prior to purchasing from the respondent, R, a delivery van asked D, their salesman, if they had any 1957 model delivery vans and was shown the van he subsequently purchased. B then showed D his old motor car and a trade-in was agreed. B thereupon signed an order for the van and was given an invoice on which a hire-purchase company to which he produced it commented that the details of the model had been omitted. D then inserted on the invoice the year "1957". Subsequently B found it had been shipped to Kenya in February, 1956, whereupon he refused to sign the form of transfer of ownership of his old car. Count 1 had charged the respondents with obtaining for R a motor by falsely pretending that the van was a 1957 model. Count 2 charged them with obtaining for R a cheque from the hire-purchase company by the same false pretence. The magistrate held on Count 1 that a *prima facie* case had been made out that B had been induced to buy the van on a false pretence but he was "not convinced" that B was thereby induced to trade-in his old car. He also held that since the inducement must in his view operate on the mind of the person alleged to have been defrauded and since it had been conceded that the false pretence did not operate on the mind of the hire-purchase company there was no case to answer on the second count.

Held –

(i) the evidence, if accepted at its face value, showed that by the false pretence alleged B was induced to enter into a transaction which included the trade-in of his old car.

(ii) it is not necessary to prove that the false pretence was made to or operated on the mind of the person who handed over the property if that person had the authority of the person to whom the false pretence was made to hand over the property, provided it is proved that the property was obtained by means of the false pretence.

(iii) the cheque paid by the hire-purchase company was not obtained by means of the false pretence but

was the balance of the price of the van which the company had purchased from R and since the money was not paid by the company as agent for B the magistrate was right in his finding on the second count.

Appeal allowed on count 1. Case remitted to the magistrate to hear and determine that count.

[**Editorial Note**: The accused subsequently pleaded guilty to counts 1 and 3, were convicted and fined.]

Case referred to in judgment:

(1) *R. v. English,* 12 Cox C.C. 171.

(2) *Ramanlal Trambaklal Bhatt v. R.*, [1957] E.A. 332 (C.A.).

(3) *R. v. Brown*, 2 Cox C.C. 348.

(4) *R. v. Moseley* (1861), Le & Ca. 92; 169 E.R. 1317.

(5) *R. v. Rouse and Others*, 4 Cox C.C. 7.

(6) *R. v. Taylor* (1901), 65 J.P. 457.

(7) *R. v. Ball*, [1951] 2 K.B. 109.

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court: The two respondents, Rootes (Kenya) Ltd. and Bertram Sharrett Dobbs, were charged before the resident magistrate, Nairobi, on two counts of obtaining money or goods by false pretences contrary to s. 308 of the Penal Code (counts 1 and 2), and on one count of obtaining registration by false pretences contrary to s. 315 of the Penal Code (count 3). The learned trial magistrate held that there was no case for the respondents to answer on counts 1 and 2 and accordingly acquitted them on both those counts. The attorney-general now appeals from that decision by way of case stated.

The evidence for the prosecution was briefly as follows: In April, 1957, Bawa Singh went to the premises of Rootes (Kenya) Ltd. in Victoria Street, Nairobi, and there saw the second respondent, Dobbs, a sales representative of the company. He asked Dobbs if they had any 1957 model delivery vans. Dobbs said “Yes” and showed him a Commer delivery van which he said was a 1957 model. Bawa Singh then showed Dobbs his Chevrolet motor car. It was agreed that Rootes (Kenya) Ltd. would make an allowance of Shs. 8,000/- to Bawa Singh on this car which they accepted as a “trade-in,” and that the balance would be paid by instalments. Thereupon Bawa Singh signed an order for the Commer van. The order form (exhibit 2) is dated April 15, 1957, and shows the total purchase price, including painting and licence fee, to be Shs. 12,329/-, leaving a balance of Shs. 4,329/- to be paid in cash on delivery, after allowing Shs. 8,000/- for the Chevrolet car. This form was also signed by Dobbs. Bawa Singh then went to Messrs. Motorex, a hire-purchase company, to arrange for payment of the balance by instalments. As a result of a conversation he had there, he returned to Rootes (Kenya) Ltd. and pointed out to Dobbs that the model of the Commer van was not stated on the Invoice (exhibit 4) which he had been given. Dobbs then inserted “1957” as being the model. When Bawa Singh was at Rootes (Kenya) Ltd. he found that they had already arranged the financing of the transaction with Lombank Ltd. Later Bawa Singh entered into a hire-purchase agreement with Lombank Ltd. in respect of the Commer van. The Agreement (exhibit 3) is dated April 29, 1957, and in it Lombank Ltd. are described as the owners of the vehicle. It is in a form commonly in use and provides that Bawa Singh shall pay an initial payment of Shs. 8,000/- on the signing of the agreement and the balance of the hire, namely Shs. 4,718/50, by twelve monthly instalments. That balance is made up as follows:

	Shs.	Cts.
Cash price of vehicle	11,900	00
Accessories	129	00
Painting	300	00
Total	12,329	00

Deduct initial payment	8,000	00
Balance	4,329	00
Add hire charges	389	50
Balance of hire	4,718	50

Lombank Ltd. paid Rootes (Kenya) Ltd. a cheque for the balance of Shs. 4,329/- owing to them. The registration book for the Commer van shows that it was registered in the names of Lombank Ltd. and Bawa Singh.

Bawa Singh took delivery of the van on April 29 or 30. A day or two later he found a label showing that the van had been oiled and greased in February, 1956. There was evidence that the vehicle was imported into Kenya in February, 1956. Bawa Singh said that he would not have bought the vehicle if he had known it was shipped to Kenya in 1956; he bought it because he was assured it was a 1957 model.

On April 29, Bawa Singh delivered his Chevrolet car to Rootes who still had possession of it at the time of the trial. He informed Rootes subsequently that he would not sign the transfer of ownership form required under the Traffic Ordinance unless they supplied him with a 1957 model van, and he has not yet signed it. In count 1 the respondents were charged with obtaining for Rootes (Kenya) Ltd. the Chevrolet car from Bawa Singh by falsely pretending to Bawa Singh that the Commer van was a 1957 model. In count 2 they were charged with obtaining for Rootes (Kenya) Ltd. a cheque for Shs. 4,329/- from Lombank Ltd. by the same false pretence.

As to count 1, the learned magistrate held that, although there was one transaction, a distinction must be drawn between the inducement to enter into a transaction for the purchase of a new car and the inducement to trade in the old. He was prepared to hold that a *prima facie* case had been made out that Bawa Singh was induced to enter into a transaction to buy the Commer van on a false pretence, but he was "not convinced" that thereby Bawa Singh was induced to trade-in his old car. It was the trade-in price of Shs. 8,000/- that induced him to part with his vehicle; the trade-in may have been a factor which Bawa Singh had in mind as to whether he would buy the van, but the inducement to him was the price he was offered. He concluded: "I am far from satisfied that the evidence as it came to me proves the first count."

As to count 2, the magistrate held that the inducement must operate on the mind of the person alleged to have been defrauded and that, as it had been conceded by the prosecution that the false pretence did not operate on the mind of Lombank Ltd., there was no case for the respondents to answer on that count also. He evidently considered that the party alleged to have been defrauded was Lombank Ltd., not Bawa Singh.

The questions of law which are submitted for the opinion of this court are as follows:

"1. Was the learned trial magistrate correct in law in holding at the conclusion of the Crown case that there was no case to answer on counts 1 and 2, and in particular.

"2. (*a*) Was the learned trial magistrate correct in law in holding that although there was only one transaction and that it was the false pretence that induced the complainant to enter into it the Chevrolet car was not obtained by that false pretence.

"(*b*) Was the learned trial magistrate correct in law in making a distinction between the inducement to enter into the agreement to purchase the new car and the inducement to trade in the Chevrolet.

"(*c*) Having held that the transaction was one transaction and that the sale of the new vehicle was induced by the false pretence was the learned trial magistrate correct in holding that the Chevrolet car was not obtained by that false pretence.

"3. (*a*) Was the learned trial magistrate correct in law in holding that because the inducement did not operate on the mind of the hire-purchase company the cheque was not obtained by the false

pretence charged.

"(*b*) Was the learned trial magistrate correct in law in holding that the inducement must operate on the mind of the person alleged to have been defrauded.

"(*c*) Was the learned trial magistrate correct in law in his assumption that Lombank Ltd., was the person alleged to have been defrauded in the charge.

"4. Did the learned trial magistrate apply the correct test in law to the evidence when he held that he was 'not convinced' and 'not satisfied that the evidence proves the first count' in view of s. 208 of the Criminal Code."

When Bawa Singh agreed to "buy" the Commer van from Rootes (Kenya) Ltd., and to pay by instalments the balance due after the allowance of Shs. 8,000/- was made for the Chevrolet car, it is evident that both Bawa Singh and Rootes (Kenya) Ltd. intended that Bawa Singh should take the van on hire-purchase; Rootes (Kenya) Ltd. immediately made arrangements with Lombank Ltd. for that purpose and Bawa Singh went to Messrs. Motorex for the same purpose. In the result Lombank Ltd. bought the van from Rootes (Kenya) Ltd. and let it on hire-purchase to Bawa Singh, the trade-in price of the Chevrolet car being treated as the initial payment under the hire-purchase agreement. There was, in effect, a tripartite agreement covering the purchase of the van from Rootes (Kenya) Ltd. by Lombank Ltd. the letting of the van on hire-purchase by Lombank Ltd. to Bawa Singh and the trading-in of the Chevrolet car. In that sense there was one transaction, the different parts of the transaction being inter-dependent. We think that the learned magistrate, having held that there was one transaction, was wrong in then treating the trading-in of the car as a separate transaction for the purpose of deciding whether Bawa Singh was induced by the false pretence to trade it in. In our view the evidence, if accepted at its face value, showed that by means of the false pretence alleged, Bawa Singh was induced to enter into a transaction which included the trading-in of his Chevrolet car. Although he was, no doubt, partly influenced by the trade-in price offered, there would not have been a trade-in at all had he not been induced by the false pretence to "buy" the Commer van. It is sufficient if the person defrauded is partly and materially, though not entirely, influenced by the false pretence; *R. v. English*, (1) 12 Cox C.C. 171. The trading-in of the car was part of the consideration for the "purchase" of the Commer van and, in those circumstances, we think the evidence *prima facie* established that the respondents obtained the car by means of the false pretence alleged, and that when the learned trial magistrate held that the evidence did not sufficiently establish that fact, he did not do so because he disbelieved Bawa Singh's evidence on the point, but because he was under the impression, erroneous in point of law, that the sale or trade-in of the Chevrolet car had to be treated independently of and as distinct from the "purchase" of the van.

It was, however, submitted on behalf of the respondents that the prosecution failed to prove that Rootes (Kenya) Ltd. obtained the property in, as distinct from possession of, the Chevrolet car. This submission was based on s. 8 of the Traffic Ordinance, 1953 which reads:

> "The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle".

Although the Chevrolet car is still registered in the name of Bawa Singh, since he refused to sign the transfer form he is deemed to be the owner only if the contrary is not proved. In our view the evidence, if accepted, showed that Bawa Singh passed the property in the car to Rootes (Kenya) Ltd. when he delivered it to them with the intention of transferring ownership.

Before leaving count 1 it is necessary to deal with the submission of the Crown that the learned magistrate did not apply the correct test in law to the evidence

when he held that he was “not convinced” and “not satisfied that the evidence proves the first count”. We do not think the magistrate intended to direct himself that he could not put the respondents on their defence unless he was convinced at that stage that the charge was established. That would amount to a misdirection since the Crown is required at that stage to establish only a *prima facie* case. We quote the following passage from the judgment of the Court of Appeal for Eastern Africa in *Ramanlal Trambaklal Bhatt v. R.* (2), [1957] E.A. 332 (C.A.) at p. 334.

> “Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a *prima facie* case is made out if, at the close of the prosecution, the case is merely one which on full consideration might *possibly* be thought sufficient to sustain a conviction. This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case.
>
> “Nor can we agree that the question whether there is a case to answer depends only on whether there is some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as Wilson, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a *prima facie* case, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence”.

In our view the learned magistrate’s finding was largely based on the premise, erroneous in point of law, that the consideration for the trade-in of the Chevrolet car had to be considered as independent of the consideration for the “purchase” of the van, and we consider that there clearly was a *prima facie* case on count 1.

Turning now to count 2, counsel for the Crown submitted, as we understood him, that the person alleged to be defrauded was Bawa Singh, Lombank Ltd. being merely the mechanical instrument by which the payment was made, and that in those circumstances it was not necessary to prove that the false pretence operated on the mind of Lombank Ltd. In support of his submission he referred us to *R. v. Brown* (3), 2 Cox C.C. 348; *R. v. Moseley* (4) (1861), Le. & Ca. 92, 169 E.R. 1317; *R. v. Rouse and Others* (5), 4 Cox C.C. 7; *R. v. Taylor* (6) (1901), 65 J.P. 457 and *R. v. Ball* (7), [1951] 2 K.B. 109.

In *R. v. Brown* (3) it was alleged in the indictment that the false pretence was made to an agent, by means of which false pretence the prisoners obtained a sum of money from his principal. On a motion in arrest of judgment it was submitted on behalf of the prisoners that the pretence must be made to the same person from whom the money was obtained and that must appear in the indictment. It was held that the judgment ought not to be arrested. In the course of his ruling Patteson, J., said:

> “It was undoubtedly more important that the pretence should be made to the person who parted with the money. *Tully’s* case was a peculiar one, and he was not quite sure that that case could be supported if carried into a count of error. There was nothing in the Act of Parliament which made it necessary that the pretence should be made to the same person as the money was obtained from; and when it was said that ‘by means of the said false pretences’ the money was obtained, that was a question of

> evidence; and if there were any means to show that the pretence to A operated on the mind of B., it might be shown in evidence".

That was not a decision that the false pretence need not operate on the mind of the person who pays the money.

R. v. Moseley (4), was a case in which the prisoner was indicted for obtaining money from A by false pretence made to A. A's wife, by her husband's direction delivered the money to the prisoner in the absence of her husband. It was objected on behalf of the prisoner that the indictment was not supported by the evidence as the prisoner did not obtain the money from A as laid in the indictment. The prisoner was convicted and on a case stated the conviction was confirmed, but no reasons were given.

In *R. v. Rouse and Others* (5), a false pretence was made by the prisoners to the secretary of a society who then accompanied the prisoners to the treasurer of the society who paid over money to the prisoners. In the second count of the indictment the false pretence was alleged to be made to, and the money obtained from, the secretary. On an objection that the evidence did not support the indictment Erle, J., said:

> "Mills is the treasurer who disposes of the money of the society on receiving certificates, from Insoll, who is the responsible party. The defendants go to Insoll, and Insoll goes to the mechanical instrument, the treasurer, and the latter produces the money. I think it is correctly stated that Insoll paid the money, and that it was obtained from him. The second count of the indictment is therefore correct".

R. v. Taylor (6), is not, in our view, of any assistance. In *R. v. Ball* (7), the appellant called at a vicarage and told the vicar that he could sell him £10 worth of peat at a cheap rate of £3 per 1,000 blocks. The vicar ordered that peat and left with his wife a signed blank cheque to be filled in and handed to the appellant on delivery. The appellant called later and told the vicar's wife that he had delivered about 3,000 blocks. The wife accordingly filled in the appropriate amount and handed him the cheque. In fact the appellant had delivered only 980 blocks. The appellant was charged with obtaining from the vicar's wife a cheque for £10, by false pretences. It was argued on behalf of the appellant before the Court of Criminal Appeal that he obtained the cheque from the vicar, but it was held that the vicar's wife had authority to part with the property in the cheque and no objection could be taken to the indictment. Delivering the judgment of the court Lord Goddard, C.J., said:

> "The argument on behalf of the appellant was that he obtained the cheque from the vicar. It may be that the indictment would have been equally good if it had alleged that he obtained it from the vicar. The Statute does not make it necessary to allege that the defendant obtained it from the owner, but that he obtained it from any other person, and that person includes a person who had authority to pass the property".

Our conclusion from those authorities is that it is not necessary to prove that the false pretence was made, to or operated on the mind of, the person who physically handed over the property if that person was merely a mechanical instrument or had the authority of the person to whom the false pretence was made to hand over the property. It seems that in those circumstances the accused may be charged with obtaining the property from either of those persons. The conclusion to which we have come is not, in our view, in conflict with the passages from Halsbury's Laws and Archbold to which we were referred. In 10 Halsbury's Laws (3rd Edn.), at p. 827 it is stated:

> "It is not necessary to specify on the indictment to whom the false pretence was made, but if the pretence was made to some person other

> than the one from whom the property was obtained, it must be proved that the pretence operated on the mind of the person from whom the property was obtained".

The passage from Archbold (33rd Edn.), at p. 728 reads:

> "It must also be proved that the goods, etc., named in the indictment . . . were obtained by means of the pretences alleged; in other words, the prosecution must prove that the alleged false pretence(s) operated on the mind of the person alleged to have been defrauded and induced him either wholly or in part to part with his money or property."

It is clear that it must be proved that the property was obtained by means of the false pretence. We agree that property is not obtained by means of a false pretence if the false pretence does not operate on the mind of the person alleged to have been defrauded. We also agree that property is not obtained by means of a false pretence if the false pretence does not operate on the mind of the person from whom it was obtained, but we think it clear from the authorities which we have cited that property is obtained from a person though it has been physically handed over by some other person, if such other person has his authority to do so or is merely a mechanical instrument.

We agree, therefore, that if Lombank Ltd. was merely the mechanical instrument by which payment was made, there was evidence that the money was obtained by means of the false pretence alleged and it was not necessary to prove that the false pretence operated on the mind of Lombank Ltd. But we are unable to agree that Lombank Ltd. was merely the mechanical instrument for the payment of the money. In our view the agreement (exhibit 3) was a valid hire-purchase agreement and not a mere money-lending transaction to provide Bawa Singh with the balance of the purchase money. The cheque which Lombank Ltd. paid to Rootes (Kenya) Ltd. represented the balance of the purchase price of the Commer van which Lombank Ltd. had bought from Rootes (Kenya) Ltd. and was not money advanced on behalf of Bawa Singh. Nor did Lombank pay the money as Bawa Singh's agent; they were not entitled to any reimbursement of the money, their only rights against Bawa Singh being under the hire-purchase agreement. In our opinion, therefore, the money was not obtained from Bawa Singh, the person alleged to have been defrauded, and, as it was conceded that the false pretence did not operate on the mind of Lombank Ltd., the money was not obtained from Lombank Ltd. by means of the false pretence.

The learned magistrate was accordingly right in holding that there was no case for the respondents to answer on count 2.

In the result we allow the appeal in so far as it relates to count 1, set aside the acquittal on that count and remit the case to the trial magistrate with a direction to hear and determine count 1 of the charge according to law.

Appeal allowed on count 1. *Case remitted to the magistrate to hear and determine that count.*

For the appellant:
JP Webber (Crown Counsel, Kenya)
The Attorney-General, Kenya

For the respondents:
WL Harragin
Hamilton, Harrison & Mathews, Nairobi

Abdillahi Jama Awaleh v R

[1958] 1 EA 20 (CAA)

Division:	Court of Appeal at Aden
Date of judgment:	21 January 1958
Case Number:	198/1957
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Aden–Campbell, C.J

[1] Immigration – Person found without passport or travel documents – Prosecuted as an illegal immigrant – Particulars of offence defective – When burden of proof rests on immigrant to prove he is lawfully within colony – Immigration Ordinance (*Cap.* 77), *s.* 21 (1) (*A.*) – *Immigration Ordinance* 1942, *s.* 6 (*A.*) – *Immigration Ordinance,* 1955, *s.* 2 (1) (*k*), *s.* 7 (1) (*a*), *s.* 8 (1) *and s.* 10 (1), (2) *and* (3) (*A.*).

Editor's Summary

The appellant then a child arrived in Aden in 1948 and subsequently obtained an identity card. In 1957 when arrested by an immigration officer the appellant had no passport or travel documents and he was accordingly prosecuted as an illegal immigrant and convicted of an offence against s. 21 (1) of the Immigration Ordinance. The charge against the appellant read "Section 21 (1) of the Immigration Ordinance–'Illegal Immigrant' "; and the particulars of the offence alleged simply that the appellant not being a British subject or naturalised was on May 7, 1957, found within the Colony of Aden having entered it illegally. The appellant having unsuccessfully appealed to the Supreme Court from his conviction appealed again. The appeal was treated as a test case affecting other pending cases. The main grounds of appeal were that the particulars of the offence alleged were defective since there should have been an averment "that the appellant did not obtain permission to land," that the magistrate came to no clear finding and gave no reasons in his judgment and had erred in law in holding that the onus of proof that he was not a prohibited immigrant was on the appellant.

Held –

(i) the appellant was entitled to know from the charge preferred against him in what respect he was alleged to be a prohibited immigrant and since this was not specified the charge was defective.

(ii) the judgment of the magistrate did not comply with s. 259 of the Criminal Procedure Code but this was not necessarily fatal to a conviction provided there had been no failure of justice.

(iii) a person found within the Colony having no passport or travel documents has not necessarily committed an offence against s. 21 (1) of the Immigration Ordinance; sub-s. (1) refers not to "any person" but to "any prohibited immigrant" and there must be many persons not born in Aden who had either entered the Colony before June 24, 1942, when a valid passport or travel document was first required or who had been permitted to land; such persons if found without documents would

not be guilty of an offence against s. 21 nor would they be prohibited immigrants.

(iv) the authorities are not entitled to prosecute a person under s. 21 (1) of the Immigration Ordinance and to cast upon that person the burden of proving he is not a prohibited immigrant unless they have applied the provisions of s. 10 of the Ordinance and given the accused an opportunity of learning and answering the precise allegations made against him.

Appeal allowed. Conviction and sentence quashed.

Case referred to in judgment:

(1) *John v. Humphreys*, [1955] 1 All E.R. 793; [1955] 1 W.L.R. 325.

(2) *Mandan Devraj v. R.* (1955), 22 E.A.C.A. 488.

(3) *R. v. Kakelo*, [1923] 2 K.B. 793.

(4) *Seneviratne v. R.*, [1936] 3 All E.R. 36.

(5) *Attygalle v. R.*, [1936] 2 All E.R. 116.

(6) *Mohamed Hassan Ismail v. R.* (1955), 22 E.A.C.A. 461.

(7) *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462.

Judgment

Sir Kenneth O'Connor P: read the following judgment of the court: The appellant was convicted on October 21, 1957, by an Aden magistrate of an offence against s. 21 (1) of the Immigration Ordinance (Cap. 77 of the Laws of Aden) and was sentenced to three months' simple imprisonment. The High Court of Aden dismissed his appeal on November 29, 1957, and against that decision he appeals to this court.

The charge against the appellant read:

> "Statement of Offence (Name of offence and section of law):
>
> "Section 21 (1) of the Immigration Ordinance–'Illegal Immigrant':
>
> "Particulars of offence (date, place and description of offence):
>
> > "Abdullahi Jama Awaleh, you are charged that on May 7, 1957, at about 7.30 p.m., being a person not a British subject or naturalised in the Colony were found at Ma'alla Sheep Pen within the Colony of Aden having entered it illegally in disregard of the provisions of the Immigration Ordinance and did thereby commit an offence punishable under s. 21 (1) of the Immigration Ordinance".

The evidence against the appellant in the magistrate's court was that of the immigration officer, Chief Inspector Ramzan, who arrested him. He said:

> "I arrested accused on May 7, 1957 at about 7.30 p.m. He had no travel documents. I found he was an illegal immigrant."

Cross-examination by defending counsel for accused: "Accused had an identity card issued after March 15, 1955. I did not inquire how he came into Aden".

The appellant's evidence was as follows:

> "I came by dhow into Aden when I was a child about nine years ago. I came alone. I am in possession of card No. 115492. After I came to Aden I worked with Dama Douleh for the whole time.

Cross-examination by prosecutor: "My father and mother were dead. I had Shs. 100/- on me. My brother gave me Shs. 100/-. It was Rs. 75/-. My uncle collected me. I had no documents. I did not pass any police officer. All the nine years I lived with Dama Douleh."

The judgment of the magistrate was:

> "On a careful consideration of the evidence submitted before me, I am satisfied that the accused is an illegal

immigrant. The burden is on the accused to prove that he is not an illegal immigrant. This burden he has not successfully discharged in my opinion and I am satisfied that the charge against him stands. I find the accused guilty as charged".

We are informed that the learned magistrate dealt with twelve other similar cases at the same time and pronounced identical judgments in them. Two of these went on appeal to the High Court and, together with the instant case,

have come on second appeal before us. The present case is in the nature of a test case, upon which not only the case now before us, but other proceedings, may depend. We shall, therefore, deal with it at some little length.

The relevant provisions of the Immigration Ordinance, 1955 (Cap. 77 of the Laws of Aden) (hereinafter called "the 1955 Ordinance") are:

Section 2 (1) (*k*)—

" 'prohibited immigrant' means any person, not being a British subject born or naturalised in the Colony, being or appearing to be of any of the following classes, namely–

(i) a destitute person;

(ii) a person suffering from mental disease of any kind or being mentally defective;

(iii) any person suffering from a loathsome or a dangerous, infectious or contagious disease or from trachoma;

(iv) any person, who, not having received a free pardon, has been convicted in any country of murder or of any offence for which a sentence of imprisonment has been passed for any term, and who by reason of the circumstances connected therewith, is deemed by the principal immigration officer to be an undesirable immigrant;

(v) any prostitute, and any person living on or receiving or who may have lived on or received any part of the proceeds of the prostitution of others;

(vi) any person deemed by the principal immigration officer to be an undesirable immigrant in consequence of information or advice received from a Secretary of State, Governor of a Colony or Protectorate, Colonial Minister or through diplomatic channels or any Minister of a foreign country, or from any other official source;

(vii) any person prohibited from entering the Colony under this Ordinance or any person having entered the Colony legally who remains in the Colony contrary to the provisions of this Ordinance;

(viii) any person who under the provisions of this Ordinance is a prohibited immigrant".

Section 7 (1) (*a*)–

"Subject to the provisions of sub-s. (5) of this section, every person entering the Colony without a valid passport shall be deemed to be a prohibited immigrant".

Section 8 (1)–

"No person shall subject to sub-s. (7) of this section be allowed to enter the Colony unless, having satisfied the principal immigration officer that he is taking up an appointment in an approved occupation, he has obtained an entry permit".

Section 10 (1), (2) and (3)–

"(1) The burden of proof that a person is not a prohibited immigrant shall lie upon the person.

"(2) When an immigration officer is of opinion that a person is a prohibited immigrant, he shall inform such person to that effect and shall give the grounds on which the finding has been made.

"(3) Where a person has been informed by an immigration officer that the latter is of opinion that he is a prohibited immigrant at any time after such person has been allowed to enter the Colony an appeal shall lie from a finding of the immigration officer under the provisions of sub-s. (2) of this section to the chief magistrate and, from the decision of such magistrate, to the Supreme Court whose decision thereon shall be final:

Provided that where an immigration officer is of opinion that such person is a prohibited immigrant within the meaning of s. 2 (1) (*k*) (vi) of this Ordinance an appeal from his finding shall lie only to the Governor-in-Council whose decision shall be final".

Section 21 (1)–

"Any prohibited immigrant making his way into, or being found within the Colony in disregard of the provisions of this Ordinance shall be deemed to have contravened them and committed an offence under this Ordinance. Any person convicted under this section shall, in addition to liability to removal or otherwise, be liable to imprisonment for any term not exceeding six months, provided that such imprisonment shall cease if and when arrangements are made for the removal of the offender from the Colony".

Section 23–

"The Immigration Ordinance and all rules, orders and notifications made thereunder are hereby repealed:

Provided that–

(*a*) any person who has been permitted to enter the Colony by virtue of any of the provisions of the Immigration Ordinance or any rules made thereunder or is in possession of any permit or pass by which such person is entitled to be in or to enter the Colony, issued under that Ordinance and valid on the date upon which this Ordinance shall come into operation shall be deemed to be in or to have entered the Colony under the provisions of this Ordinance which provision shall be deemed to apply to such person;

(*b*) if any person is found in the Colony on or after the date on which this Ordinance comes into operation, having entered the Colony in contravention of the provisions of the Immigration Ordinance, he shall be deemed to have entered the Colony in contravention of the provisions of this Ordinance".

The relevant provisions of the Immigration Ordinance, 1942 (hereinafter called the 1942 Ordinance), are sub-s. (1) and sub-s. (5) of s. 6–

"(1) No person shall be allowed to enter the Colony without a valid passport or valid travel document issued to him by some recognised authority, and any person desiring to enter the Colony shall, before being permitted to do so, appear before the immigration officer:

Provided that any person may be permitted to enter the Colony by land, or by sea if disembarking from a dhow, without a passport or a valid travel document, unless he is required to produce the same by the immigration officer or any other officer appointed under s. 4:

Provided further that when a person enters the Colony by air he shall within twenty-four hours of arrival appear before the immigration officer or any other officer appointed under s. 4".

> "(5) Any person who shall contravene the provisions of sub-s. (1) shall on conviction, in addition to the penalties prescribed in s. 23, be liable to be dealt with as a prohibited immigrant:
>
> Provided that no person shall be so convicted who proves to the satisfaction of the court that he entered the Colony more than twelve months before the date on which proceedings were instituted in respect of the alleged offence".

By Ordinance 12 of 1949 s. 6 of the 1942 Ordinance was repealed and the following substituted:

> "6 (1) (*a*) Except as otherwise provided in this section every person entering the Colony without a passport shall be deemed to be a prohibited immigrant unless he satisfactorily explains why he has no passport and establishes to the satisfaction of the immigration officer his identity and national status".

The learned chief justice held:

(1) that since the coming into force, on March 15, 1955, of the 1955 Ordinance, the possession of a permanent resident's card obtained after that date was of no avail to anyone who was an illegal immigrant and wished to prove himself to be, or to turn himself into, a legal immigrant and that the appellant was not an exempted person;

(2) that s. 10 (1) of the 1955 Ordinance cast the burden of proving that he was not a prohibited immigrant upon the appellant, notwithstanding that he had not (under sub-s. (2) of s. 10) been informed by an immigration officer that the immigration officer was of opinion that he (the appellant) was a prohibited immigrant or of the grounds on which such a finding had been made by the immigration officer, and that sub-s. (3) of s. 10 had not been operated;

(3) that the appellant's contention that because he came into Aden by dhow about nine years previously (i.e. about October, 1947) he entered legally, was not well-founded. The learned chief justice held that the effect of sub-s. (1) of s. 6 of the 1942 Ordinance, upon which the appellant relied, was not to make legal any entry into the Colony of a person landing from a dhow, but, simply, not to require a person landing from a dhow to have a passport or travel document in his possession: s. 6 (1) did not legalise the entry of a person who had not appeared before an immigration officer: accordingly the appellant had entered illegally.

(4) that sub-s. (5) of s. 6 of the 1942 Ordinance (which provides, in effect, that proceedings to secure a conviction for entry into the Colony without a valid passport or travel document must be commenced within twelve months of the entry) did not help the appellant, having regard to the repeal of the 1942 Ordinance and to proviso (*b*) to s. 23 of the 1955 Ordinance. The learned chief justice held that that proviso

> "expressly revives the illegality of the entry and declared it to be a contravention of the 1955 Ordinance".

We agree with the findings of the learned chief justice summarised under para. (1), para. (3) and para. (4) above and are content to adopt his reasoning, except that, as regards para. (4), we should prefer, instead of saying that proviso (*b*) to s. 23 of the 1955 Ordinance "expressly revives the illegality of the entry," to say that proviso (*b*) removes the limitation to a prosecution which s. 6 (5) of the 1942 Ordinance had imposed, the entry remaining illegal throughout.

The first ground of appeal argued before us was that the charge against the appellant did not specify the particulars of the offence, namely: "that the appellant did not obtain permission to land," and that the absence of particulars had gravely prejudiced the appellant's defence. Mr. Sanghani, for the appellant,

contended that, as the appellant had landed from a dhow while the first proviso to s. 6 (1) of the 1942 Ordinance was in force, he had landed legally; but if, as had been held by the learned chief justice, his entry (notwithstanding that he had landed from a dhow) was illegal because he had not appeared before an immigration officer, that the allegation of failure to appear before an immigration officer should have appeared in the particulars of the charge. Mr. Sanghani also argued that, under s. 21 of the Immigration Ordinance, it was not an offence for any person to be found in the Colony in disregard of the provisions of the Ordinance unless he was a prohibited immigrant, and that the appellant did not fall within any of the categories of prohibited immigrant defined in s. 2 (1) (*k*). In answer, learned Crown counsel contended that the inclusion in the charge of the words "having entered illegally" gave the appellant sufficient notice that what was charged against him was that he had entered the Colony, without permission to land, and counsel pointed to paragraphs (vii) and (viii) of s. 2 (1) (*k*). We are unable to accept this contention of learned Crown counsel. The appellant would have been a prohibited immigrant and he would, within the wording of the charge, have "entered it" (i.e. the Colony) "illegally in disregard of the provisions of the Immigration Ordinance", not only if he had no passport or permission to land; but if, for instance, he had been, when he entered, a destitute person, or a person suffering from a mental, or a loathsome, or a dangerous or contagious disease or even if he had trachoma; in other words if he fell within any of the other categories mentioned in s. 2 (1) (*k*) of the Ordinance. He was entitled to know from the charge which of all these various disabilities was alleged against him. In our opinion, the charge was gravely defective.

The next ground of appeal was that the magistrate came to no clear finding and gave no reasons in his judgment. It is correct that the magistrate's judgment did not comply with s. 259 of the Criminal Procedure Code. That, however, is not necessarily fatal, provided that no failure of justice has resulted.

The third ground of appeal (erroneously numbered "4") was:

> "The learned judge erred in law in holding that the onus of proof was on the appellant. There was no *prima facie* case against the appellant".

Mr. Sanghani stressed the words "prohibited immigrant" in s. 21 and argued that it was essential, before a conviction could be had under that section, that the fact that the accused was a prohibited immigrant must either have been established by the procedure set out in s. 10 of the Ordinance or the Crown must prove affirmatively that the accused was a prohibited immigrant as defined in s. 2 (1) (*k*).

Learned Crown counsel, on the other hand, contended that the onus was cast by sub-s. (1) of s. 10 upon the accused of proving that he was not a prohibited immigrant and that this applied to all proceedings, not merely to proceedings under s. 10, and applied whether the remainder of s. 10 had been operated or not: the mere fact that a person was found in the Colony without travel documents was sufficient to cast the onus on him of proving that he was not a prohibited immigrant. He referred to s. 7 (1), which says that every person entering the Colony without a valid passport shall be deemed to be prohibited immigrant; and to s. 8 (1) which requires an entry permit to be obtained before a person is allowed to enter the Colony. Learned Crown counsel referred also to s. 21 (1):

> "Any prohibited immigrant making his way into, or being found within the Colony in disregard of the provisions of this Ordinance shall be deemed to have contravened them and committed an offence under this Ordinance",

and argued that the appellant must be deemed to have contravened the provisions of the Ordinance if he was found here without a passport or other travel document. We are unable to agree that anyone found within the Colony without a passport or travel document must necessarily have committed an offence under s. 21 (1). That sub-section refers not to "any person" but to "any prohibited immigrant" found within the Colony. Section 7 (1) and s. 8 (1) apply to persons entering the Colony since March 15, 1955 (the date of commencement of the 1955 Ordinance), and proviso (*b*) to s. 23 is retrospective only to June 24, 1942 (the date of commencement of the 1942 Ordinance). There must be many persons not born in Aden who entered before June 24, 1942, when, so far as we aware, the requirement of possession of a valid passport or travel document was first enacted. Even if this is not correct, and there was some such requirement prior to June, 1942, there must be many persons in Aden who, during the currency of the 1942 Ordinance, came in by land, or disembarked from a dhow and were permitted to land, without a passport or travel document, under the first proviso to s. 6 (1) of the 1942 Ordinance. It is conceded that an oral permission would be sufficient. The mere fact that such persons are now found in the Colony without a passport or travel document would not mean that they are guilty of an offence under s. 21. They are not prohibited immigrants.

On the question of onus: It is admitted that s. 10 (2) was not operated. Learned Crown counsel argued that, nevertheless, s. 10 (1) applied. We will deal with this argument later. Crown counsel went on to argue that even if s. 10 (1) did not apply, the onus of proving that he was not a prohibited immigrant would rest on the accused in proceedings for a contravention of s. 21 (1) for failure to have travel documents, because (*a*) under s. 113 of the Evidence Ordinance, the burden of proving circumstances which bring the case within an exception lies on an accused person and (*b*) because existence of such documents would be a matter peculiarly within the knowledge of the accused. Crown counsel also relied on s. 114 of the Evidence Ordinance and cited *John v. Humphreys* (1), [1955] 1 W.L.R. 325; and *Mandan Devraj v. R.* (2) (1955), 22 E.A.C.A. 488; and *R. v. Kakelo* (3), [1923] 2 K.B. 793.

Section 113 of the Evidence Ordinance (Cap. 58) is the same as s. 105 of the Indian Evidence Act. In *Mandan Devraj v. R.* (2) it was held by this court, applying s. 105 of the Indian Evidence Act, that the burden of proving that an immigrant was entitled to remain in Uganda after the expiry of his temporary employment pass was upon him. In that case the accused person was an immigrant whose temporary employment pass had expired. The Uganda Immigration (Control) Ordinance contained an express provision which made it unlawful for any person to remain in the Protectorate after the expiration of his pass, unless he was otherwise entitled to remain under the provisions of the Immigration Ordinance or regulations. It was proved by the prosecution that Devraj was an immigrant, that his pass had expired, and that he had remained in the Colony. *Prima facie*, all the necessary ingredients of an offence had been shown. It was held that it was then for Devraj to show the exception if he could, i.e. that apart from his pass, he was entitled to remain. *Devraj's* case (2) might be an authority in Aden in proceedings under s. 20 of the 1955 Ordinance; but *Devraj's* case (2) is not an authority for the proposition that if any person is found in Aden without a passport or travel document, that alone is sufficient to cast upon him the burden of proving, in proceedings under s. 21 (1), that he is not a prohibited immigrant and that it is not necessary to invoke s. 10 of the 1955 Ordinance. We stress that s. 21 (1) applies to "any prohibited immigrant" and not to "any person"; and, under that sub-section, it has further to be shown that the prohibited immigrant found in the Colony is there in disregard of the provisions of the Ordinance. This might be presumed if he had overstayed the

period of a pass; but, as we have pointed out, it by no means follows, and should not, we think, be presumed by a court, from the mere fact that a person is found in Aden without a travel document that he is a prohibited immigrant who is in the Colony in disregard of the provisions of the 1955 Ordinance.

Neither, we think, does s. 114 of the Evidence Ordinance, corresponding to s. 106 of the Indian Evidence Act, assist the prosecution. In *Seneviratne v. R.* (4), [1936] 3 All E.R. 36, following *Attygalle v. R.* (5), [1936] 2 All E.R. 116, it was held by the Privy Council that s. 106 does not cast any burden on an accused person to prove that no crime was committed by proving facts lying specially within his knowledge. It is not correct that if anything remains unexplained by the accused there must be an inference of guilt.

> "Section 106 cannot by any implication be utilised to cast on the accused the burden of proving his innocence".

Sarkar on Evidence (9th Edn.), p. 106.

We think that the firearms licence and driving licence cases, *Mohamed Hassan Ismail v. R.* (6) (1955), 22 E.A.C.A. 461, and *John v. Humphreys* (1) mentioned by Crown counsel in argument are distinguishable from the present case. The possession of a firearm, or the driving of a motor car on the highway, *prima facie* constitutes an offence. Presence of a person in Aden without a travel document (as we have indicated) does not. But if the licence cases are not distinguishable, *Attygalle's* case (5) and *Seneviratne's* case (4) are decisions of the Privy Council which we are bound to follow. *R. v. Kakelo* (3) was decided on a special statute. It was decided in 1923 and we are inclined to doubt whether the passage on p. 795 about the burden of proof in a criminal case shifting, during the course of a criminal trial, from one side to the other (which is there, apparently stated as a general proposition) would, since *Woolmington v. Director of Public Prosecutions* (7), [1935] A.C. 462, be followed without qualification.

Our conclusion is that the mere finding of a person in Aden without a valid passport or travel document does not, ipso facto and without invoking s. 10 of the 1955 Ordinance, cast on him the burden of proving that he is not a prohibited immigrant and that he is lawfully in the Colony.

The learned Crown counsel addressed to us an argument based on the extreme inconvenience, if not impossibility, of the authorities proving an illegal entry in each case which might arise. He pointed out that while the immigrant must know how and when he entered, the authorities, in may instances, would not have this information. In our view, it is for the purpose of overcoming difficulties such as this that s. 10 has been inserted in the Ordinance. Under sub-s. (2) of s. 10 the immigration officer has only to form an opinion that a person is a prohibited immigrant, to inform him to that effect, and to give the grounds on which the finding is made, and, under sub-s. (1), there is then cast upon such person the burden of proving that he is not a prohibited immigrant. If the immigration officer is not satisfied that that burden has been discharged, he can so inform the person, who then has the rights of appeal mentioned in sub-s. (3). In our view sub-s. (1) of s. 10 cannot, as the learned chief justice held and Crown counsel argued, be lifted out of its context and applied, irrespective of the rest of s. 10, to proceedings under s. 21. But we think that a person against whom the provisions of sub-s. (1) and sub-s. (2) of s. 10 are proved to have been operated, and who has not appealed under sub-s. (3), or whose appeal has failed, is *prima facie* at least, a prohibited immigrant for all purposes under the Ordinance, and the burden of proving that he is not will lie upon him if proceedings are taken against him under s. 21 (1). We think that this must be the intention and effect of s. 10, and this is consonant with justice, because the person will have been informed of

the grounds for the finding of the immigration officer and have been given a full opportunity to rebut them.

But what, in our opinions, s. 10 (1) does not empower the authorities to do is what was done in these cases, namely, to sweep up a number of people merely because they had no travel documents, and, without operating s. 10 or giving the persons concerned an opportunity of learning and answering the allegations made against them, to prosecute them under s. 21 (1) and cast the onus upon the accused of proving that they were not prohibited immigrants.

It follows that since, in these proceedings, notwithstanding that s. 10 (2) had not been operated, the onus of proving that he was not a prohibited immigrant was placed upon the appellant both by the magistrate and in the Supreme Court, the conviction cannot stand. We have already pointed out that the charge was defective.

The appeal must be allowed and the conviction and sentence quashed.

Appeal allowed. Conviction and sentence quashed.

For the appellant:
PK Sanghani
PK Sanghani, Aden

For the respondent:
RJ Holmes (Crown Counsel, Aden)
The Attorney-General, Aden

Sohan Singh s/o Lakha Singh v R
[1958] 1 EA 28 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	15 February 1958
Case Number:	191/1957
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Connell, J

[1] Criminal law – Murder – Insanity – Fitness of accused to plead – Defence of insanity not pursued at trial – Application on appeal to call evidence of insanity – When such evidence may be given – Whether trial should refer to remand in custody of accused for medical observation – Criminal Procedure Code, s. 162 (1) (*K.*).

Editor's Summary

The appellant was charged with murder. The defence did not dispute the killing but when the trial opened counsel for the appellant expressed doubts as to his client's fitness to plead, whereupon an order for the appellant to be remanded in custody for medical observation was made. The defence of insanity based upon apparent lack of motive and the medical history of other members of the appellant's family was not pursued at the subsequent trial when the defence also declined to call a psychiatrist who had examined the appellant whilst on remand. The nature of the psychiatrist's evidence was then known to the defence. The appellant having been convicted of murder appealed and counsel appearing for him on the appeal applied for leave to call the evidence of another psychiatrist who had examined the appellant after his trial. The principal ground of appeal argued was that there had been no sufficient inquiry whether the appellant was of unsound mind and incapable of making his defence.

Held –

(i) there had been ample opportunity for medical evidence to be called by the defence at the trial and such evidence was then available and accordingly the application to call further evidence must be refused.

(ii) since his counsel did not pursue the question of the appellant's fitness to plead after the remand for medical observation, it could not be said that the trial judge was wrong to assume (as he evidently did) that the question of the appellant's fitness to plead was no longer an issue.

(iii) in view of the appellant's fitness to plead being mentioned at the trial resulting in a remand for medical observation, the proper course for the trial judge when taking the appellant's plea was to ask defence counsel whether fitness to plead was still in issue to record that reply; it was also counsel's duty to press for an inquiry into the appellant's ability to plead if he still thought there was any doubt on the matter.

Appeal dismissed.

Case referred to in judgment:

(1) *Kaplotwa s/o Tarino v. R.*, [1957] E.A. 553 (C.A.).

(2) *Dashwood v. R.*, [1942] 2 All E.R. 586; 28 Cr. App. R. 167.

Judgment

The following judgment was read by direction of the court: The appellant was convicted of murder by the Supreme Court of Kenya on November 30, 1957, and was sentenced to death. After hearing counsel on his behalf we dismissed his appeal to this court, and we now give our reasons for so doing.

It is not necessary for the purposes of this judgment to set out the facts of the case, it being sufficient to state that the evidence at the trial disclosed no motive for the murder, other than some suggestion, in one of the appellant's own statements to the police, that he may have thought that the deceased had had some illicit sexual relationship with his (the appellant's) wife. The killing of the deceased by the appellant was not in dispute, the defence being one of insanity, based on the apparent lack of motive for the crime and some evidence of insanity among other members of the appellant's family. There was no medical evidence before the trial court as to the appellant's mental state other than a brief statement in the deposition (admitted in evidence under s. 299 (*a*) (ii) of the Criminal Procedure Code) of Dr. Weir, the police surgeon. It appeared that Dr. Weir examined the appellant at Nairobi Prison five days after the murder, and the deposition contains the following passage in relation to this examination:

> "Accused had no complaints to make, he was in good health and had no signs of injury. Mentally he was composed and in no way agitated".

An application was made to us to admit further evidence as to the appellant's mental condition, the evidence being that of a psychiatrist, Dr. Foley, who had, since the trial, examined the appellant.

It appeared, however, that there had been ample opportunity for medical evidence to be called by the defence at the trial. The case had originally come before a judge of the Supreme Court on October 3, 1957, and the counsel who then appeared for the appellant is recorded as saying

> "Doubt as to the accused's fitness to plead–and as to his mental stability at time alleged offence committed. Family history also indicates instability".

It is clear therefore that at that date both the issue of unfitness to plead and the defence of insanity were contemplated by appellant's counsel. On that

statement by appellant's counsel, the court remanded the appellant in custody for fourteen days in order that he might undergo medical observation under the Mathari Hospital specialist. Subsequently, on October 18, the case was mentioned in chambers, when the trial was fixed for November 27. At the trial the defence had the opportunity of calling Dr. Margetts, the physchiatrist at Mathari Mental Hospital, who had examined the appellant, and were aware of the nature of the evidence he would give. They declined to call him. The Crown made a tentative application to call Dr. Margetts in rebuttal, but did not press it. It could not be said, therefore, that medical evidence as to the appellant's mental state was not available at the trial, or that the relevance of evidence as to his mental state could not have been appreciated. In the circumstances we considered that the application must be refused. No doubt the opinions of Dr. Foley and Dr. Margetts, if submitted to the proper quarter, will be taken into account when the question whether the sentence of death passed on the appellant is to be carried out is under consideration.

The principal ground of appeal argued before us was that no sufficient inquiry was made in pursuance of s. 162 (1) of the Criminal Procedure Code into the question whether the appellant was of unsound mind and consequently incapable of making his defence, and Mr. Lean for the appellant relied on the judgment of this court in *Kaplotwa s/o Tarino v. R.* (1), [1957] E.A. 553 (C.A.), in support of his argument that a new trial should be ordered.

As stated above, the facts were that counsel for the appellant had raised the issue of the appellant's fitness to plead when the matter came before the Supreme Court on October 3, 1957, and that in consequence of this the appellant was remanded for observation by a mental specialist. It did not appear from the record that the question of the appellant's fitness to plead was again raised by his counsel, either when the case was mentioned in chambers on October 18, or when the appellant was required to plead at the commencement of his trial on November 27. In these circumstances we were no prepared to say that the learned trial judge was wrong to assume (as he quite evidently did) that the question of the appellant's fitness to plead was no longer an issue. It may be that the learned judge had seen the specialist's report on the appellant (and we see no objection to such a report having been before him), and it was also appellant's counsel's duty to press for an inquiry into the appellant's ability to plead if he still thought there was any doubt on the matter. *Dashwood v. R.* (2), 28 Cr. App. R. 167 at p. 170. The duty to prove fitness to plead affirmatively as laid down by this court in *Kaplotwa's* case (1) only arises if an accused person's fitness to plead is in issue, that is, if

> "the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence".

The circumstances of *Kaplotwa's* case (1) clearly raised this issue, but no proper inquiry had been made into the matter.

Although we have accepted that, in the circumstances of the instant case, the appellant's fitness to plead was no longer in issue when he was called on to plead on November 27, we think it is unfortunate that the learned trial judge did not expressly note this on the record. In our view, since it appeared on the record that the question of the appellant's fitness to plead had been mentioned and that the appellant had been remanded for observation by a mental specialist, the proper course would have been for the trial judge, before taking the appellant's plea, to ask appellant's counsel whether the appellant's fitness to plead was still in issue, and to record the reply. If the reply were in the affirmative, it would clearly be the court's duty to inquire into the matter. And in a similar case, if an accused were unrepresented, it might well, in any event, be the court's duty to require evidence to be given by the psychiatrist who had

examined the appellant. The appellant himself might be in no condition to take the point.

As to the remaining grounds of appeal, it was argued that the learned trial judge ought, on the evidence, to have found that the appellant was of unsound mind at the time of the commission of the offence, and further that the deposition of Dr. Weir should not have been admitted in evidence under s. 299 of the Criminal Procedure Code. We were of opinion that there was no substance in these arguments. All that need said is that there was no such misdirection in the learned judge's judgment either on the law or the facts relating to the alleged insanity of the appellant as would justify our intervention, and that we were satisfied that Dr. Weir's deposition was properly admitted in evidence, and, in particular, that the passage in it which is quoted above was not such as would or might "unduly prejudice" the appellant.

Appeal dismissed.

For the appellant:
Ivor Lean
Shapley, Barret, Allin & Co, Nairobi

For the respondent:
JP Webber (Crown Counsel, Kenya)
The Attorney-General, Kenya

Abdul Aziz Suleman v R
[1958] 1 EA 31 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	11 February 1958
Case Number:	153/1957
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Connell, J and Pelly Murphy, J

[1] Criminal Law – Jurisdiction – Prosecution requiring consent of attorney-general or solicitor-general – Whether consent must be part of record – Prevention of Corruption Ordinance, 1956, *s.* 3(2) *and s.* 12 (*K.*) – *Interpretation and General Provisions Ordinance*, 1956, *s.* 56(*K.*).

Editor's Summary

The appellant was charged with corruption. When the prosecution case was closed he pleaded guilty to the offence alleged and was convicted and sentenced to two years' imprisonment with hard labour. His appeal to the Supreme Court against sentence was dismissed, whereupon he appealed again on the ground that by virtue of s. 12 of the Prevention of Corruption Ordinance, 1956, the prosecution required

the written consent of the attorney-general or solicitor-general. The record itself did not indicate whether the sanction had been produced to the magistrate but no request to produce the sanction, which it was admitted existed, had been made on behalf of the appellant. The grounds of appeal were that the required sanction was not made part of the record, that in consequence the magistrate could not take judicial notice of it and might have been mistaken as to its sufficiency, and that in any event since the appellant had no chance to attack its validity he had been prejudiced.

Held –

(i) unless contested, a sanction to a prosecution proves itself and a magistrate is thereby entitled to act on it without oral evidence as to its authenticity.

(ii) if no sanction had been given there would have been no jurisdiction, but whilst the magistrate's failure to note production of the sanction and to embody it in his record was a procedural defect, a distinction must be drawn between defects going directly to jurisdiction and errors of procedure which, however grave, do not take away jurisdiction; and provided a sufficient sanction existed, production and formal proof at the trial are not, in the absence of an objection, absolute prerequisites to jurisdiction.

(iii) as to the sufficiency of the sanction, the court was entitled to examine this to ascertain whether it was valid and sufficient to confer jurisdiction, as the court had done in other circumstances where the *Official Gazette* enabled the court to determine a point of jurisdiction and, having examined the consent, it was on its face a valid and sufficient sanction which was in existence prior to and at the time the case against the appellant was commenced.

Per Curiam – "We were considerably influenced by the fact that the appellant, after hearing the prosecution's case and having the best of professional advice, had pleaded guilty. If there was jurisdiction to try him, it would be wrong that he should escape on a technicality."

Appeal dismissed.

Case referred to in judgment:

(1) *Chief Kwame Asante v. Chief Kwame Tawia*, [1949] W.N.40.

(2) *Abdulla Suleiman el Harthi and Others v. R.* (1955), 22 E.A.C.A. 404.

(3) *R. v. Bates*, 6 Cr. App. R. 153.

(4) *Gokulchand Dwarkadas Morarka v. R.* (1948), 75 I.A. 30; (1948), A.I.R. P.C. 82.

(5) *R. v. St. Edmundsbury and Ipswich Diocese* (*Chancellor*), *Ex parte White*, [1948] 1 K.B. 195; [1947] 2 All E.R. 170.

(6) *R. v. Waller*, 3 Cr. App. R. 213.

(7) *R. v. Metz*, 11 Cr. App. R. 164.

(8) *R. v. Turner*, 3 Cr. App. R. 103.

(9) *R. v. Hemedi Bin Kambenga* (1940), 7 E.A.C.A. 64.

(10) *Heptulla Brothers Ltd. v. Thakore*, [1956]1 W.L.R.289.

(11) *R. v. Day*, [1940] 1 All E.R. 402.

(12) *R. v. Sparkes*, [1956] 2 All E.R. 245.

(13) *R. v. Ferguson*, 7 Cr. App. R. 24.

(14) *R. v. Collins*, 8 Cr. App. R. 244.

(15) *R. v. Robinson*, [1917] 2 K.B. 108.

Judgment

February 11. The following judgment was read by direction of the court: The appellant was charged before the resident magistrate at Nanyuki with corruption contrary to s. 3 (2) of the Prevention of Corruption Ordinance, 1956. At the close of the prosecution's case he pleaded guilty, was convicted on his plea, and was sentenced to two years' imprisonment with hard labour. He appealed to the High Court against the severity of his sentence, but not against his conviction. The appeal was dismissed. He then appealed to this court against the decision of the Supreme Court upholding his sentence on the ground that all the proceedings were incompetent by reason of s. 12 of the Ordinance. We dismissed the appeal and now give our reasons.

Section 12 reads as follows:

> "12. A prosecution for an offence against this Ordinance shall not be instituted except by or with the written consent of the attorney-general or solicitor-general:

> "Provided that a person charged with such an offence may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody or on bail, notwithstanding that the consent of the attorney-general or solicitor-general to the institution of a prosecution for the offence has not been obtained, but no further or other proceedings shall be taken until that consent has been obtained."

The grounds of appeal did not allege that a sanction had not in fact been given. At the outset of the hearing it was stated from the bar by counsel for the Crown that a sanction signed by the solicitor-general was in existence before the proceedings were instituted, and had been sent to Crown counsel at Nyeri. The document was in counsel's possession at the first hearing before us, and he would have produced it then if asked to do so; but he did not himself tender it to us, or ask leave to do so. Counsel for the appellant did not contest the fact of the existence of the sanction; but he contended that it could not be looked at, as it was not part of the record. We had at that stage no knowledge of its terms. The grounds of appeal were first, that no such sanction was "proved or exhibited or otherwise lawfully made part of the record", secondly, that, in assuming its existence, the learned magistrate could not take judicial notice of it and might have been mistaken as to its sufficiency, and thirdly, that in the circumstances the appellant had no opportunity to attack its sufficiency or validity and was thereby prejudiced. It did not appear from the record, and counsel for the Crown was not able to state, whether the sanction was ever produced to the learned magistrate or not. On May 21, 1957, the magistrate ordered the issue of a summons, and the sanction should have been before him then. It may or may not have been. The same magistrate later heard the case. The appellant was represented by leading and junior counsel. There is nothing on the record to show whether the sanction was then produced or not.

It is unusual that a proceeding which is in effect an appeal against conviction should be brought to this court where there was no such appeal to the Supreme Court, and we felt some doubt whether the appeal lay. Section 360 of the Criminal Procedure Code allows in general terms an appeal on matters of law to this court by "any party to proceedings under" Part XI of the Code, which deals with appeals from subordinate courts to the Supreme Court. The matter was not fully argued before us and it is not necessary to pronounce finally on it, since the appeal fell to be dismissed in any event, but we are inclined to the view that, although the word "proceedings" must mean "proceedings relevant for the purpose", an order made on an appeal to the Supreme Court brought only against severity of sentence is sufficient to found our jurisdiction in respect of the whole case, notwithstanding that before us severity of sentence could not be canvassed. Assuming the appeal to be properly before us, any question of the jurisdiction of the trial court could of course be raised on the appeal although never taken before. In *Chief Kwame Asante v. Chief Kwame Tawia* (1), [1949] W.N. 40, effect was given to an objection to jurisdiction which was not raised until the appeal had reached the judicial committee of the Privy Council. Their lordships said:

> "If it appeared to an appellate court that an order against which an appeal was brought had been made without jurisdiction, it could never be too late to admit and give effect to the plea that the order was a nullity."

In *Abdulla Suleiman el Harthi and Others v. R.* (2) (1955), 22 E.A.C.A. 404, an objection to the validity of a consent by the British resident to a prosecution was considered and given effect to, notwithstanding that the objection had not been taken in the trial court or on first appeal and was raised for the first time in this court. This court said:

> "Since these objections go to the jurisdiction of the trial court, there is no estoppel on the ground that they were not taken or were not taken in their present form in the courts below."

We would dispose at the outset of the second and third grounds of appeal. By s. 56 of the Interpretation and General Provisions Ordinance, 1956, a sanction of this kind, purporting to be signed by the solicitor-general, proves itself unless contested. It would therefore be proper for the magistrate to act on the document itself without oral evidence in proof of the signature, unless any question was raised as to its authenticity. The sufficiency of the sanction would similarly be judged in the first place from its own terms. It was conceded that neither the appellant nor his counsel ever asked or desired to see the sanction, or to attack either its authenticity or its sufficiency. It is clear that no such point was ever raised either at the trial or on first appeal. Subject only to the question of jurisdiction, which includes the question of sufficiency of the sanction, it could not reasonably be contended that any prejudice could have been caused by non-production of the document.

On the point of jurisdiction, it was not disputed that, if no sanction had been given, there would have been no jurisdiction to entertain the proceedings and, on the basis that the proceedings were a nullity, the conviction would have had to be quashed on appeal. *R. v. Bates* (3), 6 Cr. App. R. 153.

The appellant relied first on *Gokulchand Dwarkadas Morarka v. R.* (4) (1948), 75 I.A. 30; (1948), A.I.R. P.C. 82. In that case it was objected at the outset of the trial that the sanction relied on was insufficient, since it was not "given in respect of the facts constituting the offence charged". The sanction did not show on its face the facts to which it related, which, as their lordships said, would plainly have been desirable, but was not essential. They continued (75 I.A. at p. 38):

> "But if the facts constituting the offence charged are not shown on the face of the sanction, the prosecution must prove by extraneous evidence that those facts were placed before the sanctioning authority."
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> "Looked at as a matter of substance it is plain that the Government cannot adequately discharge the obligation of deciding whether to give or withhold a sanction without a knowledge of the facts of the case. Nor, in their lordships' view, is a sanction given without reference to the facts constituting the offence a compliance with the actual terms of cl. 23."
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> "In the present case there is nothing on the face of the sanction, and no extraneous evidence, to show that the sanctioning authority knew the facts alleged to constitute a breach of the Order, and the sanction is invalid."

We were asked by counsel for the appellant to say that, since the sanction was not before us and accordingly we were unaware of its terms, we should presume that it did not show on its face the facts to which it relates, or was otherwise insufficient, or, at least, that we should not presume that it was sufficient. In support of this, the following passage from the same judgment was relied upon:

> "On the question as to the sufficiency of the sanction the High Court noticed two previous decisions of such court, Criminal Appeals No. 535 of 1945 and No. 548 of 1946, by which it had been held that the burden of proving that the requisite sanction had been obtained rested on the prosecution, and that such burden involved proof that the sanctioning authority had given the sanction in reference to the facts on which the proposed prosecution was to be based, facts which might appear on the face of the

sanction, or might be proved by extraneous evidence. The court accepted this view of the law, but held that in the case of the appellant it had been proved that the facts on which the prosecution was proposed to be based had been before the sanctioning authority when the sanction was given. The view of the court upon this question appears from the following passage in the judgment of the court:

> 'A sub-inspector who attached the cloth has sworn that on 8.9.1944 he submitted a report to the district superintendent of police asking for sanction to prosecute the accused under cl. 18 (2) of the Cotton Cloth and Yarn (Control) Order, 1943. Subsequently the matter was forwarded to the district magistrate and the resolution granting sanction itself refers to the endorsement of the district magistrate, Sholapur, No. XIX/4500 dated 8.11.1944. It is true that in his cross-examination the sub-inspector admitted that he had not got a copy of the aforesaid endorsement made by the district magistrate, but his evidence would show that the said endorsement was made in reference to the report which the sub-inspector had forwarded to the district superintendent of police as already stated.'

"This view of the facts is not supported by the evidence on record. There is no evidence to show that the report of the sub-inspector to the district superintendent of police, which was not put in evidence, was forwarded to the endorsement of the district magistrate referred to in the sanction, which endorsement also was not put in evidence. The prosecution was in a position either to produce or to account for the absence of the report made to the district superintendent of police and the endorsement of the district magistrate referred to in the sanction, and to call any necessary oral evidence to supplement the documents and show what were the facts on which the sanction was given. Their lordships see no justification for drawing inferences in favour of the prosecution upon matters on which they withheld evidence under their control. Under s. 114, Evidence Act, illustration (*g*), the normal presumption is that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it."

We thought that this passage must be read in relation to the facts of the case. First, the sufficiency of the sanction had been expressly challenged at the outset of the trial. Secondly, it did not appear on its face to be sufficient. Thirdly, the onus was on the prosecution to establish, if they could, by oral evidence that it was sufficient. Fourthly, the evidence they called did not establish that fact. Fifthly, other evidence which might have established the fact was available and was withheld. In this case the facts, as originally known to us, were different. In the first place we did not, and do not, know whether the sanction was produced to the learned magistrate or not. It could have been produced, and non constant that it was not. It was argued for the Crown that the prerequisite for applying s. 114, illustration (*g*), was not satisfied, and that in the circumstances there was no basis for a presumption adverse to the Crown as to its contents: on the other hand, if any presumption were to be made, it should rather be that of regularity, that is to say, that the document was proper and sufficient for the purpose for which it was prepared. For reasons which will appear later we found it unnecessary to make any presumption as to the nature of effect of the sanction, and it was consequently unnecessary to decide which of the submissions made to us as to the proper presumption to be drawn was correct. We therefore express no opinion on the point.

Gokulchand's case (4) was also relied on by the appellant as authority that the existence and sufficiency of a sanction must in every case be expressly

proved by the Crown at the trial, whether objection is taken or not, and that an omission to do this goes to jurisdiction. It was also submitted that, even if in fact a sufficient sanction was in this case proved or produced to the magistrate, the failure of the magistrate to make any note embodying the sanction in the record was an error which itself resulted in a lack of jurisdiction, since all facts founding jurisdiction must, in the case of a subordinate court, appear on the face of the record. It is apparent that, if either of these submissions were accepted as correct, it would conclude the appeal, and the form of the sanction would never become material.

The appellant developed his argument thus:

> "*Prima facie*, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular court."

9 Halsbury's Laws (3rd Edn.) 349, para. 820. It is true that the magistrate's record did not show on its face the existence of a proper sanction, on which jurisdiction depended. The most recent authority upon which the statement in Halsbury is based is *R. v. Chancellor of St. Edmundsbury and Ipswich Diocese* (5), [1948]1 K.B. 195 at pp. 205, 206, where it is said by Wrottesley, L.J.:

> "But there is another test, well recognised by lawyers, by which to distinguish a superior from an inferior court, namely whether in its proceedings, and in particular in its judgments, it must appear that the court was acting within its jurisdiction. This is the characteristic of an inferior court, whereas in the proceedings of a superior court it will be presumed that it acted within its jurisdiction unless the contrary should appear either on the face of the proceedings or aliunde."

The cases of *R. v. Waller* (6), 3 Cr. App. R. 213, and *R. v. Metz* (7), 11 Cr. App. R. 164, dealt with trials by superior courts, and it might be sought to distinguish them on that ground. And in *Metz* (7), the sanction had been sent forward with the depositions. But in the latter case the court said:

> "It is not suggested that the prosecution was in fact instituted without the necessary consent, but it is said that there was no evidence of it at the trial. The point was not taken at the trial. As we now know, the consent was in fact proved at the police court. The document was in court at the trial, but it was not formally proved. If the point had been taken at the trial the defect would have been immediately cured, so the point is a pure technicality. We do not think it possible for the point now to succeed in this court when there was an opportunity for counsel to take it in the court below if he desired.
>
> "Moreover, in *Waller* a similar point arose with regard to the consent of the director of public prosecutions, which is made necessary by the Prevention of Crime Act, 1908, before proceedings can be taken in respect of habitual criminals. It was there said by the court that in the absence of an objection on behalf of the offender the consent must be presumed. Lord Alverstone, C.J., dealt in that case with the procedure under the Vexatious Indictments Act, and said, 'It is the duty of the clerk of assize to satisfy himself before the bill is presented to the grand jury that all the necessary steps preliminary to indictment have been taken, and, unless objection be taken by the prisoner that there was no consent in fact, it is to be presumed that the clerk of assize had discharged his duty in that respect.' Exactly the same principle must apply here. Our attention has been called to the case of *Bates* where the objection was taken that consent had not in fact

> been obtained, which is a totally different matter; it was there pointed out by Lord Alverstone that although the point had not been taken below it was necessary that there should be consent before the prosecution was instituted. No consent had been obtained, the conviction was quashed. The case was decided on principles which do not conflict or clash with the view of the court in the present case. The court gives no effect to a technicality, but it does give effect to a matter of substance."

R. v. Turner (8), 3 Cr. App. R. 103, where a similar point was considered, was an appeal from a decision of a subordinate court, and neither in that case nor in *Waller* (6), where it was discussed at length, was any distinction drawn between subordinate and superior courts for this purpose. And, although in the case of a subordinate court the existence of jurisdiction should be made to appear on the face of the record, we think an omission to do this leads to no more than a *prima facie* inference of lack of jurisdiction. In the passage quoted from Halsbury the words "*prima facie*" might be read as relating only to the proposition "no matter is deemed to be beyond", etc.; but we think they are intended also to modify the second proposition "while nothing is within", etc. Unless this reading were adopted, we think the second proposition would be an incomplete statement of the law. Even if the form of the record raised a *prima facie* inference of want of jurisdiction, this would not, we thought, preclude an appellate court, in which the question of jurisdiction was raised for the first time, from investigating the facts on which jurisdiction depended and so deciding whether there had been jurisdiction or not. Suppose, for example, that in a case triable only by a first-class magistrate it did not appear from the record that he was a first-class magistrate. If, on appeal, it was contended that he was only a second-class magistrate, the appellate court could and would refer to the *Gazette*, which would settle the question. *R. v. Hemedi Bin Kambenga* (9) (1940), 7 E.A.C.A. 64, is a case in which this court seems to have looked at a *Gazette* notification in order to determine a point of jurisdiction. We thought that this court could similarly look at the sanction, which, as already mentioned, would prove itself. If jurisdiction depends on a matter of fact, and the existence of that fact is questioned for the first time on appeal, the appellate court will inquire into its existence, except in cases where the legislature has conferred upon the subordinate court power to determine, without appeal, the preliminary facts upon which its jurisdiction depends. *Heptulla Brothers v. Thakore* (10), [1956] 1 W.L.R. 289, 296. We noted that in *Chief Kwame Asante v. Chief Kwame Tawia* (1) their lordships of the Privy Council remitted a case which had emanated from a subordinate court and had come up through the Chief Commissioner's Court, to the West African Court of Appeal for investigation of the necessary material for a final decision by their lordships.

At this point it is necessary to stress the distinction between defects going directly to jurisdiction and errors of procedure which, however grave, do not take away the basis of jurisdiction. It is possible that a magistrate may have jurisdiction because a valid and sufficient sanction is in existence, although it has not been produced to him and filed. There is no statutory requirement that it should be produced to him in order to found jurisdiction. It would, of course, be entirely wrong for any magistrate to proceed in a case of this kind without satisfying himself as to the existence and sufficiency of the sanction; and it is necessary, as a matter of proper procedure, that the magistrate should file the consent with the record, should note that he has done so, should give the defence the opportunity to see the sanction and raise objections to it, and should consider and adjudicate on any such objections. Any failure in this respect is an irregularity, and may be a fatal one. It may even be an illegality going to the root of the proceedings. An example would be refusal to accede to an application by the defence to see the sanction, or to allow them to challenge

its authenticity or sufficiency. But the effect of an illegality of this kind would not, we think, be that the basis of jurisdiction was taken away; it would rather be an illegal exercise of jurisdiction. The practical effect may, of course, be the same.

The foregoing remarks are relevant both to the question of non-production of the sanction and to the question of failure to note it in the record if it was produced. On the former, we were of opinion that, provided a sufficient sanction exists, production and formal proof of the sanction at the trial are not, in the absence of objection, absolute prerequisites to jurisdiction. *Gokulchand's* case (4) dealt not with production or formal proof of a sanction, but with the calling of evidence to show the sufficiency of a sanction which appeared to be insufficient on its face, and that case must be read in the context of the fact that objection was there taken at the proper time. On the issue of necessity for production and formal proof of the sanction at the trial, there is no conflict between *Gokulchand* (4) and the English cases such as *Waller* (6) and *Metz* (7). In *Gokulchand* (4) their lordships were not satisfied that a sufficient sanction had ever existed. This put *Gokulchand's* case (4) on the same footing as Bates (3), where no consent had in fact been obtained. Where there is no consent, or no sufficient consent, the conviction must be quashed. And, in the absence of evidence, their lordships refused to presume sufficiency which was not apparent on the face of the consent. As stated in *Metz* (7), however, this is a totally different matter from giving effect to the technical failure to effect the production and formal proof of a consent which both exists and is sufficient on its face. The question of sufficiency of the sanction did not arise at all in the cases decided by the Court of Criminal Appeal. If the sanction is not proved at the trial, and if the point is taken on appeal, it must be investigated and decided. *Chief Kwame Asante v. Chief Kwame Tawia* (1).

For these reasons we were of opinion that, if the sanction was sufficient in its terms to be effective and valid without the assistance of any oral evidence, the failure to produce the sanction to the magistrate, or alternatively the failure of the magistrate to note its production and so embody it in his record, which-ever in fact occurred, although it was a serious defect of procedure, would not, in the absence of any objection by the defence at the trial, have removed the basis of jurisdiction. This disposed of the two submissions of the appellant set out above, which arose without reference to the form of the sanction itself. On the point of sufficiency, we considered that we had power to look at the sanction, in order to ascertain whether it was valid and sufficient to confer jurisdiction, and the question was whether we should exercise that power. We accordingly set the case down for further argument on this point.

At the resumed hearing, counsel for the appellant objected at some length to our looking at the sanction. His first point was that it was the intention of the legislature that the magistrate should in every case determine whether jurisdiction existed, and that his finding to that effect was essential. Where the sanction alone is relied on, this is clearly incorrect. Its sufficiency is primarily a question of construction, which an appellate court is as competent to answer as the magistrate would have been. Though we have power to hear additional evidence, it was never our intention to allow oral evidence to be called, either here or below, to remedy a possible defect on the face of the sanction.

Counsel next objected that if we looked at the sanction, we should be breaking the rule that an appellate court will not allow deficiencies in a prosecution case to be filled by calling further evidence on appeal. He cited *R. v. Day* (11), [1940] 1 All E.R.402; *R. v. Sparkes* (12), [1956] 2 All E.R. 245; *R. v. Ferguson* (13), 7 Cr. App. R. 24; *R. v. Collins* (14), 8 Cr. App. R. 244; and *R. v. Robinson* (15), [1917] 2 K.B. 108. We accepted the principle, but considered that it was inapplicable here. It appeared to us that any inquiry which a magistrate may be obliged to make into the existence or sufficiency of

a sanction should properly be regarded as a separate, though related, proceeding antecedent to the trial itself. The sanction should be produced, and any objection to it should be investigated and a ruling thereon given, before the accused is asked to plead. It is necessary to distinguish between jurisdictional facts which must be proved as part of the prosecution's case, e.g. a question of the locus of the alleged offence, and the different type of jurisdictional fact, such as the existence of a proper sanction, or the qualifications of the magistrate, which are antecedent and provide the basis of jurisdiction. We saw no objection to investigating facts of the latter type in an appellate court and thought that to do so would not infringe the rule against completing an incomplete case, at least where the point is first taken in the appellate court. We have already referred to *R. v. Hemedi* (9); and *Heptulla v. Thakore* (10).

Finally, counsel for the appellant objected that the provisions of the Indian Evidence Act were exhaustive of the powers of the court to accept documents without formal proof; but this argument ignores the numerous instances, of which s. 56 of the Interpretation and General Provisions Ordinance, 1956, provides one, where the court has special statutory powers in respect of particular classes of documents.

We decided to call for the sanction. In reaching this decision we were considerably influenced by the fact that the appellant, after hearing the prosecution's case and having the best of professional advice, had pleaded guilty. If there was jurisdiction to try him, it would be wrong that he should escape on a technicality.

The sanction was produced to us by Crown counsel. It read as follows:

"THE PREVENTION OF CORRUPTION ORDINANCE, 1956

(No. 33 of 1956).

CONSENT TO PROSECUTE

(Section 12).

IN EXERCISE of the powers conferred on me by s. 12 of the Prevention of Corruption Ordinance, 1956, and having considered all the relevant facts, I hereby consent to the prosecution of–

ABDULLAH AZIZ MOTI

for an offence of corruption contrary to s. 3 (2) of the Prevention of Corruption Ordinance, 1956, based on the following facts:–

On or about March 28, 1957, at Meru in the Central Province he corruptly gave £75 to J. H. Lategan of the Maize and Produce Control to induce the said J. H. Lategan to discontinue investigations into the alleged offence under the Defence (Control of Maize) Regulations.

Dated at Nairobi this 10th day of May, 1957.

(Signed) D. W. CONROY,

Solicitor-General."

The charge on which the appellant was tried, and which was apparently presented to the magistrate on May 21, 1957, was as follows:

"CORRUPTION CONTRARY TO SECTION (3) (2) OF THE PREVENTION OF CORRUPTION ORDINANCE, 1956.

Particulars of Offence. (See Second Schedule of C.P.C.)

Abdullah Aziz Moti, in that he on March 28, 1957, at Meru within the Central Province, did corruptly give a member of a public body, to wit,

> Mr. Jan Lattigan, an investigating officer of the Maize and Produce Control, the sum of £75, to induce the said Mr. Jan Lattigan to discontinue certain investigations, a matter in which the said public body is concerned."

Counsel for the appellant was then given an opportunity of challenging the validity and sufficiency of the sanction. Without prejudice to his contentions that we should not have looked at the sanction, he contended that it was insufficient in from, in that the alleged facts on which it was granted were not sufficiently set out. We thought that it would be quite unreasonable to require them to be set out with any greater particularity. Counsel also contended that there was at least an obscurity as to the facts, since there was evidence of two distinct gifts, or offers of gifts, or sums of £75, and it was not clear to which of these the sanction related. We thought the evidence in this case showed that this contention was entirely unfounded.

We were of opinion that this was on its face a valid and sufficient sanction which was in existence prior to, and at the time of, the commencement of the case against the appellant, and which formed a proper basis of jurisdiction in the case, and that any matters relating to treatment of the sanction were at worst irregularities which did not prejudice, and in the circumstances could not have prejudiced, the appellant. We accordingly dismissed the appeal. The only issues raised were those of jurisdiction with which we have dealt. It was never suggested that there were any merits.

Appeal dismissed.

For the appellant:
DN Khanna
DN and RN Khanna, Nairobi

For the respondent:
JP Webber (Crown Counsel, Kenya)
The Attorney-General, Kenya

Prafulbhai Dayabhai Patel v The Principal Immigration Officer
[1958] 1 EA 41 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	21 March 1958
Case Number:	9/1958
Before:	Sir Kenneth O'Connor P, Sir Audley McKisack CJ and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda–Sheridan, J

[1] Immigration – Motion for mandamus to principal immigration officer to issue certificate that husband entitled to enter Uganda because wife a permanent resident there – Amending regulations affecting applicant's case whilst application pending – Immigration Control Ordinance, s. 6 (*U.*) – *Immigration* (*Control*) (*Exemption*) *Regulations,* 1954, *reg.* 3 (1) (*c*), (*U.*) – *Immigration* (*Control*) (*Exemption*) (*Amendment*) *Regulations,* 1955, *reg.* 2 (*U.*).

Editor's Summary

The appellant had married in India on January 10, 1955, a woman who was a permanent resident of Uganda. On January 19 his advocates applied for a letter of authority to enable the appellant to enter Uganda on the grounds that under the Immigration (Control) (Exemption) Regulations, 1954, he was exempted from the provisions of s. 6 of the Immigration (Control) Ordinance. Regulation 3 of the 1954 Regulations exempted inter alios a British protected person who satisfies the principal immigration officer that he is the husband of a permanent resident,

> "was married to such permanent resident before entering the Protectorate and, if he has previously entered any of the East African territories before entering such territory."

On January 20 the appellant was asked to forward confirmation from the principal immigration officers of other East African territories that he had not previously resided in those territories. Before this requirement could be satisfied new Regulations amending the 1954 Regulations came into force by which an applicant for exemption was also required to obtain the approval of the Immigration Control Board. This board on October 3, 1956, refused approval for exemption of the appellant but well before their refusal the principal immigration officer had been satisfied that the appellant had complied with reg. 3 of the 1954 Regulations. In 1957 the appellant moved the High Court of Uganda for an order of mandamus to the principal immigration officer directing him to issue the certificate he had sought in January, 1955. The motion was refused.

On appeal it was contended that since the appellant was qualified for exemption when he applied he ought to have been given a certificate and that the application should have been dealt with in accordance with the regulations in force when the application was made.

Held –

(i) the appellant had no right to exemption until he satisfied the principal immigration officer that he came within the provisions of reg. 3, which the appellant had not done at the time the new regulations came into force.

(ii) even if the appellant did satisfy the principal immigration officer that he came within reg. 3 of the 1954 Regulations, such satisfaction did not date back to the date of the appellant's application.

Appeal dismissed.

Case referred to:

(1) *Ex parte Raison* (1891), 60 L.J. Q.B. 206.

March 21. The following judgments were read:

Judgment

Sir Kenneth O'Connor P: On October 21, 1957, Prafulbhai Dayabhai Patel (hereinafter referred to as P. D. Patel) moved the High Court, pursuant to s. 18 of the Law Reform (Miscellaneous Provisions) Ordinance, 1953, for an order of mandamus to the principal immigration officer directing him to issue a certificate to the effect that P.D. Patel was a person entitled to exemption by virtue of the Immigration (Control) (Exemption) Regulations, 1954 (hereinafter called the 1954 Regulations), from the requirements of s. 6 of the Immigration (Control) Ordinance.

Section 6 of the Immigration (Control) Ordinance prohibits the entry into the Protectorate of persons who do not possess a valid permit or pass. Regulation 3 of the 1954 Regulations, before its amendment on February 24, 1955, by sub-para. (*c*) of para. (1) exempted from the operation of s. 6 of the Ordinance inter alios a British protected person who:

> "(i) satisfies the principal immigration officer that he is the husband of a permanent resident; and
>
> (ii) satisfies the principal immigration officer that he was married to such permanent resident before entering the Protectorate and if he has previously entered any of the East African territories before entering such territory."

There followed a proviso disentitling a person who has married by proxy from the benefit of the paragraph.

On February 24, 1955, the Immigration (Control) (Exemption) (Amendment) Regulations, 1955 (hereinafter called the 1955 Regulations) came into force. Regulation 2 of the 1955 Regulations amended reg. 3 of the 1954 Regulations by deleting sub-para. (*c*) of para. (1) and substituting therefore the following sub-para.:

> "(*c*) subject to the provisions of para. (4) of this regulation any person being a British subject or a British protected person who obtains the approval of the Immigration Control Board for exemption under this paragraph, either before or after his marriage, and who satisfies the principal immigration officer–
>
> (i) that he is the husband of a permanent resident, and
>
> (ii) that at the date of his marriage to such permanent resident his wife was not less than eighteen years of age, and
>
> (iii) that he was married to such permanent resident before entering the Protectorate or if he had previously entered any of the other East African territories before entering such territory, and
>
> (iv) that he was not married to the permanent resident by proxy."

It will be observed that reg. 3 of the 1955 Regulations for the first time required an applicant for exemption from s. 6 of the Ordinance to obtain the approval of the Immigration Control Board, as well as satisfying the principal immigration officer of the matters mentioned.

On January 19, 1955 (that is, before the coming into force of the 1955 Regulations), P. D. Patel's advocates applied to the principal immigration officer for a letter of authority for P. D. Patel to enter the

Protectorate on the grounds that he had been married in India, on January 10, 1955, to Pushpaben

Revabhai Patel, a permanent resident of Uganda. The sequence of events and relevant dates were then as follows: On January 20, 1955, the principal immigration officer required P. D. Patel to forward confirmation from the principal immigration officers of other East African territories that he had not previously been resident in those territories. On February 24, 1955, the 1955 Regulations came into force. On October 3, 1956, the Immigration Control Board refused approval for the exemption of P. D. Patel from the requirements of s. 6 of the Ordinance. On some day before October 3, 1956, probably on November 7, 1955, the principal immigration officer had been satisfied that P. D. Patel complied with the requirements of reg. 3 of the 1954 Regulations. The delay in his becoming satisfied of this was partly due to the fact that on February 25, 1955, the principal immigration officer, Kenya, had informed him that P. D. Patel had previously entered Kenya. This was later found to be a mistake and the principal immigration officer was notified accordingly on November 7, 1955. This delay does not seem to be material, as the mistaken letter from the principal immigration officer, Kenya, was not sent until the day after the 1955 Regulations came into force. Although it appears that at the date of the coming into force of the 1955 Regulations, P. D. Patel, in fact, qualified for exemption under reg. 3 (1) (*c*) of the 1954 Regulations, there was no evidence before the learned judge who heard the motion and there is none before us, that he had satisfied the principal immigration officer of this before February 24, 1955, when reg. 3 (1) (*c*) of the 1954 Regulations was replaced by the 1955 Regulations.

Mr. Dickie, for the principal immigration officer, suggested that as the letter from the principal immigration officer dated January 20, 1955, only required confirmation that P. D. Patel had not previously resided in any East African territory an inference might be drawn that the principal immigration officer was, on January 20, 1955, satisfied that P. D. Patel complied with the other requirements of reg. 3. I do not think that such an inference can safely be drawn. The principal immigration officer might well have required this confirmation in order to complete the applicant's case for exemption before considering and adjudicating upon it at all. He had to be satisfied that P. D. Patel had not previously entered any East African territory and, if so, when, before he could know whether or not the marriage to a permanent resident had taken place before such entry (if any). From the correspondence, it seems clear to me that the principal immigration officer was not, before February 24, 1955, "satisfied" that P. D. Patel qualified for exemption under reg. 3 (1) (*c*) of the 1954 Regulations. That being so, I am of opinion that P. D. Patel had not, at that date, acquired a right to enter the Protectorate. He could not acquire a right to exemption until he satisfied the principal immigration officer that he came within the requirements of reg. 3 (1) (*c*), and this he had not then done.

Mr. Wilkinson, for P. D. Patel, argued that it was enough that he was, in fact, then qualified and had asserted his right to enter by making an application. I cannot agree. P. D. Patel had no right to exemption which he could assert until he was not only qualified and had applied, but had also satisfied the principal immigration officer that he was qualified for exemption. The regulation does not say that a person who is the husband of a permanent resident, married to her before entering the Protectorate, has a right to exemption. The right only arises when he "satisfies the principal immigration officer" of the required facts.

Mr. Wilkinson relied on s. 10 (2) of the Interpretation and General Clauses Ordinance to the effect that where any Ordinance (which would include a rule made under an Ordinance) repeals any other enactment then, unless the contrary intention appears, the repeal shall not . . . (*c*) affect any right acquired or accrued . . .

In my opinion that provision has no application, for the reason that no

right to exemption had been acquired by, or accrued to P. D. Patel at the date of the revocation of reg. 3 (1) (*c*) of the 1954 Regulations.

Mr. Wilkinson cited a number of cases in support of the well-known propositions that no statute is (except upon matters of procedure) to be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and that, without clear words, a man is not to be deprived of a right which existed at the date of the entry into force of the repealing statute. In my view, those cases are all distinguishable from the present case: they all relate to rights which had already been acquired or accrued under the previous legislation before the date of its repeal. For instance in *Ex parte Raison* (1) (1891), 60 L.J. Q.B. 206 (which was the case on which Mr. Wilkinson principally relied), the bankrupt had acquired a right to apply for his discharge and to have his application considered under the terms laid down in the prior Act before the repealing Act came into force.

Mr. Wilkinson argued that once the principal immigration officer was satisfied (as, subsequently to February 24, 1955, he was) his satisfaction should be dated back to the date of P. D. Patel's application, so as to antecede the coming into force of the 1955 Regulations. I know of no authority for this, in the absence of express words to this effect in the repealing legislation.

It was further contended by Mr. Wilkinson that the relevant date could not be the date when the principal immigration officer was satisfied, because, if so, he could delay indefinitely, or defeat, an application merely by refusing to consider it. I cannot agree. The principal immigration officer, if contumacious, could always be commanded by mandamus to perform his statutory duty of considering and determining applications according to law. He would be bound to exercise reasonable diligence and to communicate the fact of whether he was satisfied or not to an applicant, though I do not think that he could be compelled to state his reasons. In the present case no grounds were shown for the issue of a mandamus. Even if this had been a case for a mandamus, it is difficult to see how a mandamus could have issued in the form applied for. The principal immigration officer could not be ordered to issue a certificate which he is not required to issue under the relevant legislation.

In my view, the learned judge who heard the motion was right in deciding that P. D. Patel is not entitled under reg. 3 (1) (*c*) of the 1954 Regulations as amended by reg. 2 of the 1955 Regulations to exemption from the provisions of the Immigration (Control) Ordinance.

I would dismiss the appeal with costs.

Sir Audley McKisack CJ: I agree and have nothing to add.

Forbes JA: I also agree.

Appeal dismissed.

For the appellant:
PJ Wilkinson
PJ Wilkinson, Kampala

For the respondent:
JJ Dickie (Crown Counsel, Uganda)
The Attorney-General, Kenya

The Commissioner for Lands v Sheikh Mohamed Bashir

[1958] 1 EA 45 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	24 March 1958
Case Number:	76/1957
Before:	Sir Kenneth O'Connor P, Sir Ronald Sinclair CJ and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Rudd, J

[1] Landlord and tenant – Crown lease on condition that building erected by specified time – Distinction between building condition and covenant – Whether court can grant relief against forfeiture – Meaning of "mesne profits" in O. II, r. 3 (*a*) *of Civil Procedure Rules* (*K.*) *– Crown lands Ordinance* (*Cap.* 155), *s.* 83 (*K.*) *– Registration of Titles Ordinance* (*Cap.* 160), *s.* 2, *s.* 21 *and s.* 33 (*K.*) *– East African Order in Council,* 1897, *Article* 11 *– Kenya Colony Order in Council,* 1921, *Article* 4 (2) (*K.*) *– English Conveyancing Act*, 1881, *s.* 14.

Editor's Summary

By a "grant" made under the Registration of Titles Ordinance and in accordance with the form required by s. 21 thereof, the Governor granted to the respondent a plot of land in Nairobi for a term of ninety-nine years from 1st September, 1952, at a progressive rent subject to the provisions of the Crown Lands Ordinance and certain special conditions, one of which required the respondent to erect thereon within thirty-six months from the commencement of the term an hotel of a specified size and cost. The "grant" was not executed by the respondent. In November, 1955, the appellant commenced proceedings in the Supreme Court claiming possession of the land for breach of the condition requiring erection of an hotel or, alternatively, if that condition should be held to be covenant, claiming a declaration of forfeiture. The appellant also claimed mesne profits or, alternatively, damages for breach of covenant. The respondent by his defence contended that the "grant" was a lease, that the special conditions were covenants, and whilst admitting he had erected no buildings on the land, claimed that he had been prevented from doing so by breach of covenant by the grantor and by circumstances beyond the respondent's control. He also claimed that the appellant had waived the special condition or covenant and, alternatively, that he should be relieved from forfeiture under s. 83 of the Crown Lands Ordinance. The trial judge held that the special conditions were covenants within s. 83 and that the court had power and should in this case grant relief against forfeiture. On appeal against the whole decision, the principal argument advanced for the appellant was that the trial judge had no jurisdiction to make the order granting relief against forfeiture. It was contended that s. 83 of the Crown Lands Ordinance was not applicable since it applied to breach of covenant by a lessee, whereas the building stipulation in the "grant" was a condition, and although what in form is a condition inter partes might be construed as a covenant, that principle could not be applied to the construction of a document in statutory form which is not inter partes.

Held –

(i) the “grant” to the respondent though so termed was a lease;

(ii) a building stipulation such as that in the “grant” which is expressed to be a “condition” in the Registration of Titles Ordinance and the Crown Lands Ordinance is not a “covenant”; building conditions are on a different footing from special conditions and, if drawn as conditions, they would not fall within

the scope of s. 83 of the Crown Lands Ordinance; *Hassanali R. Dedhar v. The Special Commissioner and Acting Commissioner of Lands*, [1957] E.A. 104 (C.A.) doubted.

Per Sir Kenneth O'Connor, P., "where counsel decides to ask this court to depart from one of its own previous decisions, application should ordinarily be made for a Bench of five or more judges to be assembled" *Joseph Kabui v. R.* (1954), 21 E.A.C.A. applied.

(iii) the building stipulation was not covered by the phrase "lessee's covenants" in s. 83 and there was no jurisdiction under s. 83 to grant relief against the forfeiture (which had taken place of the respondent's grant), since no relief could be granted by the doctrines of equity in the circumstances;

(iv) mesne profits are not the damages suffered by the lessor; the definition of "mesne profits" in the Civil Procedure Ordinance applies to that expression where used in O. II, r. 3 (*a*) of the Civil Procedure Rules.

Appeal allowed. Decree of the Supreme Court set aside. Declaration that the title of the defendant (respondent) to the land has been extinguished. Order for possession to be given to the plaintiff (appellant) with mesne profits at the rate of Shs. 200/- a year.

Case referred to in judgment:

(1) *Hassanali R. Dedhar v. Special Commissioner and Acting Commissioner of Lands*, [1957] E.A. 104 (C.A.).

(2) *Joseph Kabui v. R.* (1954), 21 E.A.C.A. 260.

(3) *Young v. Bristol Aeroplane Co. Ltd.*, [1944] 2 All E.R. 293.

(4) *Dendy v. Evans*, [1910] 1 K.B. 263.

(5) *Bombay* (*Province*) *v. Bombay* (*Municipal Corporation*), [1947] A.C. 58.

(6) *Young v. Bristol Aeroplane Co.*, [1946] A.C. 163; [1946] 1 All E.R. 98.

(7) *Hyman v. Rose*, [1912] A.C. 623.

(8) *Morelle Ltd. v. Wakeling*, [1955] 1 All E.R. 708.

(9) *West Derby Union v. Metropolitan Life Assurance Society*, [1897] A.C. 647.

(10) *R. v. Dibdin*, [1910] P. 57.

(11) *Hayne v. Cummings*, 143 E.R. 1191.

(12) *Bastin v. Bidwell* (1881), 18 Ch. D. 238.

(13) *Brookes v. Drysdale* (1877), 3 C.P.D. 52.

(14) *Burton v. Reevell* (1847), 16 M. & W. 307; 153 E.R. 1206.

(15) *R. v. Commissioners of Income Tax* (1889), 22 Q.B.D. 296.

(16) *Chelsea and Walham Green Building Society v. Armstrong*, [1951] 1 Ch. 853; [1951] 2 All E.R. 250.

(17) *Commissioner of Stamps Straits Settlements v. Oei Tjong Swan*, [1933] A.C. 378.

(18) *Elliott v. Boynton*, [1924] 1 Ch. 236.

(19) *Jones v. Carter* (1846), 15 M. & W. 718; 153 E.R. 1040.

(20) *Serjeant v. Nash, Field & Co.*, [1903] 2 K.B. 304.

(21) *Woolwich Equitable Building Society v. Preston*, [1938] Ch. 129.

(22) *Commissioner of Works v. Hull*, [1922] 1 K.B. 205.

(23) *Moore v. Ullcoats Mining Co. Ltd.*, [1908] 1 Ch. 575.

(24) *Wheeler v. Hitchings Ltd.* (1919), 121 L.T. 636.

(25) *Clifton Securities Ltd. v. Huntley*, [1948] 2 All E.R. 283.

(26) *Heptulla Brothers v. J.J. Thakore*, [1957] E.A. 358 (C.A.).

(27) *Cinema Press Ltd. v. Pictures & Pleasures Ltd.*, [1945] 1 K.B. 356; [1945] 1 All E.R. 440.

March 24. The following judgments were read.

Judgment

Sir Kenneth O'Connor P: By a document dated January 8, 1953, entitled a Grant and made under the Registration of Titles Ordinance (Cap. 160 of the Laws of Kenya) the Governor and Commander-in-Chief of the Colony and Protectorate of Kenya on behalf of Her Most Gracious Majesty Queen Elizabeth the Second granted to the respondent a town plot in Nairobi, more particularly described in the Grant, to hold for the term of ninety-nine years from September 1, 1952, subject to the payment of the progressive rent therein mentioned. The grant was expressed to be

> "subject also to the provisions of the Crown Lands Ordinance (Chapter 155) and the following special Conditions:
>
> Special Conditions
>
> "1. The grantee shall erect complete for occupation within thirty-six months of the commencement of the term an hotel building of approved design on proper foundations constructed of stone burnt-brick or concrete with roofing of tiles or other permanent materials approved by the Commissioner of Lands and shall maintain the same (including the external paintwork) in good and substantial tenantable repair and condition. The building shall be of at least six storeys and the cost of construction shall be at least shillings seven million".

There followed stipulations (expressed to be further "Special Conditions") providing that the building should not be erected until plans had been approved by the local authority and the Commissioner of Lands; and that the grantee should connect the drainage and sewage system with the town systems; should use the land and buildings for hotel purposes only; should not sub-divide the land; should conform to a building line; should not sell, transfer, sub-lease or otherwise alienate or part with possession of the land or charge it without consent of the Commissioner of Lands; should pay his proportionate costs of roads, drains and sewers; and should pay rates and taxes. Further stipulations, also called "Special Conditions", provided that the Governor should have the right to enter upon the land and lay and have access to water-mains, drains, telephone lines, etc.; that the main entrance to the building should be set back; and that the water supply should include storage for twenty-four hours' requirements.

This document was signed and sealed by the Acting Commissioner of Lands by order of the Governor. It was not executed by the grantee.

It will be observed:

(1) that this is an unilateral document not executed by the grantee;

(2) that it is expressed to grant land for a term of years subject to a rent and special conditions;

(3) that the word "covenant" is nowhere used in it: it does not contain any express covenants by the grantee (or lessee) or any proviso for re-entry by the grantor for breach of covenant or condition;

(4) that it purports to be issued under the Registration of Titles Ordinance; but is expressed also to be subject to the provisions of the Crown Lands Ordinance.

In fact, this grant is in the form (B.1 in the First Schedule) to the Registration of Titles Ordinance in which grants for terms of years, have, since 1919, when that Ordinance came into operation, been required, by s. 21 of that Ordinance, to be issued. By s. 2 "grant" is defined to include a lease made by or on behalf of the Crown. By s. 33 the Registrar may refuse to register any instrument which is not in

substance in conformity with the forms annexed

to the Ordinance. The effect seems to be that from and after the commencement of the Registration of Titles Ordinance, a Crown lease of land subject to the Ordinance, could only be issued in the form of an unilateral grant subject to a rent and special conditions. Prior to 1919, leases of Crown Lands were issued under the Crown Lands Ordinance in force at the time and were Crown leases *inter partes* with express lessee's covenants and a proviso for re-entry for non-payment of rent or breach of covenant. This will be referred to again.

On November 16, 1955, the appellant (plaintiff) filed a plaint in the Supreme Court of Kenya averring that the respondent (defendant) had failed to comply with condition No. 1 of the special conditions under the grant in that he had erected no buildings on the land by September 1, 1955. The appellant claimed possession of the land for breach of this condition and mesne profits at £833 per mensem from the date of the plaint until delivery of possession. In the alternative, if special condition No. 1 should be held to be a covenant and not a condition, then (a notice having been served upon the respondent under s. 83 of the Crown Lands Ordinance) the appellant claimed a declaration that the lease should be forfeited and he claimed damages for breach of covenant.

Section 83 of the Crown Lands Ordinance is as follows:

> "If the rent or royalties or any part thereof reserved in a lease under this Ordinance shall at any time be unpaid for the space of thirty days after the same has become due, or if there shall be any breach of the lessee's covenants, whether express or implied by virtue of this Ordinance, the Commissioner may serve a notice upon the lessee specifying the rent or royalties in arrear or the covenant of which a breach has been committed, and at any time after one month from the service of the notice may commence an action in the Supreme Court for the recovery of the premises, and, on proof of the facts, the Supreme Court shall, subject to relief upon such terms as may appear just, declare the lease forfeited, and the Commissioner may re-enter upon the land.
>
> "In exercising the power of granting relief against forfeiture under this section the court shall be guided by the principles of English law and the doctrines of equity".

It will be observed that this section applies (apart from non-payment of rent or royalties) to breaches "of the lessee's covenants". The respondent, by his defence, dated November 5, 1956, contended that the grant was for all purposes to be construed as a lease for a term of ninety-nine years and that the "special conditions" were, and were to be construed as, covenants. The respondent admitted that he had erected no buildings on the land by September 1, 1955, but said that he had been prevented from so doing by reason of breach of covenant by the grantor and/or circumstances beyond the respondent's control, particulars of which he set out in his defence. He also pleaded a waiver by the appellant of the special condition or covenant and denied the appellant's right to possession. Alternatively, the respondent prayed that he might be relieved from forfeiture under s. 83 of the Crown Lands Ordinance upon such terms as might appear just.

The suit came on for hearing before the Supreme Court of Kenya and judgment was given on March 4, 1957.

By his judgment the learned trial judge held:

(1) In English law, the breach of a condition imports a right of re-entry against the lessee. Under s. 111 of the Indian Transfer of Property Act, which applies to ordinary leases in Kenya, the breach of a condition does not give rise to a forfeiture, unless there is an express proviso for re-entry; but, as the Indian Transfer of Property Act did not, by virtue of the Indian Crown Grants Act, 1895, apply to Crown Grants in British India, it does not apply to Crown Grants in Kenya.

(2) Under the law of England, a covenant by a lessee differs from a condition in that, on breach of a mere covenant, the lessor is not entitled to claim a forfeiture: there must be a specific proviso for re-entry.

(3) The "special conditions" in the Crown Lease in question were "covenants" within the meaning of s. 83 of the Crown Lands Ordinance (Cap. 155) and, applying that section, the court had power to relieve against forfeiture for breach of them on such terms as might be just, and that the principles by which the court should be guided in granting such relief were the principles of English law as set out in s. 14 of the Conveyancing Act, 1881, and the doctrines of equity. In reaching this conclusion the learned trial judge referred to a practice which had grown up for over a generation and had been accepted by the Department of Lands and the Supreme Court of the Colony and this court whereby special conditions in Crown Leases had been construed as convenants within the meaning of s. 83 of the Crown Lands Ordinance.

The decision of this court to which the learned trial judge referred, and by which he felt himself bound, was the case of *Hassanali R. Dedhar v. The Special Commissioner and Acting Commissioner of Lands* (1), [1957] E.A. 104 (C.A.). This will be referred to later.

The learned judge was of opinion that there were features in this case which might justify relief from forfeiture under the pure doctrines of equity irrespective of the statutory provisions of s. 83 of the Crown Lands Ordinance or the Conveyancing Act in England. He, however, found it unnecessary to decide that point, as he held that s. 83 of the Crown Lands Ordinance applied and the court was not bound to consider whether or not relief should be granted on the principles of equity alone.

The learned judge further held that the allegations by the respondent that the Crown had, by reason of the conduct of its officials, waived the building condition in the grant or was estopped from claiming the benefit of it were not established; but that, for the reasons already mentioned, the court had under s. 83 of the Crown Lands Ordinance, power to relieve against forfeiture for breach of that condition, and that this was a case in which such relief should be granted on suitable terms to be decided after hearing the parties.

In case he should, on appeal, be held to be wrong in granting relief, the learned trial judge dealt briefly with the claims by the Commissioner for mesne profits or, alternatively, for breach of covenant. He considered that the claim for mesne profits was governed by s. 2 of the Civil Procedure Ordinance, that the Commissioner's claim was excessive, that in the circumstances of the case the respondent could not make any profit at all from the building until it was erected: certainly he could not make more than the rent reserved by the Government. The learned judge held that, similarly, the Commissioner had not proved damages by reason of the respondent's breach of contract in excess of the rent reserved.

The learned judge gave the Commissioner the costs of the suit as regards the claim for forfeiture and relief from forfeiture as between advocate and client, and ordered each party to bear its own costs on the issues of damages and mesne profits.

Subsequently, the terms upon which relief against forfeiture should be granted were worked out and embodied in a decree dated May 2, 1957.

The appellant now appeals to this court against the whole of the decision of the learned trial judge, except in so far as it relates to costs. There is a cross-appeal by the respondent against the order of the learned judge directing the respondent to bear his own costs on two issues of mesne profits and damages, and against the award of costs on an advocate and client basis on

the other issues. There is also an application by the appellant to adduce further evidence bearing upon the question of whether or not it would be just to grant relief and tending to show that the respondent is no longer financially able to build an hotel.

The appeal first came on for hearing on January 30, 1958, before a bench of three judges. At a certain stage in the argument of learned counsel for the appellant it appeared that he was asking the court not to follow the previous decision of this court in *Hassanali Dedhar's* case (1) on the ground that the court had decided *Hassanali Dedhar's* case (1) per incuriam, in that it was never put to the court in that case that the English Conveyancing Act, 1881, did not bind the Crown and that, therefore, the court could not, in the case of a Crown grant be guided by, or exercise powers of relief exercisable by a court in England under, s.14 (2) of that Act. After argument, and following the dictum in *Joseph Kabui v. R.* (2) (1954), 21 E.A.C.A. 260, 261 to the effect that where counsel decides to ask this court to depart from one of its own previous decisions, application should ordinarily be made for a bench of five or more judges to be assembled, the appeal was adjourned for a bench of five judges to be convened. However, it proved impossible to convene a bench of five judges (or even, owing to illness, to assemble the original bench of three judges) and, since a full Court of Appeal has no greater powers than a division of the court (*Young v. Bristol Aeroplane Co. Ltd.* (3), [1944] 2 All E.R. 293), it was decided to hear the appeal de novo with a bench of three judges, two of whom had been members of the first bench. It was decided to hear argument first on the questions of law raised in the appeal as, upon the decision of those would rest the question of whether or not it was necessary to consider the application to adduce further evidence.

The first and most substantial ground of appeal alleges that the trial judge had no jurisdiction to make the order appealed against.

Mr. Sherrin, Crown counsel, for the appellant, submitted that the grant (which, though termed a grant, is in effect a lease) came to an end, for breach of the building condition, on the filing of the plaint in the suit, and that the Supreme Court had no power to revive the grant. This argument he subsequently modified, having regard to *Dendy v. Evans* (4), [1910] 1 K.B. 263, and said that though the issue and service of the plaint operated as a final election by the grantor to determine the grant, since an order for possession had not been made in the suit and relief had been granted, the effect was that the grant was to be treated as continuing. He contended, however, that the court below had been wrong in granting relief. He argued that s. 83 of the Crown Lands Ordinance did not apply because that section applies to breaches of "the lessee's covenants", whereas the building stipulation in the grant was a condition and not a covenant: moreover, even if the building stipulation was a covenant and s. 83 applied, the principles of English law by which the court must, under that section, be guided in granting relief included the principles that the Crown is not bound by a statute unless named expressly or by necessary implication or unless it is apparent that the beneficent purpose of the Act must be wholly frustrated unless the Crown is bound (*Province of Bombay v. Municipal Corporation of Bombay* (5), [1947] A.C. 58): that none of these considerations applied to the Conveyancing Act of 1881, and that, accordingly, that Act did not bind the Crown and the court could not, in granting relief, exercise the powers or be guided by the principles set out in s. 14 of that Act. Mr. Sherrin conceded that, under s. 83 of the Crown Lands Ordinance, the court could relieve against forfeiture for breach of a lessee's covenant in a Crown lease according to the doctrines of equity, but said that relief on those grounds would be confined to cases of non-payment of money, fraud, accident or surprise and that nothing of that nature arose here. He pointed to various provisions of the Crown Lands Ordinance as supporting the contention that a distinction

was drawn by the draftsman and the legislature between "condition" and "covenant" and argued that, although what was in form a condition occurring in an agreement inter partes, might be construed as a covenant if the intention of the parties so demanded, that principles could not be applied to an unilateral grant in a statutory form: the legislature must be taken to have been aware of the difference between a covenant and a condition and to have given those words their correct meanings.

Mr. Sherrin further submitted that in *Hassanali Dedhar's* case (1) the question of whether the relevant provision was a condition or a covenant was never raised or argued: in fact it was conceded by both parties in that case that the court had power to grant relief under s. 83 of the Crown Lands Ordinance.

Mr. Sherrin also submitted that *Hassanali Dedhar's* case (1) was not a binding authority on the question of whether the court should be guided by the principles set out in s. 14 of the Conveyancing Act, 1881, because it was never considered in that case whether the Conveyancing Act, 1881, bound the Crown. He contended that *Hassanali Dedhar's* case (1) was decided per incuriam and need not be followed. He relied on *Young v. Bristol Aeroplane Co*. (6), [1946] A.C. 163. He also submitted that the principle of stare decisis should not be applied where the result would be to curtail the prerogative of the Crown.

Mr. Gledhill, for the respondent, dealt first with the question of whether *Hassanali Dedhar's* case (1) was binding on this court. He submitted that it was: that that case was previous decision of this court to the effect that the Supreme Court had, under s. 83 of the Crown Lands Ordinance, power to grant relief, on such terms as might appear just, against forfeiture of a Crown grant for failure to perform a building stipulation contained in it, and that, in exercising that power, the court should be guided by the principles indicated in s. 14 of the Conveyancing Act, 1881, and should exercise a wide discretion as laid down by Lord Loreburn in *Hyman v. Rose* (7), [1912] A.C. 623 at p.631. Mr. Gledhill submitted that the court in deciding *Hassanali Dedhar's* case (1) had not acted per incuriam. He relied on *Morelle Ltd. v. Wakeling* (8), [1955] 1 All E.R. 708 for the proposition that as a general rule, the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned and that there was a difference between forgetfulness of these and forgetfulness of a doctrine of the common law.

Mr. Gledhill contended that it was rightly held in *Hassanali Dedhar's* case (1) that the principles of English law by which the court was to be guided in granting relief against forfeiture were those set out in s. 14 of the Conveyancing Act, 1881. He stressed the words in the first part of s. 83 "subject to relief upon such terms as may appear just" and argued that the last three lines of the section were in the nature of a proviso and should not be taken to control the main provision of the section and imply into it a restricted meaning of which there was no trace, or be treated as if it were an independent enacting clause instead of being dependent on the main enactment. He relied on *West Derby Union v. Metropolitan Life Assurance Society* (9), [1897] A.C. 647, 651, 652, 657; and *R. v. Dibdin* (10), [1910] P. 57, 125.

Mr. Gledhill agreed, however, that *Hassanali Dedhar's* case (1) was not an authority on the question of whether s. 83 of the Crown Lands Ordinance applied to relief against breach of conditions as well as breach of covenants, because it had been conceded by both parties in that case that it did so apply and the point had never been raised.

Mr. Gledhill referred to the passage in the judgment of the learned trial judge which relates to the practice which had grown up of treating conditions as covenants and relieving, under s. 83, against forfeiture for breach of both, and submitted that weight should be given to the practice. He said that

forfeiture

of a Crown lease was, under s. 83, a creature of statute and the date of it was the date declared by the court and not the date of the filing of the plaint. He submitted that under s. 83 there was no difference in legal effect between a covenant and a condition. He argued that references to covenants could be construed as referring to conditions and vice versa and relied upon *Haynes v. Cummings* (11), 143 E.R. 1191; *Bastin v. Bidwell* (12), (1881) 18 Ch. D. 238, 246; and *Brookes v. Drysdale* (13)(1877), 3 C.P.D. 52. He argued that the Crown itself had considered that the stipulations in the grant were covenants and that s. 83 applied to them, as it had served a notice under that section. He submitted that, generally speaking, in Part VII of the Crown Lands Ordinance, the word "covenant" relates to stipulations in leases and "condition" to stipulations in licences, and referred to s. 76, s.77 and s. 79. He contended that s. 14, s. 16 and s. 17 of the Crown Lands Ordinance were purely procedural and applied to the preliminaries to be gone through before town plots were sold. He suggested that "conditions" in those sections were used merely in the sense of conditions of sale. He argued that prior to the enactment of the Registration of Titles Ordinance, Crown leases were issued containing lessee's covenants to which s. 83 applied, and that it could not have been the intention of the legislature in 1919, when the Registration of Titles Ordinance came into force, by merely enacting an unilateral form in which stipulations were expressed to be "conditions" and not "covenants", to take away from lessees the right to relief against forfeiture which they had previously enjoyed: he pointed to the preamble to the Registration of Titles Ordinance to show that it was merely intended to be a conveyancing measure and should not be taken to have repealed by implication the right of a lessee under a Crown lease to relief against forfeiture. Mr. Gledhill argued that even if a distinction was to be drawn between a breach of condition and a breach of covenant, a breach of condition only rendered the lease voidable at the option of the lessor and the lessor had not avoided it: the lessor had said that he was going to the court to ask the court to determine it for breach of covenant.

In dealing with the first ground of appeal it will be convenient to consider first what is the law applicable. I agree with the conclusion of the learned trial judge that the provision relating to forfeiture in s. 111 of the Indian Transfer of Property Act did not apply to a Crown lease or Crown grant in Kenya. The Indian Crown Grants Act was passed in 1895 for the purpose of removing doubts and expressly declared that the Indian Transfer of Property Act, 1882, should not apply or be deemed ever to have applied to Crown lands in British India. The Indian Transfer of Property Act was applied to Kenya by art. 11 of the East African Order in Council, 1897. The learned judge took the view that as the Transfer of Property Act did not then apply to Crown land in British India, it would not apply to Crown land in Kenya. This may well be right. Moreover, as the Crown is not named in the Act, there is no necessary implication that it must apply to the Crown nor would its purpose be wholly frustrated if it did not so apply. *Province of Bombay v. Municipal Corporation of Bombay* (5). On general principles, therefore, the Act would not, in 1897, have applied to Crown land in Kenya. But, in my opinion, even if s. 111 of the Indian Transfer of Property Act had ever applied to Crown land in Kenya, it would have been

> "replaced by other provision in lieu thereof by Ordinances for the time being in force in the Colony",

within the meaning of art. 4 (2) of the Kenya Colony Order in Council, 1921. The Crown Lands Ordinance, 1902, in s. 18, specifically dealt with forfeiture of Crown leases for breach of lessee's covenants, and subsequent Crown Lands Ordinances contained similar provisions. In my opinion, by virtue of art. 4 (2) of the Kenya Colony Order in Council, 1921, the law applicable to the present

case is the English common law and doctrines of equity save in so far as the same have been modified, amended or replaced by other provision in lieu thereof under the Crown Lands Ordinance (Cap. 155) and the Registration of Titles Ordinance (Cap. 160).

The most important issue in this case is whether or not the Supreme Court had power under s. 83 of the Crown Lands Ordinance to relieve against forfeiture of the respondent's grant for breach of the building stipulation contained therein.

Section 83 is expressed to apply to breaches of lessee's covenants in leases.

I am satisfied that the grant to the respondent though termed a grant is in law a lease. It is within the definition of "lease" given in Foa's Landlord and Tenant (7th Edn.) at p. 6 which is based on 2 Blackstone's Commentaries at p. 317. "Grant", by s. 2 of the Registration of Titles Ordinance, is defined to include a lease.

It is necessary next to consider whether the building stipulation in the respondent's grant is a "covenant" or a condition. At common law, a condition is a qualification annexed to an estate, whereby the latter shall either be created (condition precedent), enlarged, or defeated (condition subsequent), upon its performance or breach. The main distinction between a condition subsequent for the cesser of the term of a lease upon the happening of a certain event and a lessee's covenant is that (subject to any right of relief from forfeiture given to the lessee) upon breach of a condition the lessor may re-enter, because the estate of the lessee is determined; whereas a breach of covenant only gives him the right to recover damages (or to obtain an injunction) unless the right to re-enter is expressly reserved to him by the lease. Foa's Landlord and Tenant (7th Edn.), pp. 311–312.

As already mentioned, the respondent's grant is drawn in the statutory form B.1 in the First Schedule to the Registration of Titles Ordinance which is, since the coming into force of that Ordinance in 1919, the only form in which grants of Crown land for a term of years can be issued. (Section 21 of the Registration of Titles Ordinance). There is another form (B.2) for Crown grants in fee. As already mentioned, the grant in this case is expressed to grant the land to the respondent to hold for a term of ninety-nine years subject to the payment of the rent reserved

> "and subject also to the provisions of the Crown Lands Ordinance (Chapter 155) and the following special conditions."

Then follows a heading "special conditions" of which the building stipulation is the first. Is this a condition or a covenant? It is expressed in the grant to be a condition. It appears in an unilateral document framed according to a statutory form contained in a Schedule to the Registration of Titles Ordinance. Words of art in a statute are *prima facie* to be taken in their technical sense.

> "When the legislature uses technical language in its statutes, it is supposed to attach to its technical meaning, unless the contrary manifestly appears"

per Lord Wensleydale in *Burton v. Reevell* (14) (1847), 16 M. & W. 307, cited with approval by Lord Esher, M. R., in R. v. *The Commissioners of Income Tax* (15) (1889), 22 Q.B.D. 296, 309. The words "condition" and "covenant" in leases are terms of art. I think that when the legislature enacted the statutory Form B.1 in the Registration of Titles Ordinance, it must, *prima facie*, be taken to have used "condition" in its technical sense, particularly as the grant is an unilateral document not intended to be executed by the grantee. No doubt, an unilateral document, e.g., a deed poll, could contain a covenant expressed to be made with some one not a party to the document, enforceable at the instance of that party. *Chelsea and Walham Green Building Society v.*

Armstrong (16), [1951] 1 Ch. 853. But the form in which the grant in this case is drawn does not contain an express covenant by the grantor or grantee. It is a grant subject to conditions and, in my view it must be taken to have been the intention of the legislature in enacting s. 21 and Form B.1 that in future Crown grants for terms of years should be grants subject to conditions. I do not think that cases such as *Hayne v. Cummings* (11) and *Brookes v. Drysdale* (13) have any application to an unilateral grant in a statutory form. The documents considered in those cases were documents inter partes. The stipulations contained in them were construed as covenants because it was necessary so to construe them in order to give effect to the intention of the parties. In my view, the ratio decidendi of those cases cannot properly be applied to the construction of a document in a statutory form which is not inter partes.

The grant is expressed to be subject to the provisions of the Crown Lands Ordinance (Cap. 155). If the word "covenant" were found to be used indiscriminately in that Ordinance to denote stipulation in leases or other documents contemplated by that Ordinance whether, in strictness, such stipulations were covenants or conditions, that would support the contention of the respondent that "covenants" in s. 83 may be taken to include a building stipulation. But this does not appear to be so. The Crown Lands Ordinance (Cap. 155) clearly contemplates, as did earlier Crown Lands Ordinance will be inter partes and contain lessor's and lessee's covenants. Apart from "agreements" relating to land, three forms of document of title to Crown land seem to be contemplated under that Ordinance, that is to say, a conveyance, a lease and a licence. (See s. 4 and s. 7). Generally speaking, the word "covenants" seems to be used to refer to undertakings in leases, and "conditions" to stipulations in licences, e.g., "covenants, agreements, or conditions contained in any lease agreement or license" in s. 3 (ii) and see s. 45, s. 77, s. 79 and s. 84. But this is not invariable. The word "condition" is used in various senses. For instance, s. 3 (iii) speaks of "the conditions contained in any agreement, lease or licence", and s. 14, s. 16, and s. 24 (*d*) refer to conditions and covenants to be inserted in leases. The word "conditions" in the phrase "any terms and conditions as he may think fit" in s. 3 (i) and in the phrase "upon such terms and conditions as he shall think fit" in s. 3 (iii) and "upon such conditions as may be specified" in s. 63 seems to denote any form of stipulation. "Conditions" in the phrase "conditions of sale" e.g., in s. 17 and s. 25, has its usual technical meaning.

On the other hand, the word "covenant" seems to be used throughout the Crown Lands Ordinance to denote undertakings in leases by the lessor or by lessees, e.g. in s. 14(*d*), s.16(*e*), s. 21(1), s. 36, heading of s. 37 and First Schedule, s. 38, s. 76, s. 77 and s. 79.

I think it significant that a building stipulation in a lease is always, so far as I can ascertain, throughout the Crown Lands Ordinance, referred to as a "building condition" and not as a "building covenant" or a "covenant", e.g. in s. 14, s. 16 and s. 21. In fact, in s. 14 and s. 16 "building conditions" are contrasted with "special covenants". Section 14 provides that the Commissioner shall, before any town plot is auctioned, determine

> "(*c*) the building conditions to be inserted in the lease of the plot; and
>
> (*d*) the special covenants, if any, which shall be inserted in the lease":

s. 16 provides that the notice of sale shall state

> "(*e*) the building conditions and the special covenants, if any, to be inserted in the lease . . .".

A building stipulation such as that in the respondent's grant is expressed to be a "condition" in both Ordinances, the Crown Lands Ordinance and the Registration of Titles Ordinance. According to the language used, it is not a "covenant" under either Ordinance.

As already mentioned, Mr. Gledhill argued that prior to the enactment of the Registration of Titles Ordinance in 1919, Crown leases were issued containing building and other stipulations all in the form of lessee's covenants: that relief against them could be, and was, given by the court under s. 83 of the Crown Lands Ordinance, and that it could not have been the intention of the legislature by enacting a form in the Registration of Titles Ordinance (which was merely an Ordinance to provide for transfers of land by registration of titles) to take away from lessees important rights to relief which they had hitherto enjoyed. There is no evidence before the court as to the exact form of lease ordinarily issued under the Crown Lands Ordinance. In my opinion, if the language of a statute such as the Registration of Titles Ordinance is plain, effect would have to be given to it, even if in some respects its results were unforeseen. Apart from that principle, there might be force in Mr. Gledhill's argument as regards covenants properly so called under the Crown Lands Ordinance, e.g. covenants implied under s. 77 or "special covenants" inserted in leases under s. 14 (*c*). These would properly have been inserted in leases under that Ordinance as lessee's covenants and s. 83 would in terms apply to them. It is unnecessary to decide the effect on them of the enactment of Form B.1. But s. 14 of the Crown Lands Ordinance clearly indicates that building conditions are on a different footing to special covenants, and are intended to be inserted as conditions in leases under the Crown Lands Ordinance. If so drawn, they would not fall within s. 83. If drawn as lessee's covenants, they might be treated by a court as falling within s. 83, but a lease drawn in that form would be contrary to the intention of the Crown Lands Ordinance. Accordingly, the enactment by the Registration of Titles Ordinance of Form B.1 could not, as regards building conditions, take away from lessees under the Crown Lands Ordinance rights to relief under s. 83, because they never had such rights in leases properly drawn under that Ordinance.

In my opinion, a building condition in a lease drawn in the Form B.1 in the Schedule to the Registration of Titles Ordinance does not fall within the phrase "lessee's covenants" in s. 83 of the Crown Lands Ordinance. I do not feel constrained by *Hassanali Dedhar's* case (1) to hold that it does, because the point was never raised in *Dedhar's* case (1), which proceeded on the assumption, conceded by both parties, (wrongly I now think) and never contested or argued, that the building stipulation in that case was a lessee's covenant within s. 83 and the decision was, therefore, reached per incuriam, in forgetfulness of the inconsistent statutory provision contained in Form B.1 of the First Schedule to the Registration of Titles Ordinance. *Morelle Ltd. v. Wakeling* (8); *Young v. Bristol Aeroplane Co.* (6).

I do not think that the fact, mentioned by the learned trial judge, that a practice has grown up in the Lands Department of treating building conditions in Crown leases as lessee's covenants under s. 83 ought to influence my decision. As their Lordships of the Privy Council said in *Commissioner of Stamps Straits Settlements v. Oei Tjong Swan* (17), [1933] A.C. 378 at p. 391:

> "It may well be that those who had at first to administer the Ordinance were not aware that it gave them the power to tax movable property out of the Colony. . . But the fact that the potency of the weapon confided to them was not fully realized by those who wielded it cannot control the interpretation of the Ordinance now that its true scope has to be judicially ascertained."

Similarly I do not think that an erroneous practice in the Lands Department can control the true interpretation of s. 83 of the Crown Lands Ordinance.

The learned trial judge mentions that the Supreme Court of Kenya has granted relief under s. 83 from forfeiture for breach of special conditions in Crown grants and that its right to do so has never been questioned. If the

point has never been raised before the Supreme Court, it is difficult to treat their decisions as authoritative upon it.

In my opinion, the first ground of appeal must be decided in favour of the appellant. Section 83 of the Crown Lands Ordinance did not apply, and the learned judge had no jurisdiction under it to relieve against the forfeiture (which had taken place) of the respondent's grant for breach of the building condition contained in it. The learned judge would, by virtue of art. 4 (2) of the Kenya Colony Order in Council, 1921, have had power to relieve under the doctrines of equity; but not (if s. 83 of the Crown Lands Ordinance did not apply) under s. 14 of the Conveyancing Act, 1881 or under s. 146 of the Law of Property Act, 1925. Those Acts are not, I think, statutes of general application within the meaning of the article. The doctrines of equity will not help the respondent unless he has shown that he was entitled to relief upon one of the grounds upon which equity was wont to relieve apart from statutory provisions.

> "Except in the case of non-payment of rent, and failure to insure, and except in rare cases of accident and surprise, no relief against forfeiture could be given until the Conveyancing Act, 1881, came into force."

Woodfall on the Law of Landlord and Tenant (25th Edn.), p. 1005. The learned judge considered that there were features in the case which might justify relief from forfeiture under the doctrines of equity irrespective of the statutory provisions of s. 83 of the Crown Lands Ordinance or the Conveyancing Act, 1881. He did not decide the point. This is not a case of non-payment of rent or failure to insure and I am unable to see how, on the evidence as recorded, either accident or surprise could be said to exist.

As I have held that the decree of the learned Judge purporting to grant relief against forfeiture under s. 83 of the Crown Lands Ordinance was made without jurisdiction, it is unnecessary to consider the second, third and fourth grounds of appeal.

It is now necessary to consider the effect and the effective date of the forfeiture. The effect of forfeiture for breach of a condition is, as already stated, that the lessor may re-enter because the estate of the lessee is determined (Foa's Landlord and Tenant (7th Edn.) p. 311); or, rather, is voidable at the option of the lessor, who must, in order to take advantage of the breach, do some unequivocal act notified to the lessee, indicating his intention to avail himself of the option given to him. The service upon the lessee in possession of a writ in ejectment is sufficient, and actual or constructive entry is not required, the lease being determined by service of the writ, and as from that time. Foa p. 316 and p. 642; *Elliott v. Boynton*, (18) [1924] 1 Ch. 236, 246 (C.A.); *Jones v. Carter* (19) (1846), 15 M. & W. 718; *Serjeant v. Nash, Field & Co*. (20), [1903] 2 K.B. 304 (C.A.); Woodfall (25th Edn.) p. 991; *Woolwich Equitable Building Society v. Preston* (21), [1938] Ch. 129; *Commissioner of Works v. Hull* (22), [1922] 1 K.B. 205; Hill & Redman (11th Edn.) p. 432; *Moore v. Ullcoats Mining Co*. (23), [1908] 1 Ch. 575; *Wheeler v. Hitchings* (24) (1919), 121 L.T. 636. It is difficult to reconcile the cases just mentioned with some of the dicta in *Dendy v. Evans* (4). In that case Cozens Hardy, M.R., said, at p. 267, that it was clear that the old rule of the court of Chancery centuries ago was inconsistent with the view that the mere issue of the writ without more terminated the interest of the lessee, and he indicated that the lease was only terminated if the lessor got judgment for ejection. The learned author of the 7th edition of Foa's Landlord and Tenant in note (s) on p. 642 suggests that these dicta in *Dendy's* case (4) should probably be construed with strict reference to the facts of that case. If there is a conflict between *Dendy's* case (4) and *Elliott v. Boynton* (18), I prefer to follow *Elliott v. Boynton* (18) on this point. It is a later decision of the Court of Appeal and consistent with a long line of authority. I think that the true position is that the issue by the lessor of a writ for ejectment

when a condition has been broken, puts an end to the lease as from the date of the issue of the writ, subject to the lease being revived if a court of equity grants relief against the forfeiture in the action. In my view, the building condition in the respondent's grant having been breached, the grant came to an end from the date of the filing of the plaint, that is November 16, 1955, and, since the learned judge's order purporting to grant relief under s. 83 of the Crown Lands Ordinance was made without jurisdiction, the grant has not been revived. There should have been a declaration under s. 157 of the Crown Lands Ordinance that the grant has been forfeited as from November 16, 1955, and possession should have been ordered to be given to the appellant either forthwith or on or before a day named by the court, with mesne profits from the date of the plaint until delivery of possession to the plaintiff.

With regard to the fifth and sixth grounds of appeal, the claim in the plaint was for mesne profits at the rate of £833 per mensem. This is the amount which an expert witness for the Crown estimated that the Crown lost by being kept out of a very valuable piece of property. Mr. Sherrin argued that mesne profits were the damages which the lessor had suffered by reason of the lessee wrongfully retaining possession of the land, and that they should not be calculated by reference to the rent or to the definition in s. 2 of the Civil Procedure Ordinance. He relied on *Elliott v. Boynton* (18); *Clifton Securities Ltd. v. Huntley* (25), [1948] 2 All E.R. 283; and *Heptulla Brothers v. J.J. Thakore* (26), [1957] E.A. 358 (C.A.). He argued that the definition of mesne profits in s. 2 of the Civil Procedure Ordinance applied only to the phrase mesne profits when it appeared "in this Ordinance" and in the absence of repugnancy in the subject or context, and that the definition could not apply to the expression mesne profits when appearing in a plaint, and that there was repugnancy. I am unable to accept this argument. The claim for mesne profits could only be joined with a claim for possession of the land by virtue of Order II, r. 3 (*a*) of the Civil Procedure Rules. This is a rule made under the Civil Procedure Ordinance and the definition of "mesne profits" in that Ordinance must apply to it. Either the plaintiff claimed "mesne profits" according to the definition or he was not entitled to claim mesne profits in this suit at all. I think that he must be bound by what he claimed. The learned judge found that the respondent could not make any profit from the building until it was erected and that the amount of mesne profits recoverable could not exceed the amount of the rent. I think the judgment cannot be for more than this amount.

It is unnecessary to deal with the seventh and eighth grounds of appeal or with the alternative claim in the plaint. These would only need to be dealt with if I had held that the building condition was a covenant. I should, perhaps, mention that the fact that the appellant out of abundance of caution, served a notice under s. 83 of the Crown Lands Ordinance did not, in my view, indicate that he thought that s. 83 applied, or prevent him claiming or recovering possession on the basis that it did not.

Having found that s. 83 of the Crown Lands Ordinance does not apply to the breach of the building condition in the respondent's grant, it is not necessary to decide the question of whether or not, in giving relief against forfeiture for breach of lessee's covenants under s. 83, a court should be guided by the principles of English law set out in s. 14 of the Conveyancing Act, 1881. However, as the question has been fully argued and may arise in future if a court is asked to relieve against forfeiture for breach of a lessee's covenant, e.g. a covenant contained in a Crown Lease executed before 1919, perhaps I should state my opinion on it.

Section 83 says that when the notice required by the section has been served and an action has been commenced in the Supreme Court for recovery of the premises and the facts have been proved,

> "the Supreme Court shall, subject to relief upon such terms as may appear just, declare the lease forfeited, and the Commissioner may re-enter upon the land."

In the Crown Lands Ordinance, 1902, the section ended there. The Supreme Court had, therefore, power to grant relief upon such terms as might appear just without any qualification. By s. 66 of the Crown Lands Ordinance, 1915, the section was re-enacted with the addition of a further short paragraph. This still remains part of s. 83 and reads:

> "In exercising the power of granting relief against forfeiture under this section the court shall be guided by the principles of English law and the doctrines of equity."

Hitherto it has been assumed (and it was so held in *Hassanali Dedhar's* case (1)) that the principles of English law by which the court was to be guided in granting relief were the principles set out in s. 14 (2) of the Conveyancing Act, 1881, that is to say that the court might grant or refuse relief, as the court having regard to the proceedings and conduct of the parties under the foregoing provisions of s. 14 and to all the other circumstances thought fit, and might grant relief on terms as set out in the sub-section. But it has now been contended for the appellant that, as the Conveyancing Act, 1881, does not bind the Crown in England, those principles are inapplicable here. The result of this would be that the court could not relieve against forfeiture for breach of a lessee's covenant except in cases where relief could be granted apart from the Conveyancing Act, 1881, i.e. relief for non-payment of rent, failure to insure, and rare cases of accident or surprise. The question is how are the words "the principles of English law" to be construed. In this context they are far from plain. I am unable to believe that it was the intention of the legislature in 1915 to continue to empower the court in the main enacting part of the section to give relief on such terms as might appear just and then, by an additional paragraph in this form, so to restrict the court's powers as to prevent it doing justice. All the above-mentioned cases in which relief could be granted apart from the Conveyancing Act, 1881, (except perhaps failure to insure) could be relieved against under the "doctrines of equity" without invoking any of the "principles of English law", so that the interpretation contended for would give no meaning, or next to no meaning to the words "the principles of English law". And, as the doctrines of equity would apply in any event, without the 1915 addition to the section, that addition, if construed as the Crown contends, would have been unnecessary. Moreover, such a restriction as is suggested would be repugnant to the main enacting part of the section the object of which clearly is to permit relief upon such terms as may appear just. I have no doubt that the intention was to direct that the Supreme Court in granting relief against forfeiture for breach of lessee's covenants in Crown leases should be guided by the principles of English law as between subject and subject and the doctrines of equity, and that if the legislature had intended to exclude the operation of s. 14(2) of the Conveyancing Act, 1881 (which was the main provision of English law governing relief against forfeiture for breach of covenants in leases, though not, it is true, in Crown leases) they would have said so in plain terms. To give effect to the Crown's contention would, in my view, be to offend against various cannons of construction of statutes. It would be to defeat the manifest object of the legislature, to render certain words in the section nugatory, and to permit the 1915 addition, which though not in form a proviso, is somewhat similar to a proviso, to control the main enacting part of the section. I would, therefore, reject this contention.

I would allow the appeal, set aside the Decree dated May 2, 1957, and substitute therefore a declaration that the title of the defendant to the land described in the Plaint as L.R. No. 209/4279 has been extinguished as from

November 16, 1955, and an order that possession of the said land be given by the defendant to the plaintiff on or before such date as the court (that is to say the Supreme Court) sees fit to name after hearing the parties, with mesne profits at the rate of Shs. 200/- a year. This is the amount of the rent and the amount admitted by the respondent to be payable as mesne profits. If, as this court is informed, the rent has already been paid, credit should be given for such payment against the amount of the mesne profits decreed.

As I have held that there is no power to grant relief against forfeiture of the building condition, additional evidence tending to show that it would be unreasonable to do so is unnecessary and the application to adduce such evidence should be refused.

As to costs, the plaintiff has succeeded substantially, but has lost on the question of the quantum of mesne profits. I think that the plaintiff should have four-fifths of the costs of the suit as between party and party, to be taxed. The appellant should also have four-fifths of the costs of the appeal as between party and party to be taxed. *Cinema Press Ltd. v. Pictures & Pleasure Ltd*. (27), [1945] 1 K.B. 356, 364.

Sir Ronald Sinclair CJ: I agree and have nothing to add.

Forbes JA: I also agree.

Appeal allowed. Decree of the Supreme Court set aside. Declaration that the title of the defendant (*respondent*) *to the land has been extinguished. Order for possession to be given to the plaintiff* (*appellant*) *with mesne profits at the rate of Shs.* 200/- *a year.*

For the appellant:
HG Sherrin and *D Stephen Davies* (Crown Counsel, Kenya)
The Attorney-General, Kenya

For the respondent:
J Gledhill and *Swaraj Singh*
Swaraj Singh, Nairobi

Ahmad Bin Ahmed Kassim Kusais v Syed Abdulla Fadhal
[1958] 1 EA 60 (CAA)

Division:	Court of Appeal at Aden
Date of judgment:	21 January 1958
Case Number:	63/1957
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Aden–Knox-Mawer, Ag. C.J

[1] Practice – Parties – Appeal – Action against two defendants in alternative – Judgment against one defendant – Whether on appeal by this defendant other defendant should be made a party to appeal – Eastern African Court of Appeal Rules, 1954, *r.* 57(2) *and r.* 71.

Editor's Summary

The respondent, R, sued the appellant, A, and another defendant, B, to recover Shs. 2,000/- and although in form the claim was against both defendants "jointly and/or severally", it was apparent from the pleadings that the claim was against one or the other in the alternative. R succeeded against A, the claim against B being dismissed despite the refusal of R to abandon this claim. A appealed by leave and served notice of appeal on both R and B, but in the record of appeal B was neither named in the title nor served with the record. The appeal was against the entire decision and if successful would have involved reversal of the decree in favour of B. On the first hearing of the appeal, the court pointed out to the appellant's counsel on a preliminary objection by counsel for R that if the appeal were heard without B being made a party to the appeal, it might do B a grave injustice. The appeal was then adjourned to the next sitting of the court at Aden and counsel for the appellant was warned that he should consider joining B as a respondent. At the adjourned hearing the appellant had not joined B as a respondent and, having changed his counsel, contended, *inter alia*, that it was unnecessary to join B, as the respondent had abandoned the suit against B, and that either the court or the respondent R should have joined B.

Held –

(i) whilst B's counsel may have thought the claim against B had been abandoned, this was not so in fact.

(ii) the court was concerned to protect B from the potential damage that would ensure if the appellant should succeed in getting the judgment against himself set aside.

(iii) it was not the duty of the court to join parties except on application by a person interested which was never made in this case.

Appeal dismissed.

No cases referred to in judgment

Judgment

Briggs V-P: read the following judgment of the court: This was an appeal from a judgment and decree of the Supreme Court of Aden. We dismissed the appeal with costs and now give our reasons.

The respondent sued the appellant and another person (hereinafter called "the second defendant") for a sum of Shs. 2,000/- and costs. Although in form the plaintiff claimed against the defendants "jointly and/or severally", it was apparent at the close of the pleadings that he really claimed against one defendant or the other in the alternative, and it may be said now that, at that stage, it was almost inevitable that he should succeed against one or other,

but it was by no means clear which of them was liable. At the trial the evidence for the plaintiff indicated that the appellant was liable, and counsel for the second defendant said,

> "I am not calling my client as the plaintiff is now proceeding only against defendant (1)."

The plaintiff, however, did not concur in or accept this submission, and never abandoned his alternative claim against the second defendant. The court gave judgment for the plaintiff for Shs. 2,000/- against the appellant, and dismissed the suit as against the second defendant. No order was made as to the costs of any of the parties. Costs as between party and party are always very small in Aden, and no one appears to have objected at that time.

The appellant appealed by leave. He served notice of appeal on both the plaintiff and the second defendant, and for some reason unexplained he brought the appeal against the whole of the judgment, i.e. against the part of it which benefited the second defendant as well as the part which damnified himself. It is true that at the end of the memorandum of appeal the following words appear:

> "Reasons wherefore the appellant prays,
>
> (1) that the decision of the Aden Supreme Court be reversed, and that the suit may be dismissed against him together with the costs of this appeal and of the suit in the court below."

These words are, in the first place, mere surplusage. They have no proper place in a memorandum of appeal. See form F to the rules of this court. In any event, the "prayer" is still apparently that the whole of the decision be reversed.

In the circumstances, the appellant was in form attempting by means of the appeal to deprive the second defendant of a valuable right. The appeal record is intituled between the appellant and the respondent alone, and until the second hearing before us it was never suggested that the second defendant had been made, or was intended to be made, a respondent to the appeal, or had been served with the record. In a sense he had "become a respondent" within the meaning of r. 57(2) of the rules of this court by being served with notice of appeal. He would be entitled to Shs. 60/- for costs of the appeal which, so far as he is concerned, was abandoned or withdrawn. (Item 3, Scale A.) At the time of the hearing he was not in the ordinary sense a party.

The appeal first came on for hearing on October 1, 1957, in Nairobi, and Mr. Chanan Singh appeared for the appellant. The question of want of parties had been clearly raised by way of formal preliminary objection taken by the respondent. He submitted, and the argument is unanswerable, that if this court were to set aside the decree in favour of the second defendant in his absence, it would be doing him a grave injustice, while if it refused to set aside that decision, but set aside the judgment for Shs. 2,000/- against the appellant, it would be doing an equal injustice to the respondent, having regard to the fact that, if the appellant was not liable to him, it seemed almost certain that the second defendant must be so liable. After considerable discussion, in the course of which Mr. Chanan Singh was fully apprised of this argument and of the reasoning underlying it, this court decided, on the appellant's application, to adjourn the hearing of the appeal to the January sittings of the court in Aden, and warned the appellant's counsel that he should consider joining the second defendant as a respondent to the appeal for the reasons indicated above. Costs of the day were reserved.

On January 15, 1958, the hearing was resumed at Aden and Mr. Iyer (Mr. Handa with him) appeared in place of Mr. Chanan Singh for the appellant.

No steps had been taken to join the second respondent in the intervening period of over two months. When we invited Mr. Iyer's attention to the point previously discussed, he addressed to us a bewildering series of unrelated and often contradictory submissions, to which we will do such justice as we can.

The first was that it was unnecessary to join the second defendant because the respondent had abandoned the suit against him. We have explained that this was not the case. The second defendant's counsel may have thought so, or may have expressed himself obscurely, but in any event the point is unsound. The second point made was that, if anyone ought to join the second defendant, it was the respondent, who alone might obtain some benefit from his presence. This argument disregarded the factor of potential damage to the second defendant. The court was concerned to protect him. Benefit to another party was for this purpose immaterial. It was further argued that the respondent could cross-appeal, add the second defendant as a party, and claim to set aside the part of the decree in his favour, if the appellant should succeed in setting aside the judgment against himself. But it would be improper, generally speaking, to lodge a cross-appeal in order to do something which the appellant already seeks to do by the substantive appeal. And, if the appellant has been guilty of a serious error of procedure, it is not the duty of the respondent to rescue him from its consequences.

Mr. Iyer then went on to submit that the second defendant had been made, and was, a party to the appeal for all purposes. He passed over the title of the appeal as a merely trivial irregularity, and flourished a document which, he suggested, was an acknowledgment by the second defendant's advocate of service of a copy of the record. We ascertained on inquiry that this "acknowledgment" appeared on the back of a blank sheet of paper and referred by number to proceedings having a number not referable to these proceedings. No affidavit was filed or tendered to us. Even if the document had purported to be a regular acknowledgment of service of the record of this appeal, we should still have refused to act on it. We have repeatedly stressed that we will not dispense with a proper affidavit of service where service has to be proved. In view of the title of the proceedings and the events at the first hearing, we regarded the submission on such grounds that the second defendant had been properly joined as a respondent as an impertinent afterthought.

Mr. Iyer's next point was that, if the second defendant was a necessary party, it was the duty of the court to join him. We pointed out that the court was under no duty to join parties unless on application by a "person interested". Rule 71. No such application was before us. Mr. Iyer said that his client had no "interest" in joining the second defendant, and declined to resile from that attitude, even though we pointed out to him that a failure to join the second defendant might result in dismissal of the appeal on the preliminary objection. He submitted that the respondent should apply, although we pointed out that there is no duty on a respondent to remedy the appellant's procedure errors with a view to rendering an incompetent appeal potentially successful.

At this stage Mr. Iyer applied to amend his memorandum of appeal so as to limit the appeal to that part of the decree which damnified his client, leaving untouched the part in favour of the second defendant. To allow such an amendment at that time would, apart from all other objections, have been a gross injustice to the respondent, and we refused the application.

Mr. Iyer's final point, which did no credit to him as an advocate or to anyone else concerned, was that he had not been properly instructed as regards what took place before this court on October 1, 1957. If this had been the case, the fault could only have been that of the appellant or one of his advisers, and this court could not have damnified the respondent in consequence of it.

If at any stage Mr. Iyer had, as we suggested, applied to join the second defendant in due form, we should have allowed his application, and should

have considered that a suitable order as to costs would sufficiently have protected the respondent's interests. But no such application was made, and the appellant was therefore bound to suffer the consequences of his own, or his counsel's obstinacy.

We would add that the appellant's attitude may have been due to a fear of having to pay an extra set of costs; but if he had succeeded he would not have had to do so. It is more probable that he was reluctant to have the second defendant before the court, because his presence would have emphasised the essentially alternative nature of the claim, and his arguments would have reinforced those of the respondent. We are not, however, concerned with the appellant's motives, but only with his acts and their legal consequences.

The order for costs which we made will cover the costs reserved at the first hearing.

Appeal dismissed.

For the appellant:
SN Iyer and *HM Handa*
HM Handa, Aden

For the respondent:
PK Sanghani
PK Sanghani, Aden

Ahamed Hirsi Mohamed v R
[1958] 1 EA 63 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	19 March 1958
Case Number:	65/1958
Before:	Sir Ronald Sinclair CJ and MacDuff J
Sourced by:	LawAfrica

[1] Criminal Law – Sentence – Punishment authorised either imprisonment or fine – Whether sentence comprising both lawful.

[2] Criminal Law – Order for destruction of miraa at cost of accused – Whether order made bad for vagueness – Proper procedure – Miraa Prohibition (*Scheduled Areas*) *Ordinance*, 1951, *s.* 3 (1) (*K.*).

Editor's Summary

The appellant was convicted under s. 3(1) of the Miraa Prohibition (Scheduled Areas) Ordinance, 1951

(as amended by Ordinance No. 11 of 1957) and sentenced to six months' imprisonment and to pay a fine of Shs. 500/- or six months imprisonment in default of payment. The magistrate also made an order for destruction of the miraa in which he stated that if any costs resulted to the Government in carrying out that order, such costs should be defrayed by the appellant and in default of payment of such costs the appellant should serve a further sentence of one month's imprisonment. The maximum penalty for a contravention of s. 3 (1) of the Ordinance as amended is a fine of Shs. 2,000/- or imprisonment for a term not exceeding twelve months.

Held –

(i) the appellant should not have been sentenced to both imprisonment and a fine, but there was no reason to interfere with the sentence of imprisonment which must stand;

(ii) the order for payment of the costs of destruction was bad for vagueness; such an order must specify the actual cost of destruction and that could be done only after the cost has been ascertained. The magistrate should after

ordering destruction adjourn the hearing to a date on which he can obtain evidence of the actual cost of destruction and make a further order under s. 3(3).

Appeal against sentence of imprisonment dismissed. Order fining appellant and for payment of the cost of destruction quashed.

No cases referred to in judgment

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court: We are satisfied that the appellant unequivocally pleaded guilty to the charge and no appeal therefore lies against conviction.

The appellant was sentenced to six months' imprisonment and to pay a fine of Shs. 500/- or six months' imprisonment in default of payment. The trial magistrate also made the following order:

> "Court orders the destruction of ninety-six bundles miraa (P./Ex. 1) and one gunny bag. Should any costs result to the Government in destroying the miraa P./Ex. 1. such costs shall be defrayed by the accused and in default of payment of such costs accused one and two shall each serve a further sentence one month's imprisonment."

The maximum penalty for a contravention of s. 3(1) of the Miraa Prohibition (Scheduled Areas) Ordinance, 1951 (as amended by Ordinance No. 11 of 1957), is a fine of Shs. 2,000/- or imprisonment for a term not exceeding twelve months. The appellant should not, therefore, have been sentenced to both imprisonment and a fine. We see no reason to interfere with the sentence of imprisonment, which is maintained, but the sentence of a fine of Shs. 500/- is quashed.

Sub-s. (3) of s. 3 of the Ordinance provides:

> "Where a court convicts any person of an offence under sub-s. (1) or (2) of this section it may order that any miraa found in the possession of the offender, or in or upon any land owned or occupied by such person, be destroyed and, in addition, the court may order that the cost of such destruction shall be paid by the offender and in default of payment thereof that the offender be imprisoned for a term or, as the case may be, for a further term not exceeding one month."

In our view the order for payment of the cost of destruction was bad for vagueness. Such an order must specify the actual cost of destruction and that can be done only after the cost has been ascertained. In the instant case the miraa was, no doubt, burned and the cost of destruction, if ascertainable at all, must have been trivial. The order for payment of the cost of destruction is, therefore, quashed.

Subject to those variations of the sentence the appeal is dismissed.

We realise that, from the wording of this sub-section, a magistrate is faced with some difficulty in its application on a proper case. We would suggest when an order for destruction is made, and the cost thereof is likely to be more than trivial, that the magistrate, after making the order, adjourn the hearing to a date on which he can obtain evidence as to the actual cost of destruction. He will then be in a position to make the order envisaged by this sub-section and at the same time impose an appropriate term of imprisonment in default of payment in accordance with the actual cost that has been incurred.

Appeal against sentence of imprisonment dismissed. Order fining appellant and for payment of the cost of destruction quashed.

The appellant in person.

For the respondent:
AP Jack (Deputy Public Prosecutor, Kenya)
The Attorney-General, Kenya

Zaidi Bin Sulaimani v R
[1958] 1 EA 65 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	21 March 1958
Case Number:	15/1958
Before:	Sir Kenneth O'Connor P, Sir Audley McKisack CJ and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda–Lewis, J

[1] Appeal – Application for leave to appeal out of time – Application for copy of trial record made four days after conviction – Copy supplied almost two months later – Memorandum of appeal and record filed three weeks later – Whether due diligence exercised by appellant's advocate – Criminal Procedure Code, s. 326 (*U.*).

Editor's Summary

The appellant was convicted on September 6, 1957, by a magistrate of an offence under the Traffic Ordinance, 1951. He was then unrepresented by counsel. On September 10 when he sought advice as to an appeal, his advocate applied for a certified copy of the judgment and an uncertified copy of the proceedings before the magistrate. These were received by the advocate on November 4, and on November 29 a memorandum of appeal with an application for leave to appeal out of time were filed. Section 326 of the Criminal Procedure Code provides that

> "every appeal shall be entered within thirty days of the order or sentence appealed against: Provided that the High Court may for good cause admit an appeal though the period of limitation prescribed in this section has elapsed."

The ground for the application for leave was the time taken to provide the advocate with the judgment and record. The judge who heard the application held that the reason given was not sufficient and dismissed the application. On appeal it was conceded that appellant's advocate had only two days before the time for appeal expired in which to prepare and file the memorandum of appeal and that the subsequent delay in filing the application for leave was not material.

Held – in the circumstances there had not been unreasonable delay in filing the application for leave to

appeal and that good cause had been shown for an extension of time.

Appeal allowed. Case remitted to the High Court for hearing of the appeal.

Case referred to:

(1) *Burek Abdula and Mohamed Awath v. R.* (1951), 6 U.L.R. 280.

Judgment

Forbes JA: read the following judgment of the court: This is an appeal from an Order of the High Court of Uganda refusing an application to admit an appeal from the court of the resident magistrate, Masaka, to hearing out of time. After hearing counsel for the Crown we allowed the appeal, set aside the order of the High Court and remitted the matter to the High Court for hearing of the appeal from the resident magistrate's court.

We now give our reasons.

Section 326 of the Criminal Procedure Code of Uganda (Cap. 24) reads:

> "Every appeal shall be entered within thirty days of the date of the order or sentence appealed against:
>
> "Provided that the High Court may for good cause admit an appeal though the period of limitation prescribed in this section has elapsed."

The manner in which an appeal is to be entered is prescribed by s. 327 of the Code as follows:

> "327. (1) Every appeal shall be made in the form of a petition in writing presented by the appellant or his advocate and every such petition shall (unless the High Court otherwise directs) be accompanied by a copy of the judgment or order appealed against.
>
> "(2) When the appellant is represented by an advocate or is the attorney-general the petition shall contain particulars of the matters of law or of fact in regard to which the subordinate court appealed from is alleged to have erred."

In the instant case the appellant, who was unrepresented in the resident magistrate's court, was convicted of an offence under the Traffic Ordinance, 1951, on September 6, 1957. On September 10 he briefed an advocate to prosecute an appeal, and on the same day the advocate applied to the resident magistrate, Masaka, for a certified copy of the judgment and an uncertified copy of the proceedings. These were received by the advocate on November 4. The memorandum of appeal together with application for leave to appeal out of time were filed on November 29, the ground for the application being that it was impossible to file to the appeal in time in view of the date when the judgment and record were received.

The learned judge who heard the application held that the reasons given did not, in his view, amount to "substantial ground" and he dismissed the application.

The only authority cited to us was a judgment of the High Court of Uganda in *Burek Abdula and Mohamed Awath v. R.* (1) (1951), 6 U.L.R. 280, which reads as follows:

> "There is no application before this court for leave to appeal out of time (see proviso to s. 328, Criminal Procedure Code). We have, accordingly, no option but to dismiss these appeals. In any event we consider that such an application would have stood no chance of success in view of the appellant's own admission at the end of the memorandum of appeal, where, by his advocate, he admits that copies of the record were ready on September 17, 1951.
>
> "He could still have appealed on September 29 and been within time, so he had over twelve days *after* receiving copies. But, in any event, there is no provision in s. 328, or anywhere else, where a *Criminal Appeal* is concerned, for excluding the time required to obtain copies of a record or even copies (certified or uncertified) of a judgment. The period of thirty days is rigid and 'good cause' must be shown before this court can act or will act under the proviso to s. 328."

Although not mentioned in the record, the learned judge was no doubt aware of this case and felt bound to follow it. With respect, however, we think that the dictum in the last paragraph of the judgment goes too far. It is perfectly true that s. 326 of the Criminal Procedure Code (which is identical with s. 328 of the version of the Code in force in 1951) does not exclude from the time prescribed for the filing of an appeal the time required to obtain copies of the

judgment and record. In our view, however, the limitation must have been prescribed on the assumption that the record would be available within such time as would allow the filing of the appeal within the time limited by the exercise of due diligence. We cannot suppose that the legislature intended that an appellant should be deprived of his right of appeal by reason of delay in the preparation of the record, as, for instance, in a case where the record was not ready until the time limited had expired. The position might be different if the advocate prosecuting the appeal had represented the appellant in the court below, but, in a case like the present where the advocate had not appeared in the lower court, it would clearly be impossible for him to frame the memorandum of appeal until he had had an opportunity of considering the record. Counsel for the Crown conceded that an appellant's advocate could not reasonably be expected to go to the court registry (perhaps a district registry) to inspect the record if he failed to obtain a copy of the record in time.

It is to be noted that in the case cited the appellant still had "over twelve days" within which to file his appeal before the statutory limitation expired, and in the circumstances the court might well feel that he had failed to exercise due diligence and so to show good cause why the statutory period should be extended. In the instant case, the record reached the appellant's advocate a mere two days before the expiration of the time limited for filing the appeal. It is true that the record is a short one, but nevertheless we consider that the two days remaining was an unreasonably short time for the preparation and filing of the memorandum of appeal. Our doubt in the matter was whether reasonable diligence had been shown in the filing of the application for leave to appeal out of time, since this was not filed until November 29. Counsel for the Crown, however, did not seek to make a point of this, conceding that the delay subsequent to the obtaining of the record was not such as to be material. In the circumstances of this case, we accepted that there had not been unreasonable delay in the filing of the application, and were satisfied that "good cause" had been shown for extension of time.

We were informed by counsel that it was customary in cases such as the present for a provisional notice of appeal to be filed within the prescribed period, and for the substantial grounds of appeal to be added subsequently, after the record had become available. Such a procedure would, no doubt, be convenient and satisfactory, and, in fact, statutory provision authorising it has been introduced in the Kenya Criminal Procedure Code–see s. 10 of Kenya Ordinance No. 57 of 1955. No similar provision has, however, been made in the Uganda Criminal Procedure Code, and, in the absence of such provision, it did not appear to us that an appellant should be penalised for failure to file such a provisional notice.

Appeal allowed. Case remitted to the High Court for hearing of the appeal.

For the appellant:
BKM Kiwanuka
BKM Kiwanuka, Kampala

For the respondent:
AM McMullin (Crown Counsel, Uganda)
The Attorney-General, Uganda

Principal Immigration Officer, on Behalf of the Governor of the Somaliland Protectorate v Ashor Ali Aross, HT Musa Aboker, Ali Burreh

[1958] 1 EA 68 (CAH)

Division:	Court of Appeal at Hargeisa
Date of judgment:	25 January 1958
Case Number:	7/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Somaliland Protectorate–Greene, J

[1] Guarantee – Indemnity – Immigration bond – Guarantor unaware of contents of document – Onus of proof.

Editor's Summary

The appellant sued the respondent in the District Court to recover a sum of money which had been paid out by the Government in repatriating one X. The respondent had signed a bond to cover such a contingency when X had applied for a passport. His signature was in the space indicated for the guarantor and purported to be signed before a superintendent of police. The bond was also signed by him in respect of a certificate identifying X's photograph. The respondent wrote a letter to the district judge stating that he had signed the bond for the purpose of identifying X's photograph only, that the bond was never read over to him, the contents were never explained and that he could never have accepted liability. At the trial the respondent elected not to give evidence. Judgment was entered for the appellant. On appeal by the respondent the Protectorate Court allowed the appeal on the ground that the Crown failed to prove that the respondent did in fact have the document read over to him.

Held – the bond having been proved and the signature of the respondent having been admitted, the Protectorate Court was wrong in casting upon the appellant the burden of proving that the respondent understood the exact nature of the bond and in demanding conclusive proof of this from the appellant; the burden was upon the respondent of proving that the document did not represent his agreement, and that he did not understand and consent to the instrument according to its tenor.

Appeal allowed. New trial ordered before another judge of the District Court.

Case referred to in judgment:

(1) *L'Estrange v. Graucob Ltd.*, [1934] 2 K.B. 394; [1934] All E.R. Rep. 16.

(2) *The Luna*, [1920] P. 22.

(3) *Howatson v. Webb*, [1907] 1 Ch. 537; [1908] 1 Ch. 1.

(4) *Curtis v. Chemical Cleaning & Dyeing Co., Ltd.*, [1951] 1 All E.R. 631.

(5) *Pym v. Campbell Brothers* (1856), 25 L.J. Q.B. 277; 6 E. & B. 370.

Judgment

Sir Kenneth O'Connor P: read the following judgment of the court: The appellant sued in the District Court at Berbera for the recovery from the respondent of a sum of Shs. 2,130/12 alleged to have been paid out by the Government of British Somaliland as expenses of the repatriation of one Awil Mohamed Hersi (hereinafter referred to as "Awil"), for the payment of which sum the respondent was alleged to have made himself liable on a bond. The bond (it is a type-written document) was dated in 1951,

the day and month being left blank. After reciting that Awil had applied to the passport officer, Hargeisa, for the grant of a passport to enable him to proceed to any place in the British Empire, the respondent bound himself to the Governor of the Somaliland Protectorate

> "to pay all charges and expenses which might be incurred by the Governor of the Somaliland Protectorate or other authority in the repatriation to the Somaliland Protectorate on account of poverty or for any other reason of the said . . . from the above-mentioned country or any other country during the period of five years from the date of the grant of such passport."

It will be observed that Awil's name was not inserted, as it should have been, in the space provided. The bond was signed by the respondent in the place indicated on the form for the signature of the guarantor and purported to be signed before a superintendent of police.

Underneath the bond are a further four lines of typescript consisting of a certificate that the attached photograph is a true picture of Awil and that the particulars given thereon are true. There is no note or certificate to the effect that the contents of the document were interpreted and explained to the respondent.

The respondent, before the case started, had written a letter to the district judge in which he stated, *inter alia*, that Awil had applied for a passport and that he (respondent) had been asked to identify him, that, having recognised Awil from his photograph, he had declared the photograph shown to him to be Awil's photograph, but that he (respondent) was not informed that he was required to sign the form making himself responsible for the payment of money and that he did not agree to pay any money for Awil's expenses in any way: that he was a poor man and could never have accepted such a liability: that the bond was never read to him and that he did not know its contents.

At the start of the case in the district judge's court the defendant stated that he denied liability and wished his written defence (by which, he meant the letter referred to) to be placed in evidence. The district judge then noted: "Exhibit 'A', a written defence identified by defendant is placed in evidence". The evidence of the plaintiff, the immigration officer, was then taken.

This evidence, which was accepted by the learned judge of the District Court, was to the effect that on the strength of the bond a document of identity had been issued in December, 1951, and a passport issued to Awil on January 12, 1952: that in March, 1955, Awil had applied for repatriation to the Somaliland Protectorate from Beirut, being there destitute, and that his repatriation expenses amounting to £106. 10. 12 cts. had been paid by the Protectorate Government. This is the amount of Shs. 2,130/12 claimed in the plaint.

At the close of the evidence for the plaintiff, the district judge noted: "Defendant states he is not calling any witnesses."

The district judge decided against the defendant/respondent on the ground that no man signs a document without first clearly understanding its contents and in fact it is his responsibility to ensure that he does understand it; that the fact that there were two signatures was sufficient to show that the respondent knew that he was signing in respect of two matters, to wit the identification of a photograph and a bond to cover repatriation. It was, apparently, assumed and was not controverted before us, that the respondent could not read English; but he is not illiterate.

The respondent appealed to the Protectorate Court. At the hearing before that Court, the learned acting attorney-general drew attention to the defence of the respondent and to the fact that no evidence

had been led to rebut his assertion that the bond had not been read over to him.

The learned judge said:

> "In cases of this nature great care must be exercised, so that it can be conclusively proved that the man who signs a bond of this nature, understands properly the exact nature of the bond, and in view of the fact that the Crown failed to prove that appellant did in fact have the document read over to him, the order of the magistrate must be set aside and judgment entered for the defendant."

From that decision the appellant appeals to this court.

We think that the failure to date the bond properly and the failure to insert Awil's name in the space provided after the words "the said" were not fatal to the efficacy of the instrument. The bond is dated 1951, and we think that Awil's name can be supplied from the recital. Signature of the bond by the respondent was admitted. But, with respect, we do not think that the learned judge applied correct principles in the passage quoted above. The signing of a contractual document, generally speaking, implies knowledge of its terms and consent to them. *L'Estrange v. Graucob Ltd*. (1), [1934] 2 K.B. 394, 403. And this may obtain even when the document is not in a language known by the signatory. *The Luna* (2), [1920] P. 22. It is, however, open to the signatory to prove that he was induced by fraud, misrepresentation or mistake to sign a document different in character to that which he thought he was signing. *Howatson v. Webb* (3), [1907] 1 Ch. 537; [1908] 1 Ch. 1 (C.A.); *Curtis v. Chemical Cleaning & Dyeing Co., Ltd*. (4), [1951] 1 All E.R. 631.

> "The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement . . ."

per Erle, J., in *Pym v. Campbell Brothers* (5) (1856), 25 L.J. Q.B. 277; 6 E. & B. 370, cited in Sarkar's Law of Evidence (8th Edn.) at p. 685. The bond having been proved and the signature of the respondent having been admitted, the burden was upon the respondent of proving that the document did not represent his agreement. With respect, we think that the learned judge erred in casting upon the plaintiff the burden of proving that the defendant understood the exact nature of the bond and in demanding conclusive proof of this from the plaintiff. The defendant's signature having been admitted, it was for him to show that he did not understand and consent to the instrument according to its tenor. Conclusive proof was not, in any event, essential. A balance of probabilities was the required standard. The defendant/respondent did not discharge this onus. He neither gave nor called evidence. His letter or written statement was "placed in evidence" at the outset of the case; but this cannot mean more than that it was put on the record, presumably in lieu of a pleading. Though the district judge treated it as evidence, it was not evidence: its contents were not proved and the plaintiff had no opportunity of testing them in cross-examination.

In view of the misdirection as to onus, and of the respondent's failure to discharge the burden, which was upon him, of proving, by evidence, want of knowledge of the character of the bond, we came to the conclusion that the decision of the Protectorate Court could not stand.

We thought, however, that it would not be right simply to allow the appeal and restore the decision of the district judge. It appeared that the plaintiff/respondent (who was not legally represented in the trial court) had been misled into thinking that his written statement had been accepted as evidence. It would be unjust, in view of this, for us to allow the appeal on the ground that there was no evidence by the defendant/respondent in discharge of the onus of proving mistake as to the character of the document or misrepresentation as to its effect. The trial had been unsatisfactory. We, accordingly, ordered a

new trial before another judge of the District Court, and (the appellant consenting) gave the respondent costs limited to travelling and nine days' subsistence expenses.

Appeal allowed. New trial ordered before another judge of the District Court.

For the appellant:
PO' Donoghue (Crown Counsel, Somaliland)
The Attorney-General, Somaliland

The respondent in person.

Ndungu Kamau and Nine others v R
[1958] 1 EA 71 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	3 March 1958
Case Number:	1-10/1958
Before:	Sir Ronald Sinclair CJ and Macduff J
Sourced by:	LawAfrica

[1] Criminal law – Burden of proof – Illegal movement of cattle – Particulars of offence – Whether burden discharged in accordance with Animal Diseases Rules, 1948, *r.* 21 (2) (*K.*).

Editor's Summary

The appellants, who were unrepresented and who had pleaded not guilty, were each convicted for illegal movement of cattle contra r. 21 (2) of the Animal Diseases Rules, 1948, and were fined and ordered to pay poundage. The particulars of offence alleged that the appellants had moved a specified number of cattle "on to Anglo-French Sisal Company without a permit" . . . One of the grounds of appeal was that the prosecution had failed to prove that the Anglo-French Sisal Company was a farm or native land, or native area, or public road or forest area, or unalienated land within the native land or native area. Rule 21 (2) of the Animal Diseases Rules, 1948, states:

> "No cattle . . . shall be moved from or on to any farm or from or into the native lands or any native area, or on to or over any public road, or on to or over any forest area, or on to or over any unalienated Crown land not being within the native lands or a native area, without a permit authorising such movement granted and signed by an issuer of permits."

Under r. 2 a farm is defined as

> ". . . an area of land held by the owner or occupier under one registered title."

Held – for the prosecution to succeed under r. 21 (2) it must establish that the land on to which the cattle were alleged to have been moved is a farm, native land, a native area, a public road, a forest area, or unalienated Crown land; further to establish that the land is a "farm" the prosecution must bring it within the definition in r. 2 and prove that the area of land referred to is held by the owner or occupier under one registered title.

Appeal allowed, convictions quashed, fines to be refunded.

Case referred to in judgment:

(1) *Karuma s/o Kaniu v. R.* (1955), 22 E.A.C.A. 364.

(2) *Saleh Mohamed v. R.* (1953), 20 E.A.C.A. 141.

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court: These ten appeals were in respect of the same offence, committed by the respective appellants at the same time, the same grounds of appeal were taken in each memorandum, so for convenience of hearing they were consolidated.

The appellants were each convicted on:

> Count II. Illegal movement of cattle contrary to r. 21 (2) of the Animal Diseases Rules, 1948.
>
> Particulars of Offence.
>
> . . . At about 11 a.m. on December 12, 1957, at Thika in the Central Province, had moved. . . head of cattle on to Anglo-French Sisal Co. without a permit authorising such movement granted and signed by an issuer of permits,

and were fined amounts ranging from Shs. 120/- to Shs. 700/- and ordered to pay poundage in respect of the cattle seized in varying amounts. Against those convictions and sentences all appellants have lodged appeals citing a number of grounds of which we propose to consider one only.

The last ground of appeal was:

> "That the prosecution failed to prove that the Anglo-French Sisal Co. was a farm or native land, or native area, or public road, or forest area or unalienated land within the native land or native area."

Rule 21 (2) of the Animal Diseases Rules which the appellants were charged with contravening says:

> "21(2) No cattle, swine, sheep or goats shall be moved from or on to any farm or from or into the native lands or any native area, or on to or over any public road, or on to or over any forest area, or on to or over any unalienated Crown land not being within the native lands or a native area, without a permit authorising such movement granted and signed by an issuer of permits":

It necessarily follows that in the particulars of offence the prosecution must particularise what land the cattle are alleged to have been moved from or on to, and within which of the categories set out in the sub-rule that land comes. We are informed by the acting deputy public prosecutor that the respondent would accept that the words "Anglo-French Sisal Co." in the particulars are intended to refer to "the farm of the Anglo-French Sisal Co." Were this the only objection we would consider it to be no more than an omission curable under the provisions of s. 381 of the Criminal Procedure Code.

However, by particularising that the land on to which the cattle were alleged to have been moved was a farm a more serious objection arises. Farm is defined in r. 2 as follows:

> "'farm' means an area of land held by the owner or occupier under one registered title";

The acting deputy public prosecutor has argued that the definition should be taken in two parts, first that "farm" means an area of land, second that the boundaries of the area of land are defined by the remainder of the definition "held by the occupier under one registered title". In our opinion this argument must be rejected; not only does it entail an unjustifiable interpretation of the

clear words of the section but it would still not absolve the prosecution from proving the land to have been held under one registered title in proving its boundaries. It was next argued that this would come within the maxim omnia praesumuntur rite esse acta and reliance was placed on the dicta in *Kuruma s/o Kaniu v. R.* (1) a Privy Council Appeal reported at (1955), 22 E.A.C.A. 364 where at p. 366 their Lordships said:

> "They think it may well be that when an indictment alleges that a particular offence was committed at a particular place and no challenge or issue is raised at the trial on that point the court may assume or at least take judicial knowledge that the place is situate where the indictment states it is or that maxim omnia praesumuntur rite esse acta would apply."

Leaving aside the question as to whether this dicta can be accepted as binding in this Colony in view of the decision in *Saleh Mohamed v. R.* (2) (1953), 20 E.A.C.A. 141, the facts in respect of which their lordships suggested the application of this maxim are very different from those in the instant case. Again the appellants, who were not represented at the lower court hearing, pleaded not guilty and by so doing put in issue every material fact required to constitute the offence charged.

In our view r. 21 (2) requires that the prosecution establish that the land on to which the cattle are alleged to have been moved is a farm, native land, a native area, a public road, a forest area or unalienated Crown land. To establish that the land is a farm the prosecution must bring it within the definition in r. 2 and prove that the area of land referred to is held by the owner or occupier under one registered title. Having failed to prove this ingredient of the offence the offence itself has not been proved and the convictions cannot stand. In each case the convictions and fines are quashed. The fines, if paid, are to be refunded to any appellant who has so paid his fine. The learned magistrate made an order that each appellant pay poundage. Since these orders resulted from his conviction of the respective appellants each such order is set aside and any sums ordered to be paid, if paid, are to be refunded to any appellant who has so paid poundage.

Appeal allowed, conviction quashed, fines to be refunded.

For the appellants:
Swaraj Singh and *DJ Ganatra*
Ganatra & Sharma, Nairobi

For the respondent:
JP Webber (Crown Counsel, Kenya)
The Attorney-General, Kenya

Hindu Dispensary, Zanzibar v NA Patwa and Sons
[1958] 1 EA 74 (CAZ)

Division:	Court of Appeal at Zanzibar
Date of judgment:	18 February 1958
Case Number:	34/1957

Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Zanzibar–Law, J

[1] Rent restriction – Flat unoccupied "without good cause" allocated to body corporate – Flat allocated for residential use of employee of body corporate – Whether body corporate can be "suitable tenant" – Rent Restriction Decree, s. 7 (1) (*l*) (*i*) (*Z.*).

Editor's Summary

The appellant was registered as a charitable body and body corporate with power to hold land. The Zanzibar Rent Restriction Board, having found that a flat owned by the respondents had remained unoccupied for more than one month without good cause, allocated the flat to the appellant under s. 7 (1) (*l*) (i) of the Rent Restriction Decree, 1953, which provides that the board shall have power "to allocate to any suitable tenant . . . any house or portion thereof which without good cause has been left unoccupied for a period exceeding one month . . ." The flat was allocated to the appellant for the purpose of housing a doctor to be employed by the appellant in its business. The respondents appealed to the High Court which allowed the appeal on the ground that a body corporate could not be a "suitable tenant" under the Rent Restriction Decree. On a second appeal it was contended that since the Decree applies to both business premises and dwelling houses the flat though intended to be occupied as a dwelling was qua the appellant "business premises"; and that a body corporate could be a "suitable tenant" of business premises under s. 7 (1) (*l*) (i) of the Decree. The respondents argued that the word "house" used in s. 7 (1) (*l*) (i) implied that the board could not allocate a building for business purposes.

Held –

(i) since the Rent Restriction Decree also applied to business premises a trading company could be a "suitable tenant" of premises for the purposes of its business.

(ii) the suit premises, though intended to be occupied as a dwelling house were qua the Dispensary "business premises".

Kampala Cotton Co., Ltd. v. Pravinlal V. Madhavani (1954), 21 E.A.C.A. 129 followed.

Per Curiam– "A company can have possession of business premises by its servants or agents. In fact that is the only way it can have physical possession."

Appeal allowed. Decision of Law, J., in *N. A. Patwa & Sons v. The Hindoo Dispensary, Zanzibar*, [1957] E.A. 186 (Z.), reversed. Order of the Rent Restriction Board restored.

Case referred to in judgment:

(1) *Hiller v. United Dairies* (*London*) *Ltd*., [1934] 1 K.B. 57; [1933] All E.R. Rep. 667.

(2) *Skinner v. Geary*, [1931] 2 K.B. 546; [1931] All E.R. Rep. 302.

(3) *Hardial Singh v. Malayan Theatres Ltd*., [1953] A.C. 632.

(4) *Kampala Cotton Co. Ltd. v. Pravinlal V. Madhavani* (1954), 21 E.A.C.A. 129.

(5) *M. M. Desai and Others v. Sultan Ali* (1953), 20 E.A.C.A. 1.

February 18. The following judgments were read:

Judgment

Sir Kenneth O'Connor P: The appellant, the Hindu Dispensary, is a charitable body, registered under the provisions of s. 2 of the Land (Perpetual Succession) Decree (Cap. 103) as a body corporate, with power, amongst other things, to hold any land or any interest therein. On December 8, 1956, the Zanzibar Rent Restriction Board, in purported exercise of its power under s. (1) (*l*) (i) of the Rent Restriction Decree, 1953, having found that a flat in Zanzibar, owned by the respondents, had remained unoccupied for a period exceeding one month without good cause, allocated the flat to the appellant as a "suitable tenant", for the purpose of housing therein a doctor who was about to arrive in the Protectorate. The doctor was an employee of the Hindu Dispensary, employed for the purpose of its business.

Against this allocation by the board the respondents appealed to the High Court of Zanzibar. That court allowed the appeal, holding that a body corporate could not be a "suitable tenant" within the meaning of s. 7 (1) (*l*) (i) of the Rent Restriction Decree, 1953. From that decision the appellants appeal to this court.

Section 7 (1) of the Rent Restriction Decree, 1953, so far as material, reads:

> "7.(1) A Rent Restriction Board shall in relation to the area for which it is established have power . . .
>
> (*l*) (i) to allocate to any suitable tenant at such rent as the board may fix any house or portion thereof which without good cause has been left unoccupied for a period exceeding one month . . ."

The word "house" used in the above paragraph is not defined in the Decree. "Premises" are defined, by s. 2, as meaning "any dwelling house or business premises as herein defined". The definition of "dwelling house" so far as material is: "'dwelling house' includes any house or part of a house or room let as a separate dwelling . . ."; and that of "business premises" is: "business premises" means any building or part of a building let for business, trade or professional purposes . . .".

The learned judge dealt with the matter as follows ([1957] E.A. at p. 187):

> "Mr. Chowdhary for the appellants, the landlords, relies on the English case of *Hiller v. United Dairies Ltd.*, [1934] 1 K.B. 57, which lays down that a limited company is not entitled to the protection of the Rent Restriction Acts as a statutory tenant, as it cannot fulfil the requirement of personal occupation of residential premises as a house. Mr. Talati for the respondents relies on *Kampala Cotton Co., Ltd. v. Pravinlal V. Madhavani*, 21 E.A.C.A. 129, which lays down that a dwelling house, used as such by the tenant's employee, is none the less let for business purposes if it is in fact let to, and used by, the tenant, even a limited company tenant, as one of the features of the tenant's business operations. He argues that the respondents require the premises to house a doctor who is to be employed for the purposes of their business, which is to conduct a dispensary, and that therefore the respondents, although a body corporate, can become the statutory tenant and occupy the premises vicariously through their doctor-employee. As Briggs, J.A., said in the course of his judgment in the *Kampala Cotton Co.* case, 'the Uganda statute differs from the English Acts in two important respects. It protects business premises as well as dwellings, and it does not contain any provision similar to the words "so long as he retains possession" appearing in s. 15 of the 1920 Act.' The Zanzibar Decree likewise extends the protection of the Rent Restriction legislation to business premises, but at the same time retains provision (in s. 24) similar to that in s. 15 of the 1920 Act. The position

> in Zanzibar is therefore not the same as that obtaining in Uganda, and it would seem that the legislature in Zanzibar intended, so far as dwelling houses are concerned, to confer purely personal rights, and to restrict the protection of the Decree to tenants who are in and retain physical possession, and consequently for the purposes of s. 7 (1) (*l*) (i) of the Decree to tenants who are capable of occupying residential premises in a personal and physical capacity. Mr. Talati has submitted that a limited company tenant in Zanzibar would be entitled to the protection of the Decree in respect of a dwelling house occupied by an employee for the purposes of the company's business. That might well be so, if the employee was in possession of the dwelling in consequence of a contractual tenancy between the landlord and the company, and was holding over on the expiry of that contractual tenancy, and if it had been part of that contractual tenancy that the occupation was to be of a vicarious nature. In such a case the company might claim the protection of the Decree as a statutory tenant under the doctrine of vicarious occupation (*Wabe v. Taylor*, [1952] 2 All E.R. 420; [1952] 2 Q.B. 735). But that is a very different state of affairs from the position in this case, which is that a body corporate is seeking to obtain possession, as a statutory tenant, of a dwelling house to be occupied in future by an employee for the purposes of its business. There is no existing or prior contractual relationship between the landlords and the body corporate, so far as the dwelling is concerned, and there is completely lacking that element of physical possession by an individual which in my opinion is requisite before the protection of the Decree can be invoked by a body corporate in relation to a dwelling."

In *Hiller v. United Dairies Ltd*. (1), [1934] 1 K.B. 57, a limited company were the leaseholders of a shop, with living rooms above, in which their manager resided for purposes of the business. On the expiration of the lease the landlord claimed possession. The company claimed that they were protected by the Rent Restriction Acts, as being in occupation by their manager. It was held that they were not so protected. Lord Wright said (at pp. 60 and 61) that a non-occupying tenant was never within the precincts of the Acts, which were dealing only with an occupying tenant who had a right to stay in and not be turned out. Where, therefore, when the contractual tenancy came to an end, the tenant not being in physical possession of any part of the premises, there was nothing in the Act which enabled him to resist the claim of the landlord to possession. Lord Wright added:

> "If the rights under the Acts which are given to the statutory tenant are, as this court has held in several cases, purely personal, I do not see how these rights can be vicariously enjoyed or how the principle of dwelling in the premises by an agent can be admitted."

Slesser, L.J., said, at p. 62, quoting Scrutton, L.J., in *Skinner v. Geary* (2), [1931] 2 K.B. 546,

> "For the reason given the Act does not in my opinion apply to protect a tenant who is not in occupation of a house in the sense that the house is his home and to which, although he may be absent for a time, he intends to return."

This passage well illustrates an essential difference between the English Rent and Mortgage Interest Restriction Acts considered in *Hiller v. United Dairies Ltd*. (1) and the Zanzibar Rent Restriction Decree, 1953. Whereas the English Acts apply only to certain classes of houses let as dwelling houses, the Zanzibar Decree expressly applies also to business premises. It would, therefore, be impossible to hold that the Zanzibar Rent Restriction Decree applies only to

protect a tenant who was in occupation of a house as his home. As was said by Lord Porter in *Hardial Singh v. Malayan Theatres Ltd.* (3), [1953] A.C. 632, when speaking of the Singapore Control of Rent Ordinance which extended to business premises as well as dwelling houses:

> "Their lordships may therefore at once state that they get very little assistance from cases which have been decided upon the terms of the English Acts, since in their view principles applicable to the retention by tenants of places which are required as a home have very little bearing on the position of a tenant who requires a place in which to conduct his business."

In *Kampala Cotton Co., Ltd. v. Pravinlal V. Madhavani* (4) (1954), 21 E.A.C.A. 129, this court held that in Uganda, a separate building, in itself a dwelling house, and used as such by the tenant's employee, is "let for business purposes" if it is in fact let to, and used by the tenant, even a limited company tenant, as one of the features of the tenant's business operations. Also discussed in the *Kampala Cotton Co.* case (4) was the question whether a company could in Uganda successfully claim protection of the premises as a dwelling house under the doctrine of vicarious occupation; but that point was deliberately left undecided.

The decision in the *Kampala Cotton Co.* case (4) was binding upon the learned judge and is binding upon us, unless it is distinguishable. The learned judge attempted to distinguish it on the ground that s. 24 of the Zanzibar Decree, which lays down the conditions of a statutory tenancy, provides (as does the corresponding provision of the Rent Restriction legislation in England) that a tenant who, under the provisions of the Decree, retains possession of any premises shall, "so long as he retains possession", observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, whereas the corresponding section of the Uganda Ordinance does not contain the words "so long as he retains possession". It is true that this was one of the distinctions between the Uganda statute and s. 15 of the English Act of 1920 pointed out in the *Kampala Cotton Co.* case (4). But this distinction goes mainly, though not entirely, to the question, which was left undecided in the *Kampala Cotton Co.* case (4), whether vicarious possession by its employee would be a sufficient possession of the premises considered as a dwelling house to enable a company tenant to resist eviction by the landlord.

No question of vicarious present possession arises here, as there was, in fact, no possession, and, for the same reason, no question at present arises of retaining possession as against the landlord, or of a "statutory tenancy" in the sense in which that expression is used in the marginal note to s. 24. The questions which now fall to be decided are whether a corporation can be a suitable tenant of business premises under s. 7 (1) (*l*) (i) of the Rent Restriction Decree and whether the suit premises are business premises. If the answers to those questions are in the affirmative, it will be unnecessary to consider the question whether there could be a future vicarious occupation by an employee of a dwelling house allocated under s. 7 (1) (*l*) (i).

To take the second question first: The *Kampala Cotton Co.* case (4) is authority for the proposition that the provision of housing for the company's staff may be a normal part of the business operations of a company tenant. The learned judge in the present case found that the Hindu Dispensary required the flat for the housing of a doctor whom they proposed to employ in connection with their dispensary business. Accordingly, in my opinion, the suit premises, though intended to be occupied as a dwelling house, are, qua the Dispensary, "business premises".

On the question of whether a corporation can be a "suitable tenant" of business premises, it must, in my opinion, follow from the inclusion of business

premises within the scope of the Decree that a trading company can be a tenant of premises for purposes of its business. It cannot have been the intention of the legislature to give an important business advantage only to individuals or firms. In cases of doubtful significance, a statute is not to be construed as effecting manifest injustice. As Sir Newnham Worley said in the *Kampala* case (4):

> "I respectfully agree with the learned trial judge–that it is 'beyond argument that the protection afforded in respect of business premises must be extended to limited companies, and to business men occupying, and carrying on business by their servants or agents'."

I think it is quite clear that, whether or not a company can occupy a dwelling house vicariously by its servant, it can have possession of business premises by its servants or agents. In fact, that is the only way in which it can have physical possession. Accordingly, I find nothing repugnant in the inclusion of the words "so long as he retains possession" in s. 24. If there is any indication to be gathered from the language of this section that individual tenancies alone were here considered, that indication must, in my view, give way to the manifest intention of the Decree, to be gathered from the extension of its scope to business premises, that the protection afforded must extend to business premises let to trading companies for purposes of their business. If the provisions of the Decree apply to business premises let to trading companies, I think that they must also apply to premises let to other corporations for purposes of their businesses. It follows that I do not, with respect, think that the distinction drawn by the learned judge and based on the wording of s. 24 is a valid distinction, and I see no reason why the Hindu Dispensary should not be a "suitable tenant" within s. 7 (1) (*l*) (i) of the Decree. The question of whether or not the premises would be immediately occupied by the Dispensary's employee would be one for consideration by the board when deciding whether or not the Dispensary was a "suitable tenant". If, without good cause, the premises remained unoccupied for more than a month after allocation, the board could allocate them again.

I have avoided using the expression "statutory tenancy" as applying to a tenancy created under s. 7 (1) (*l*) (i) of the Rent Restriction Decree. An allocation under that sub-section is not a "statutory tenancy" in the usual sense, that is to say created by the statute in favour of a tenant who retains possession of the premises after the expiration of a contractual tenancy, and on the same terms and conditions as the original contractual tenancy. It is equivalent to a new tenancy created by the board acting under statutory powers which enable it to make an allocation on new terms and conditions. As was said in *M. M. Desai and Others v. Sultan Ali* (5) (1953), 20 E.A.C.A. at p. 6:

> "In every case where the board allocates a house to a tenant it creates a legal nexus between the allottee and the landlord which carries with it all the rights and obligations inherent in a contract of letting."

Mr. Chowdhary, for the landlord, argued that the board could not allocate a building for business purposes because the word used in s. 7 (1) (*l*) (i) is "house" and not "premises", and because the object of the paragraph is to prevent dwelling houses being left vacant for more than a month. I do not agree. "House", as already pointed out, is not defined in the Decree. The word used in s. 7 (1) (*l*) (i) is not "dwelling house". Even if it could be assumed that the board could not allocate premises to be used for business purposes other than the provision of staff housing (a point which I do not find it necessary to decide) and even if it is clear that the object is to prevent dwelling houses being left vacant, that object would be satisfied by an allocation of the premises for domestic occupation by the Dispensary doctor, provided that his arrival was not too long delayed.

I would allow the appeal, with costs here and in the High Court, set aside the Decree of the High Court dated February 28, 1957, and restore the order of the Rent Restriction Board dated December 8, 1956.

Briggs V-P: I agree and have nothing to add.

Forbes JA: I also agree.

Appeal allowed.

For the appellant:
KS Talati
Wiggins & Stephens, Zanzibar

For the respondent:
SM Chowdhary
SM Chowdhary, Zanzibar

Mohanlal Kalyanjee Lakhani v SKH Finance & Investment Co Ltd
[1958] 1 EA 79 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	18 March 1958
Case Number:	47/1957
Before:	Sir Kenneth O'Connor P, Forbes JA and MacDuff J
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Harley, Ag. J

[1] Mortgage – Enforcement of security by second mortgagee – First mortgagee joined as defendant – Plaint alleged no relief sought against second defendant but order for sale of mortgaged premises prayed – Decree made for sale in default of payment by mortgagor – Whether decree should have directed sale subject to first mortgage – Indian Transfer of Property Act, 1882, *s.* 8 *– Indian Acts* (*Amendment*) *Ordinance* (*Cap.* 2), *s.* 2 (*K.*).

Editor's Summary

The respondent company as second mortgagee had sued the appellant as mortgagor and joined the first mortgagee as second defendant. The plaint averred that no relief was sought against the second defendant but the relief sought was an order for sale and discharge of both mortgages out of the proceeds. The appellant disputed the validity of the second mortgage and the transfer thereof to the respondent

company. The trial judge found for the respondent and a decree was later drawn by the appellant's advocate and approved by the advocate for the respondent ordering that accounts be taken and if the appellant did not pay the principal interest and costs due to the respondent company that "the mortgaged property be sold and that the proceeds . . . be paid into court and applied first in payment of what is found due to the second defendant under the first mortgage . . .". The main points taken for the appellant on his appeal were that the assignment of the second mortgage to the respondent company did not include the arrears of interest, that in consequence the respondent company could not rely on these arrears as a default, that the transfer to the respondent was not properly executed and that the order for sale of the Supreme Court had not been approved by the second defendant and, therefore, the order was ultra vires.

Held –

(i) the transfer made it clear that the consideration included the interest due and the assignment of "the benefit of the said mortgage" was intended to assign any arrears of interest due thereunder.

(ii) execution of the assignment of the mortgage by the respondent company was unnecessary;

(iii) the decree of the Supreme Court should have directed the sale of the mortgaged property subject to the first mortgage.

Appeal dismissed. Order for amendment of decree of the Supreme Court.

No cases referred to in judgment

March 18. The following judgments were read:

Judgment

Forbes JA: This is an appeal from a decision and preliminary decree of the Supreme Court of Kenya in a suit by a second mortgagee for sale of the mortgaged property.

The appellant, the original first defendant, is the mortgagor of the property, which is subject to a first mortgage in favour of one Goodhind. Goodhind is not a party to this appeal, but was joined as second defendant in the original suit. The plaint stated in para. 11 that no relief was claimed against the second defendant, but nevertheless, in the prayer, asked in effect that the property be sold free from incumbrance and that the first as well as the second mortgage be discharged out of the proceeds of sale. The terms of the prayer are as follows:

"(1) That accounts be taken of amounts due to the plaintiff and costs as at a date to be fixed by the court for the redemption of the mortgaged property.

"(2) That if the payment of the said sum be not made on or before the date so fixed for redemption the mortgaged property be sold and necessary directions in that behalf given and that the net proceeds of sale be paid into court to the credit of this suit and applied first in payment to the second defendant of the said amount so found owing and such subsequent interest and costs as may be allowed by the court and secondly in payment to the plaintiff of the amount found due to it and such subsequent interest and costs as aforesaid and that the plaintiff may be allowed leave to bid at such sale.

"(3) That in case the said proceeds of the sale are found to be insufficient to pay the amount owing to the plaintiff liberty be reserved to the plaintiff to apply for a personal decree in respect thereof.

"(4) That such further directions or alternative relief be given as to this honourable court may seem fit in the circumstances of this case.

"(5) That the costs of this suit be awarded to the plaintiff and that the costs of the entire suit be borne by the first defendant."

The respondent company, the original plaintiff, claims to be second mortgagee of the property by virtue of a transfer of mortgage dated November 5, 1956, whereby one Albert Blandowski, the original second mortgagee, purported to assign to the plaintiff company the benefit of the second mortgage. And the respondent company's suit is founded on the alleged failure of the appellant to pay the principal sum secured by the second mortgage (which was due for repayment on March 1, 1956) and to pay instalments of interest due under the mortgage on October 15, 1956, and November 15, 1956.

The defence was an almost complete denial of the facts alleged in the plaint,

and, in particular, the validity both of the original second mortgage and of the transfer of mortgage to the respondent company were challenged.

At the trial evidence in support of the respondent company's claim was given by Mr. Sirley, a member of the firm of Sirley and Kean, the respondent company's advocates. No evidence was called on behalf of the appellant, Mr. Mandavia for the appellant relying on the argument that the respondent company had failed to prove its case.

The learned trial judge, however, held that the second mortgage and the assignment of it by Blandowski to the respondent company had been clearly proved by the evidence, and gave judgment for the respondent company as follows:

> "1. That accounts be taken as prayed by the registrar;
>
> "2. that if defendant pay the amount so found due together with further amounts due or accruing on or before August 7, 1957, the plaintiffs shall deliver up to defendant (1) the mortgage documents, and if the said amount be not paid the order shall be as prayed by the plaintiffs in para. 2 of the prayer;
>
> "3. that plaintiffs be at liberty as prayed to apply for a personal decree;
>
> "4. that plaintiffs be at liberty to apply for further directions;
>
> "5. that the order for costs be as prayed in para. 5 of the prayer."

This decision was embodied in a decree drawn up by the appellant's advocate and approved by the respondent company's advocates which recited, *inter alia*, that the claim was for

> "Accounts to be taken of amounts due to plaintiff and second defendant for principal, interest and costs as at a date to be fixed for redemption,"

and ordered:

> "(1) That accounts as prayed for in the plaint be taken by the registrar:
>
> "(2) That if the first defendant pays the amount so found due together with further interest due and accruing due, on or before the 7th day of August, 1957, the plaintiff shall deliver up to the first defendant the mortgage documents:
>
> "(3) That if the said amount be not paid on or before the said 7th day of August, 1957, the mortgaged property be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into court and applied first, in payment of what is found due to the second defendant under the first mortgage and secondly, in payment to the plaintiff of what is found due to it on the second mortgage, and that the balance, if any, be paid to the first defendant:
>
> "(4) That the plaintiff be at liberty as prayed to apply for a personal decree if the proceeds of the said sale be insufficient to satisfy its claim in full:
>
> "(5) That the plaintiff be at liberty to apply for further directions:
>
> "(6) That the first defendant do pay to the plaintiff its taxed costs of the suit, and do bear the costs of the entire suit as prayed for in para. 5 of the prayer."

Seven grounds of appeal are set out in the memorandum of appeal, but as I understand them the substantial grounds argued were:

1. (*a*) That, by reason of s. 8 of the Indian Transfer of Property Act, arrears of interest accrued before the transfer were not included in the alleged transfer of the second mortgage to the respondent company, and that the respondent company accordingly could not rely upon non-payment of interest due on October 15, 1956.

(*b*) That evidence of non-payment of interest due on November 15, 1956, amounted to no more than evidence of non-receipt of the interest by Messrs. Sirley and Kean, and there was no evidence that Sirley and Kean were authorised by the respondent company to receive the interest on its behalf.

(*c*) That accordingly there was no default on which the respondent company could claim judgment.

2. That the transfer of mortgage was not properly executed by the respondent company in that the affixing of the seal of the company was only witnessed by one individual (though that individual purported to witness in two different capacities) and that the transfer was therefore invalid.

3. That the second defendant (the first mortgagee) did not appear or give his consent to the sale of the mortgaged property free from his incumbrance, and that therefore the order for the sale free from incumbrance and payment off of the first mortgage was ultra vires.

As regards the first ground set out above, it was pointed out by Mrs. Kean for the respondent company that by reason of amendments to the Transfer of Property Act effected by Act 2 of 1900 (which are in force in Kenya by virtue of s. 2 of the Indian Acts (Amendments) Ordinance (Cap. 2 of the 1948 Laws of Kenya)) s. 8 of the Transfer of Property Act has no application to mortgage debts. Mr. Mandavia for the appellant argued that nevertheless the transfer should show clearly that accrued interest had been included in the transfer, and that the assignment of the "benefit of the mortgage" was too vague to effect the assignment of arrears of interest.

The transfer is expressed to be made

> "in consideration of the sum of shillings thirty-five thousand (Shs. 35,000/-) being the principal secured by the said mortgage and interest due thereon having been paid by the said Mohanlal Kalyanji Lakhani (the receipt of which sum the mortgagee hereby acknowledges)."

"Mohanlal Kalyanji Lakhani" (that is, the mortgagor/appellant) is clearly an error. It is not disputed that this should have read "having been paid by the company". Apart from this error, the transfer makes it clear that the consideration is the payment not only of the amount of the principal sum, but also of "interest due". In view of this it appears to me clear that the assignment of "the benefit of the said mortgage" was intended to be an assignment of arrears of interest due.

As regards non-payment of the interest due on November 15, it is true that no notice of the assignment was given to the appellant, but it is clear that interest had throughout been paid to Messrs. Sirley and Kean acting on behalf of the mortgagee. Mr. Sirley's evidence is that he continued to demand payment of interest up to approximately the beginning of December and he can only have done so after November 5 on behalf of the new mortgagee, the respondent company. There is no suggestion in evidence of either instalment of interest having in fact been paid, either to Blandowski or to the respondent company. In the circumstances it appears to me that there was ample evidence on which the learned trial judge could find as a fact that there had been default in the payment of interest due on October 15 and on November 15, and that either default would suffice to support the respondent company's suit.

The second ground of appeal mentioned above is based on the assumption that it was necessary for the respondent company to execute the assignment. The company did in fact execute the assignment, but I cannot find that there was any necessity in law for it to do so. No authority for that proposition was cited, and the forms of transfer of mortgage set out at p. 687 et seq. of

Vol. 10 of the Encyclopaedia of Forms and Precedents (3rd Edn.) provide only for signature of a transfer of mortgage by the transferor. Mr. Mandavia argued that the assignment passed obligations as well as benefits and that the signature of the transferee was necessary to show acceptance of the obligations. It seems clear, however, that the transferor can only transfer what he has, and the transferee can only take subject to obligations to which the transferor was subject, whether or not the transferee executes the assignment. In my opinion execution of the assignment by the respondent company was not essential, and accordingly the question whether or not the assignment was properly executed by the respondent company does not arise.

As regards the third ground of appeal stated above, it would appear correct that the decree should have directed the sale of the property subject to the first mortgage. Mrs. Kean conceded that the consent of the first mortgagee would, in fact, be necessary before the property could be sold free from incumbrances, but argued that the obtaining of such consent was a matter of machinery which could follow the preliminary decree. However, the plaint expressly stated that no relief was claimed against the first mortgagee and did not ask for accounts to be taken of what was due to the first mortgagee, the first recital in the preliminary decree being inaccurate in stating that such accounts had been claimed. In the circumstances I am of opinion that the direction for sale free from incumbrance and payment off of the amount due under the first mortgage was inappropriate and might well be prejudicial to the interests of the first mortgagee, and I consider that the preliminary decree requires amendment accordingly.

In the result I would order that the appeal be dismissed, but that the preliminary decree be amended:

(*a*) by the deletion in para. 1 of the recitals of the words “and second defendant”;

(*b*) by the insertion in para. (3) of the order immediately after the words “be sold” of the words “subject to the first mortgage”; and

(*c*) by the deletion in para. (3) of the order of the words “first, in payment of what is found due to the second defendant under the first mortgage and secondly.”.

As regards costs, it is true that the appellant has succeeded in his argument to the extent of satisfying me that the preliminary decree requires amendment. However, the decree was in fact drawn by the appellant’s advocates, and the amendment affects only the interests of the original second defendant who is not a party to the appeal. The interests of the appellant himself are not affected by the amendments. In the circumstances, I would order that the appeal be dismissed with costs, subject, of course, to the making of the amendments to the preliminary decree which I have indicated.

Sir Kenneth O’Connor P: I agree and have nothing to add. An order will be made in the terms indicated in the judgment of the learned justice of appeal.

MacDuff J: I agree.

Appeal dismissed. Order for amendment of decree of the Supreme Court.

For the appellant:
GR Mandavia
G R Mandavia, Nairobi

For the respondent:
Mrs L Kean

Sirley & Kean, Nairobi

Ambalal Becharbhai and Others v Alawi Abdul Rehman Bahurmuz
[1958] 1 EA 84 (CAA)

Division:	Court of Appeal at Aden
Date of judgment:	21 January 1958
Case Number:	87/1957
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Aden at Aden–Knox-Mawer, Ag. C.J

[1] Landlord and tenant – Standard rent – Principles of assessment – Whether Supreme Court has power to assess rent on an appeal from Rents Tribunal – Rent Restrictions Ordinance (*Cap.* 136), *s.* 6 (*A.*) – *Civil Courts Ordinance* (*Cap.* 25), *s.* 98 (*A.*) – *Rent and Mortgage Interest Restriction Act,* 1920 (*A.*) – *Appeals to the Court of Appeal Ordinance* (*Cap.* 7), *s.* 6 (*A.*).

Editor's Summary

The respondent as agent for the landlord of a certain building in Aden applied to the Aden Rents Tribunal to assess standard rents for various portions of the building. The tenants appealed to the Supreme Court against these assessments. The court decided that the tribunal had not considered the question as to whether the rent of the premises in 1939 was ascertainable or not, and remitted the matter to the tribunal. The tribunal on the evidence was unable to decide whether the premises were let on September 3, 1939, and again assessed the rent at the same figure as before. The tenant appealed a second time to the Supreme Court which again remitted the matter to the tribunal and indicated the method by which the standard rent should be assessed, namely to ask itself what would have been the standard rent on September 3, 1939, and then to add the statutorily permitted increase. The tribunal heard the matter for the third time and failed to apply the principle indicated by the Supreme Court, and arrived at the same decision as before. On appeal by the tenants for the third time the acting chief justice held that the tribunal had failed to apply the principle indicated, and concluded that it would be useless to remit the matter again to the tribunal, and made his own assessments. On appeal from this decision it was argued that the Supreme Court had no jurisdiction to assess the rent, and even if it had the acting chief justice had himself failed to apply the correct principle in assessing the rent.

Held –

(i) in accordance with the Rent Restrictions Ordinance s. 6 and in the absence of any specific provision, it is a necessary inference from the fact that an unlimited right of appeal is conferred that the Supreme Court possesses all powers necessary to deal with such appeals including power to substitute its own findings on questions of fact and of quantum for those of the tribunal, and hence has jurisdiction to assess the rent of the suit premises;

(ii) the learned acting chief justice had failed to apply the correct principle and there was no proper basis for the rents fixed.

Appeal allowed. Proceedings remitted to the Rents Tribunal to determine the standard rents.

No cases referred to in judgment

January 21. The following judgments were read:

Judgment

Forbes JA: This is an appeal against a decision of the Supreme Court of Aden fixing the rents payable in respect of various portions of a building situated in Section A, Crater. The appellants are the tenants of the different

portions of the building. The original application to the Aden Rents Tribunal to fix standard rents for the premises was made by the respondent as agent for the landlords in October, 1956. That application was heard by the Rents Tribunal in December, 1956, and the following brief judgment was recorded:

> "After viewing the premises and hearing the parties and their witnesses and taking into account all the surrounding circumstances the Rent Tribunal fixes the rent of the said premises at Shs. 800/- p.m. as follows:
>
> 1. Godown No. 160/173 (G.F.)
> at Shs. 100/- p.m. Occupied by Resp. No.1
> 2. Godown No. 160/173 (G.F.)
> at Shs. 100/- p.m. Occupied by Resp. No.2
> 3. Godown No. 160/173 AI
> at Shs. 150/- p.m. Occupied by Resp. No.3
> 4. Flats on 1st and 2nd Floor
> at Shs. 400/- p.m. Occupied by Resp. No.4
> 5. Shop No. 160/174
> at Shs. 50/- p.m. Occupied by Resp. No.5
>
> Shs. 800/-"

Against this decision the tenants appealed to the Supreme Court. The learned acting judge of the Supreme Court, who heard the appeal, remitted the matter to the Rents Tribunal for re-hearing. The material part of his judgment is as follows:

> "Mr. Sanghani's main ground of appeal is that the tribunal has apparently assessed the rent entirely on the basis of its own valuation of the premises whereas the tribunal should and could have based its assessment upon the 1939 rents plus the twenty-five per cent. permitted increase. In this connection three decisions of this court may be cited.
>
> "In *Vraglal Govindjee v. Abdul Rehman Salem El Hibshi*, 2 Aden L.R. 86, the tenant framed an appeal to the Supreme Court on the ground that the tribunal had made its assessment by estimate after inspection, instead of basing it upon the rent at which the premises were let on September 3, 1939. The court however held that the appellant had had an opportunity before the tribunal of proving that the premises were let on September 3, 1939, but had refrained from doing so, or had been unable to do so. It was not, the court ruled, incumbent upon the tribunal suo motu to make investigations into the matter and the appeal was therefore dismissed. However in the present case Alawi Abdul Rehman Bahurmuz admitted that the premises were indeed let in 1939.
>
> "Mr. Ansari for the respondents has relied upon the case of *Hani & Rohel Awad Salem v. S. Saeed Waked*, Civil Appeal No. 6 of 1956. In that case the Supreme Court on perusing the record of the hearing before the tribunal found that there was no evidence at all regarding the 1939 rent. I do not think this can fairly be said to be so in the present case.
>
> "In *Mohamed Jaber Nader v. Abdulla Omer Bazara & Bros*., Civil Appeal No. 21 of 1955, this court was concerned with a similar argument. There the Supreme Court stated 'On perusal of the file it appears that the parties never mentioned at all that the premises were let in 1939. Had that been done there might be some force in the argument that the tribunal should have followed up such a statement by a query as to what was the amount of the rent.' In the present case there was certainly the evidence of the fifth appellant who was actually tenanting the same premises throughout 1939. Furthermore there was the testimony of Mr. Tripathi who tenanted the second floor flat from 1941 onwards, and

the Municipality assessments for 1939-1940, which were produced before the tribunal.

"If the tribunal has decided entirely to disregard this evidence and to arrive at an independent assessment based solely on inspection, then it should, in order to conform with justice, equity and good conscience, at least say so in the finding and if possible give its reasons for so doing. For otherwise it becomes arguable that the tribunal has not even directed its mind to the question as to whether any of the 1939 rents were ascertainable or not. Accordingly I think it just that the case should be sent back to the tribunal so that after fully considering this question, the tribunal may record a clear finding thereon."

The tribunal re-heard the application on February 17, 1957, and delivered the following judgment:

"Having heard further evidence from the parties on the issues (*a*) whether or not the applicant is entitled to make this application for and on behalf of the co-owners; and (*b*) what was the rent, if any, paid for the premises in 1939 i.e. on September 3, 1939, we have come to a clear finding thereon namely that the applicant has the right to apply to this tribunal and secondly that no rent was paid for the premises on September 3, 1939. We have fully considered this question and have come to a finding thereon. We have directed our minds to the question of rent in 1939. We have, on the evidence submitted been unable to find out if the premises were let on September 3, 1939. We consider the figure of Shs. 142,500/- paid for the premises as rather excessive and we do not accept the figure. Having regard to the circumstances of the case and considering all factors thereon, we fix the standard rent of the premises at Shs. 800/- p.m. as follows:"

And the tribunal proceeded to fix the rents at the same figures as had been fixed at the original hearing.

Once again the tenants appealed. On this appeal coming before the learned chief justice he said:

"The second ground of appeal is that even if no September 3, 1939, rent can be established, and I am satisfied that the decision of the tribunal that they could find no such rent here is to be supported, nevertheless, the tribunal erred in that they looked at the building in 1957 and assessed the rent on the basis of what a reasonable rent would be if the building had been erected in, for example, 1956. I have been referred to Megarry on Rent Restriction (8th Edn.) p. 28 where the author says:

'He who seeks a standard rent must first see whether a letting of the right kind existed on August 3, 1914, or September 1, 1939, as the case may be. If not, he must travel backwards in time from the date until he comes to such a letting. If he can find none, then he must retrace his steps and travel forwards in time from that date until he comes to the first letting of the requisite nature. Where the only tenancy of which there is evidence was granted after the relevant date, this will establish the standard rent, even if there is no positive evidence that this was the first letting. Rating returns and estate duty affidavits have been admitted as secondary evidence; but the information contained in a mere abstract of title is insufficient evidence of an earlier letting.'

"This of course is true by reason of the definition of standard rent in the English Increase of Rent and Mortgage Interest Restrictions Act, 1920. This reads as follows:

'The expression "standard rent" means the rent at which the

> dwelling house was let on August 3, 1914 or, where the dwelling house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling house which was first let after the said August 3, the rent at which it was first let.'

"The definition of 'standard rent' in the Aden Rent Restrictions Ordinance (Cap. 136) bears no similarity to the English Act. It reads:

> ' "standard rent" means in respect of premises, to which this Ordinance applies, such rent as may be fixed in accordance with the provisions of this Ordinance by a Rents Tribunal established under those provisions or, where no such rent has been fixed, the rent at which such premises were let on the third day of September, one thousand nine hundred and thirty-nine plus twenty-five per cent thereof; provided that the Governor-in-Council may by order alter the said amount of twenty-five per cent., and in that event such altered amount shall be deemed to be incorporated in this definition in place of the said twenty-five per cent.'

"The definition provided by the Aden Ordinance seems to me to be quite unhelpful since, although it is said that the standard rent of premises not let on September 3, 1939, shall be that which is 'fixed in accordance with the provisions of this Ordinance', the Ordinance does not in fact contain any such provisions at all. It is hoped that the legislature will interest itself in this defect.

"Can a basis for assessing these rents of premises in existence in 1939 but not let till later be deduced from the Ordinance as a whole? I think it can. I agree with Mr. Sanghani's contention that it does violence to the whole intention of the Ordinance if a material difference is allowed to exist in the standard rent of two identical buildings both in existence on September 3, 1939, one of which is let on that day and the other which is let on September 4, 1939. It seems to me that the only basis, under the Ordinance as it stands at present, upon which the tribunal can decide the rent of premises such as these which we are discussing is to ask itself what would have been the standard rent on September 3, 1939, and then to add the statutorily permitted increase.

"It remains to decide whether, applying this principle to the present case, the tribunal have erred. In my view they appear to have done so. In the first place there was evidence which they appear to have accepted that the building was let at somewhat lower rents in previous years. One of the previous tenants, Mr. Tripathi, giving evidence, says that in 1941 he became a tenant of part of the premises and paid a rent which was materially lower than that assessed by the present tribunal. He says in his evidence 'at that time there was not much of a population in Aden and that is why a good number of flats were available.' There is no reason whatever to suppose that the rent of a flat in 1941 would be less than that of one on September 3, 1939. In fact the contrary is to be expected for there was even less population in Aden in 1939 than in 1941.

"It is observed also that the tribunal have directed their minds to a sum of Shs. 142,500/- paid for the premises by a purchaser in 1953. It is true that the tribunal says that it considers the figure 'to be rather excessive and we do not accept the figure.' Nevertheless on the principle which I have set out the tribunal should not, in cases such as this, pay any attention to the cost of the building whatever and here I think they have done so. The application must therefore go back to the tribunal for rehearing."

I respectfully agree with the conclusion reached by the learned chief justice

as to the method which ought to be employed to assess the standard rent of premises which were in existence in 1939 but either were not let on September 3, 1939, or the rent payable at that date is in dispute, if his reference to "the standard rent on September 3, 1939", is read as

> "the notional economic rent which would have been obtainable if the premises had been let on September 3, 1939."

I think it is sufficiently clear that this is what the learned chief justice intended. The reference to a standard rent in 1939 is clearly a slip since under the Rents Restriction Ordinance (Cap. 136) there was no standard rent in 1939.

It is true that, as the learned chief justice points out, the Rents Restriction Ordinance does not provide any express guide, such as is to be found in English legislation, as to the principles which should guide a Rents Tribunal in fixing rent. The Ordinance, however, is an Ordinance "to restrict the increase of rent", and, where the rent payable on September 3, 1939 is ascertainable, the Ordinance lays down that the permitted increase is twenty-five per cent. This must clearly be the yard stick which a Rents Tribunal should, if possible, apply in determining the standard rent of any old-established building. Any other method must, again as the learned chief justice points out, result in anomalies and do violence to the whole intention of the Ordinance. Certainly where a building was in existence in 1939 the Rents Tribunal should endeavour to reach a conclusion as to the actual rent or notional economic rent at that time and should assess the standard rent on the basis of that rent together with the permitted increase, after, of course, making allowance for any alteration or reconstruction which may have been carried out.

Upon the re-hearing ordered by the chief justice the tribunal declined to depart from the assessment of rents which they had previously made. Their judgment is as follows:

> "This case comes to this tribunal for rehearing a second time. No further evidence has been produced by the parties. Both the advocates, Mr. Ansari and Mr. Sanghani, address the tribunal. After hearing both the advocates we come to the conclusion that we cannot possibly ask ourselves what would have been the standard rent of the premises on September 3, 1939, because, in fact, we hold that the premises were not let on September 3, 1939. It would have been possible for us to do so had we come to the conclusion that the said premises were let on September 3, 1939, but that the rent paid was in dispute or in doubt. We state that the premises were not let on September 3, 1939, and we cannot, therefore, imagine what was the rent, if any, paid on that date.
>
> "Furthermore, this tribunal is of the opinion that we cannot necessarily or presumably hold that because Mr. Tripathi paid a low rent in 1941 for a part of the premises, the rent in respect of the premises would be lower still on September 3, 1939, because again we hold that on September 3, 1939, the said premises were not let.
>
> "Mr. Tripathi's statement in this connection, like the municipal assessment for the premises in 1939/40, can only be a guide but is not binding on the tribunal. If the assessment of the municipality in 1939 may be a guide only, more so is Mr. Tripathi's evidence of rent in 1941. In *Jamnadas Nathoobhai v. Messrs. Salem & Mohamed Bashenfer*, Civil Appeal No. 2/1955, it was held by the Supreme Court that the only rent which rules the Tribunal is the actual rent between the landlord and the tenant.
>
> "Moreover, in this case, we have not taken the cost of the premises or building into consideration, although in Civil Appeal No. 21/1956, *Saeed Mohamed Omer Bazara v. Abdul Kader Gunaid Bagonaid*, the Supreme

> Court held that the tribunal should consider the costs of the building, we repeat that we do not accept the figure given by the applicant.
>
> "The tribunal has considered this case very carefully and at great length. We feel that in view of the conditions of the premises, its area and its situation, and considering all the circumstances of the case, we cannot possibly arrive at any other conclusion and we accordingly assess the standard rent of the premises at Shs. 800/- p.m."

It is possible that the tribunal was misled by the learned chief justice's reference to "the standard rent on September 3, 1939". From the tenor of the judgment, however, it seems to me more probable that the misunderstanding of the learned chief justice's direction was calculated, and that the decision was deliberately perverse. Whatever the reason, the tribunal did not apply the principle which the learned chief justice had directed it to apply. There was in fact considerable material in the evidence on which a finding as to the notional economic rent which would have been obtainable had the premises been let in September, 1939, could have been reached.

Yet another appeal by the tenants to the Supreme Court followed this judgment, and this time the appeal came before the learned acting chief justice. The learned acting chief justice concluded, not unreasonably in the circumstances, that it would be useless to remit the matter yet again to the Rents Tribunal, and proceeded to make his own assessment of the rents. His judgment is as follows:

> "This is an appeal by the tenants of a building situated in Section A, Crater, against the assessments by the Rents Tribunal of the standard rents of the various portions of the building occupied by them. This is in point of fact no less than the third occasion upon which the Rents Tribunal has arrived at a decision in this matter, and this is the third appeal lodged against that decision. Upon each of the former occasions this court has remitted the case to the tribunal for its further consideration.
>
> "It has been pointed out by this court that in assessing the standard rent of a pre-war building such as this, where the premises were either owner-occupied on September 3, 1939, or where the rental then paid is unascertainable, the Ordinance lays down no specific provision binding upon the tribunal. However this court has indicated certain considerations which should weigh with the tribunal in arriving at its figures in such a case.
>
> "The tribunal has however found itself unable to allow those considerations to influence its decision. The only course therefore is for this appellate court to substitute its own assessments. These assessments are in the opinion of this appellate court equitably adjusted so as to represent a fair balance between the factors which have influenced the tribunal and the factors particularly stressed by the chief justice in his judgment when this case was last before the Supreme Court.
>
> 1. Godown 160/173 (ground floor) occupied by appellant No.1 Shs. 69/50.
> 2. Godown 160/173 (ground floor) occupied by appellant No.2 Shs. 69/50.
> 3. Godown 160/173A1 (ground floor) occupied by appellant No.3 Shs. 115/-.
> 4. Flats on 1st and 2nd floor occupied by appellant No.4 Shs. 315/-.
> 5. Shop No. 160/174 (ground floor) occupied by appellant No.5 Shs. 32/50.
>
> "The standard rent of the whole building thus totals Shs. 601/50.
>
> "The appellants are awarded costs."

Against this last decision the tenants have appealed to this court, and this is the appeal now under consideration.

The first ground of appeal argued by Mr. Sanghani for the appellants was whether the Supreme Court had jurisdiction to make its own assessment of the rents in question. He contended that the Supreme Court did not possess such jurisdiction, and that it should either have remitted the matter back to the Rents Tribunal for yet a fourth hearing, or have set aside the Rents Tribunal assessments and dismissed the application for the fixing of standard rents.

The right of appeal against a decision of the Rents Tribunal is conferred by s. 6 of the Rents Restriction Ordinance, which reads as follows:

> "6. Any person aggrieved by a decision of the Rents Tribunal may, within fourteen days of such decision, apply to the judge of the Supreme Court for leave to appeal to such court and if such leave is granted may appeal to the said court in accordance with the provisions applicable to appeals in that court but subject to any rules made under the provisions of this Ordinance."

No rules relating to appeals have been made under the Rents Restriction Ordinance, and therefore the right of appeal, subject to leave to appeal being granted, is to appeal in accordance with the provisions applicable to appeals to the Supreme Court from subordinate courts. It is not clear whether this provision refers to practice and procedure only, or is intended to regulate such matters as the powers of the court on an appeal, but I do not think that the point is material here. If the provision does extend to regulate the powers to be exercised by the court, it will have the effect of importing s. 98 of the Civil Courts Ordinance (Cap. 25), which confers, *inter alia*, power to determine a case finally. If, as appears to me to be the true construction, the provision relates only to practice and procedure, then I am of opinion that, in the absence of any specific provision, it is a necessary inference from the fact that an unlimited right of appeal is conferred that the appellate court should possess all powers necessary to deal with such appeals, including power to substitute its own findings on questions of fact and of quantum for those of the tribunal. Accordingly I am of opinion that on any construction of s. 6, the Supreme Court had jurisdiction to assess the rents of the suit premises.

The next question argued on the appeal was whether the learned acting chief justice applied the proper principles in arriving at his assessment. Mr. Sanghani argued in support of the principle laid down by the learned chief justice that the standard rent should be assessed by reference to the notional economic rent in 1939, but submitted that the learned acting chief justice did not apply this principle and that there was no proper basis for the rents fixed by the learned acting chief justice.

I find myself in agreement with this argument.

Mr. Handa for the respondent argued that the learned chief justice did not lay down a principle on which the tribunal was required to act, but merely indicated points for the consideration of the tribunal. I cannot accept this argument. In my opinion the learned chief justice gave the tribunal a specific direction as to the proper principle to be applied. The learned acting chief justice very properly held that the tribunal had failed to apply that principle. But, with the greatest respect, he then failed to apply it himself. He says of the assessments which he makes

> "These assessments are in the opinion of this appellate court equitably adjusted so as to represent a fair balance between the factors which have influenced the tribunal and the factors particularly stressed by the chief justice in his judgment when this case was last before the Supreme Court."

By so striking a balance he has, as it seems to me, departed from the principle laid down by the learned

chief justice, which, as I have stated, is in my opinion

the proper principle to be applied. In the circumstances, I am of opinion that the appeal should succeed, and the assessments made by the learned acting chief justice should be set aside.

Mr. Sanghani invited this court to fix the rents itself, though this invitation appeared somewhat at variance with his earlier submission that even the Supreme Court had no jurisdiction to fix the rents. I have already stated my conclusion that the Supreme Court had jurisdiction to fix the rents itself, and in view of the unrestricted right of appeal (subject to the grant of leave in certain cases) to this court conferred by s. 6 of the appeals to the Court of Appeal Ordinance (Cap. 7), it would seem that this court also would have the power to fix the rents in appropriate cases. This aspect of the matter, however, once the proper principle is appreciated and applied, becomes purely a question of fact which is far more appropriate for determination by the Rents Tribunal, the body designated by the legislature to carry out this duty. Accordingly, and notwithstanding the attitude previously adopted by the Rents Tribunal, I would remit the matter to the tribunal to determine the standard rents in accordance with the principle set out above. The appellants should have the costs of the appeal.

There is one other matter to which I would refer. The record in this appeal has been certified by Mr. Sanghani to be a true copy. In fact it is nothing of the sort. It contains a variety of typographical errors which in some cases are sufficiently serious to make the meaning of the particular passage obscure. This is most unsatisfactory and causes difficulty and delay. The whole object of requiring a certificate by counsel is to secure an accurate record for the use of the court, and it is counsel's duty to see that the record really is accurate before he certifies it. It is to be hoped that in future counsel will take that duty seriously. If this is not done, the court may be obliged to disallow costs of preparing the record.

Sir Kenneth O'Connor P: I agree with the judgment that has just been read. The appeal is allowed with costs in this court and the court below. The assessments of rent made by the Supreme Court are set aside and the matter is remitted to the Rents Tribunal to assess the standard rents of the premises on the principle set out in the judgment just delivered.

Briggs V–P: I agree.

Appeal allowed. Proceedings remitted to the Rents Tribunal to determine the standard rents.

For the appellants:
PK Sanghani
PK Sanghani, Aden

For the respondents:
HM Handa
HM Handa, Aden

Khamis Bin Salim Bin Khamis El Sheksi v Mohamed Ismail Khoja
[1958] 1 EA 92 (CAZ)

Division: Court of Appeal at Zanzibar

Date of judgment: 26 March 1958

Case Number:	73/1957
Before:	Sir Kenneth O'Connor P, Forbes JA and Gray Ag J
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Zanzibar–Windham, C.J

[1] Sale of land – Consent of Land Alienation Board obtained – Transfer registered – Option to repurchase at higher price not registered – Whether entire transaction constitutes sale or mortgage – Land Alienation Decree, 1939, *s.* 4 (*Z.*) *– Registration of Documents Decree* (*Cap.* 111), *s.* 4 *and s.* 6 (*Z.*) *– Transfer of Property Decree* (*Cap.* 82), *s.* 54 *and s.* 59 (*Z.*) *– Evidence Decree* (*Cap.* 10), *s.* 92 (*Z.*) *– Alienation of Land* (*Restriction and Evidence*) *Decree* (*Cap.* 112), *s.* 18 (*Z.*) *– Land Protection* (*Debt Settlement*) *Decree,* 1958 (*Z.*) *– Indian Registration Act,* 1908, *s.* 17 *and s.* 49.

Editor's Summary

The appellant in 1951 purported to sell a shamba in Pemba to the respondent. As the appellant was an Arab the consent of the Land Alienation Board was required and this was duly obtained and the transfer was registered in the Register of Documents on December 15, 1951. Shortly after the sale of the shamba a document, signed by the respondent and witnessed by a single witness, gave the appellant an option to repurchase the shamba on or before Rajab 5, 1371, at the price of Shs. 6,000/-. This document was not registered. The appellant continued in possession of the shamba until August, 1956, when the respondent instituted proceedings to recover possession and mesne profits. The defence was that the transaction was not a sale but a mortgage. The High Court rejected this contention and gave judgment for the respondent, whereby the appellant was ordered to give up possession and to pay Shs. 2,500/-mesne profits. On appeal it was contended that the trial judge erred in finding that the transaction was an outright sale followed by a conditional option of repurchase and should, following the English principles of equity, have found that the transaction was a mortage and that the appellant retained an equity of redemption.

Held –

(i) under the provisions of s. 59 (1) of the Transfer of Property Decree a document must be signed, witnessed and registered before it can take effect as a mortgage and s. 4 of the Registration of Documents Decree, which provides that an unregistered document shall not "affect any immovable property comprised therein or be received as evidence in any civil proceedings of any transaction affecting that property", applied to the option to repurchase which in any event had expired.

(ii) the English principles of equity affecting mortgages by conditional sale must give way to the express statutory provisions of s. 59 (1) and accordingly the transaction was a straightforward sale.

Appeal dismissed.

Case referred to in judgment:

(1) *Athman bin Haji v. Said bin Saleh* (1929), 4 Z.L.R. 58.

(2) *Harkisondas v. Bai Dhanu* (1926), 50 Bom. 566.

(3) *Balkishen Das v. Legge* (1900), 22 All. 149.

(4) *Ariff v. Jadunath Majumdar* (1931), 58 I.A. 91.

March 26. The following judgments were read by direction of the court:

Judgment

Forbes JA: This is an appeal from a decision of the High Court of Zanzibar.

The appellant was, in 1951, the owner of a shamba situated in the district of Chake Chake, Pemba. On October 2, 1951, he purported to sell this shamba to the respondent. Since the appellant was an Arab, it was necessary, in order to effect the sale, to obtain the consent of the Land Alienation Board under s. 4 of the Land Alienation Decree, 1939 (No.9 of 1939). Sub-section (1) of that section as it then was (it has subsequently been replaced) read as follows:

> "4.(1) From and after the commencement of this Decree no permanent alienation of land and no lease thereof for a term exceeding two years and no mortgage thereof (where such permanent alienation, lease or mortgage is evidenced by an instrument executed subsequent to the commencement of this Decree) shall where the alienor lessor or mortgagor is an Arab or an African, be of any effect unless and until consent is given thereto by the board established for the area in which the land is situated, and such consent is endorsed upon the instrument effecting such transaction:
>
> Provided that the provisions of this sub-section shall not apply in the case of—
>
> (*a*) gifts during lifetime in favour of near relatives; and
>
> (*b*) wakfs in favour of near relatives."

It may be noted that the grounds on which the consent of the board may be refused in the case of a proposed sale differ considerably from the grounds on which such consent may be refused in the case of a proposed mortgage. The relevant provisions are contained in s. 5 and s. 7 of the Decree. And it may also be noted that a ground on which consent to a proposed sale may be refused is

> "where the board has good cause to believe that the proposed transfer is intended by the parties thereto to take effect as a mortgage" (s. 5 (1) (*c*)).

Application for consent to the proposed sale was made by the appellant and was in evidence as exhibit D in the High Court. The instrument of transfer (exhibit A) was duly executed by the parties on October 2, 1951, and was submitted for registration on that date. The consent of the Land Alienation Board to the sale was given on September 22 and was endorsed on the instrument of transfer on October 15, 1951, and the instrument was registered in the Register of Documents on December 15, 1951.

Notwithstanding the sale of the property, the appellant remained in occupation, and it was not till August, 1956, that the respondent instituted proceedings for recovery of possession of the shamba. In his plaint the respondent alleged that the reason for the appellant's retention of possession of the shamba was that the parties had entered into a collateral agreement whereby the appellant was given an option to repurchase the shamba within a limited period. This alleged agreement was evidenced by a document signed by the respondent and witnessed by a single witness, and was in evidence as exhibit B. It reads as follows:

> "To: Khamis bin Salim bin Khamis el Sheksi,
>
> of Ole, Chake Chake.
>
> "This is to write that you have sold your shamba by a registered deed on 2.10.51. The very shamba you agree to repurchase for Shs. 6,050/-

> (shillings six thousand and fifty) and I have received Shs. 50/-towards that sum. I undertake to write a deed on payment of the balance of Shs. 6,000/-.If you fail to pay the said sum by 5th Rajab, 1371, this transaction shall stand as cancelled."

This document was not registered. It is dated October 7, 1951, but the learned chief justice in his judgment expressed the view that it might well have been executed on October 3.

Besides possession of the shamba, the respondent in his plaint claimed mesne profits to the amount of Shs. 2,500/-.

In his written statement of defence the appellant alleged, in effect, that the transaction had been a mortgage transaction in respect of a loan of Shs. 5,000/-. In paragraph 2 (*b*) he averred that the respondent–

> "falsely and fraudulently represented to the defendant (i.e. the appellant) that as he was not a licensed money lender, he could not advance the said sum of Shs. 5,000/- to the defendant on a mortgage of the said shamba but could pay the sum of Shs. 5,000/- to him if he executed a sale deed of his aforesaid shamba in his favour, and further falsely and fraudulently proposed to reconvey the said shamba to the defendant on repayment of the sum of Shs. 6,000/- plus Shs. 50/-."

At the trial, the appellant, who was then unrepresented, said in evidence, *inter alia*:

> "I did not sell the shamba to plaintiff, but I mortgaged it. . . . I took 5,000/- from him and I agreed to repay Shs. 6,000/-. . . When the harvest came I gave him Shs. 2,000/- towards repayment of this Shs. 6,000/-."

And in cross-examination he said:

> "I admit that exhibit A is a sale deed. I know the difference between a sale and a mortgage."

The material parts of the learned chief justice's judgment are as follows:

> "On carefully considering all the evidence I find myself driven to the opinion that neither the plaintiff nor the defendant was telling the whole truth. I think it may well be that on or before the execution of exhibit A the plaintiff paid to the defendant not the full purchase price of Shs. 6,000/- as expressed and acknowledged by the defendant therein, but only Shs. 5,000/- the balance of Shs. 1,000/- being considered as interest, both parties knowing well that the twofold transaction was in its intended effect, though not legally, a mortgage rather than a sale. And from the evidence of the plaintiff's rough account book, exhibit E, I think that the date when exhibit B was in fact executed may well have been not October 7, as expressed thereon, but October 3, that is to say one day after the execution of exhibit A. But having said that, I do not find that it alters the legal effect of those two documents, which in short is that exhibit A is an out and out sale to the plaintiff and exhibit B is the granting by the plaintiff to the defendant of an option to repurchase, upon terms which the defendant failed to comply with, so that the option expired on March 30, 1952.
>
>
>
> "As regards the remainder of the evidence in the present case, where that of the plaintiff conflicts with that of the defendant, I hold, even after giving due weight to the fact that the evidence of a convicted forger must be looked at with caution, that his evidence is to be preferred to that

> given and called by the defendant, and in particular I find that the plaintiff was not guilty of any misrepresentation towards the defendant regarding the nature of the documents that were being executed or would be executed. Both parties, I am satisfied, knew exactly what they were doing, and did it with their eyes open. I also find that at no time did the defendant pay or tender to the plaintiff, or to anyone on the plaintiff's behalf, any part of the Shs. 6,000/- mentioned in exhibit B. The payment of Shs. 2,000/- evidenced by the plaintiff's receipt, exhibit C, relates in my view, as indeed it would appear from the face of that receipt, to some quite different transaction between the parties. I cannot avoid the conclusion that in remaining on the shamba until now, and in putting up the defence which he has failed to substantiate, the defendant has been seeking to retain the fortuitous advantages which accrued to him in 1953 through a bumper clove harvest (which was keeping the plaintiff himself fully occupied with other shambas) and from 1954 until 1956 through the plaintiff's imprisonment. Finally, I accept the plaintiff's unchallenged estimate of Shs. 2,500/- as the mesne profits from October 2, 1952, when the disputed shamba became his property, and August 28, 1956, when this action was filed.
>
> "I accordingly give judgment for the plaintiff as prayed, and order the defendant to deliver up to him possession of the disputed shamba on or before April 30, 1957, and to pay to him Shs. 2,500/- as mesne profits thereon, together with his costs of this action."

In reaching his decision as to the legal effect of documents, exhibits A and B, the learned chief justice relied on the decision in the case of *Athman bin Haji v. Said bin Saleh* (1) (1929), 4 Z.L.R. 58.

From this decision the appellant has appealed, the grounds of appeal being that–

> "The learned judge erred in holding that the transaction evidenced by the documents produced constituted an outright sale followed by a conditional option of repurchase, and should have held that they constituted a mortgage and that the appellant retained an equity of redemption."

With great respect, I find the learned chief justice's conclusion that

> "in remaining on the shamba until now . . . the defendant has been seeking to retain the fortuitous advantages which accrued . . . through a bumper clove harvest"

a little difficult to reconcile with his earlier conclusion that it may well have been

> "that the twofold transaction was in its intended effect, though not legally, a mortgage rather than a sale."

I, personally, have little doubt that the earlier conclusion was correct and that the appellant was allowed to remain in possession because the transaction was intended to take effect as a mortgage.

However, in the view I take of the case I do not find that conclusion material. Various matters were argued on the appeal, and in particular Mr. Fraser Murray for the appellant sought to establish that the principles of equity applicable to transactions of a similar nature in England should be applied, and that, applying those principles, the transaction should be held to be a mortgage. In my view, however, the matter is governed by statute. I have already referred to s. 4 (1) of the Land Alienation Decree, 1939, which provides, *inter alia*, that a mortgage is to be of no effect unless the consent of the Land Alienation Board has been obtained. Sub-section (2) of that section also provides:

> "Notwithstanding the provisions of sections 54 and 59 (1) of the Transfer of Property Decree, every such alienation and mortgage as is mentioned in sub-section (1) shall be effected by a registered instrument."

The other relevant statutory provisions are s. 4 and s. 6 of the Registration of Documents Decree (Cap. 111), s. 59 (1) of the Transfer of Property Decree (Cap. 82), and s. 92 of the Evidence Decree (Cap. 10).

The material portions of s. 4 and s. 6 of the Registration of Documents Decree are as follows:

> "4. No document executed after the first day of January, 1920, purporting or operating to create, declare, assign, limit, or extinguish any right, title, or interest, whether vested or contingent to, in, or over immovable property in Zanzibar, except such documents as are of a testamentary nature, shall affect any immovable property comprised therein or be received as evidence in any civil proceedings of any transaction affecting that property unless it has been registered as hereinafter prescribed:
>
> "Provided that an unregistered document affecting immovable property and required by this Decree or the Transfer of Property Decree to be registered may be received as evidence—
>
>
>
> (*c*) of any collateral transaction not required to be effected by registered instrument."
>
> "6. Notwithstanding the provisions of section 4 of this Decree it shall not be necessary to register any of the following documents–
>
>
>
> (*e*) any document which merely creates a right to obtain any other document;"

And the material portion of s. 59 (1) of the Transfer of Property Decree reads as follows:

> "59(1) Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses."

It is clear that in Zanzibar a mortgage such as that which is alleged to exist in the instant case can only be effected by registered instrument. And I am clearly of the opinion that where the transaction comprises two documents, as alleged in this case, the provisions of s. 59 (1) of the Transfer of Property Decree must apply to each document and, if the transaction is to take effect as a mortgage, that each document must be signed by the mortgagor and two witnesses and be registered. It was argued that the second document, exhibit B, fell either under para. (*c*) of the proviso to s. 4 of the Registration of Documents Decree or under para. (*e*) of s. 6 of that Decree. If the two documents constitute two independent transactions, this argument may well be correct; but if they constitute a single transaction I do not think it is possible to separate them and treat one part as exempt from registration by virtue of those paragraphs. The whole document evidencing the transaction, whether it consists of one part or of two, must comply with the requirements of s. 59 (1) of the Transfer of Property Decree. That is, the whole must be duly signed, witnessed and registered in compliance with that section before it can take effect as a mortgage. It follows that the provisions of s. 4 of the Registration of Documents Decree that an unregistered document shall not

> "affect any immovable property comprised therein or be received as evidence in any civil proceedings of any transaction affecting that property"

apply to exhibit B.

I am fortified in my view by the decision of the Full Bench of the High Court of Bombay in *Harkisondas v. Bai Dhanu* (2) (1926), 50 Bom. 566. In that case the questions referred to the Full Bench were:

> "Whether when a registered deed of sale (A) of immovable property worth Rs. 100 or over is passed, and as part of the same transaction and not as an independent transaction, the vendee executes an unregistered agreement (B) to reconvey the property to the vendor on payment of a certain sum of money, the document (B) is inadmissible in evidence for want of registration under s. 17 (1)(*b*) and s. 49 of the Indian Registration Act either,
>
> (*a*) where the transaction constitutes a mortgage, or
>
> (*b*) where it is a bona fide sale with a contract for repurchase."

The material parts of s. 17 and s. 49 of the Indian Registration Act are in pari materia the relevant provisions of s. 4 and s. 6 of the Zanzibar Registration of Documents Decree. The Full Bench in that case unanimously decided that the answer to question (*a*) was in the affirmative.

In the instant case, accordingly, if the transaction is a mortgage, the court is precluded by statute from having regard to the document exhibit B; and the only document then before the court is the conveyance, exhibit A, properly executed, consented to by the Land Alienation Board, and registered. Nor is oral evidence admissible to vary or add to the terms of exhibit A–s. 92 of the Evidence Decree; *Balkishen Das v. Legge* (3) (1900), 22 All. 149. It is true that evidence of circumstances to show the relation of the written language to existing facts is admissible in evidence under s. 92, but in the absence of the document, exhibit B, I do not think the available admissible evidence suffices to alter the ostensible effect of exhibit A. And although fraud was alleged in the pleadings the learned chief justice expressly held that the respondent was not guilty of any misrepresentation towards the appellant regarding the nature of the documents, and that both parties knew exactly what they were doing. I see no reason to differ from this finding.

It follows from what I have said that the principles of equity which would be applicable in England to a transaction of this nature are excluded by the statutory provisions mentioned. Equity cannot override the provisions of a statute and confer upon a person a right which the statute enacts shall be conferred only by a registered instrument (*Ariff v. Jadunath Majumdar* (4) (1931), 58 I.A. 91 at p.104).

It was suggested by the court during the hearing of the appeal that the consent of the Land Alienation Board to the sale might have been obtained by means of a fraudulent concealment of a material fact, namely, of the intention of the parties that the transaction should take effect as a mortgage (see s. 5 (1) (*c*) of the Land Alienation Decree, 1939) and that it might therefore be that the sale was invalid. Whatever might have been the result of an application by the appellant to set aside the purported sale on this ground (and it would seem that in any such proceedings he must have relied on a fraud to which he was party) the matter was not pleaded in the current proceedings and I do not think that at this stage this court can have regard to it. It is not without interest that s. 18 of the Alienation of Land (Restriction and Evidence) Decree (Cap. 112), which gave the court express power in certain circumstances to declare void a conveyance where it considered that the transaction amounted to a mortgage, was repealed and not re-enacted by the Land Alienation Decree, 1939.

It may be remarked in passing that it would seem that evasion of the restrictions applicable to mortgages under the Land Alienation Decree, 1939, by means of transactions such as the one under consideration, could be rendered more difficult if the prescribed form of application for the consent of

the board

were amended to include an express question requiring details, in the case of a proposed sale, of any collateral arrangement giving the vendor an option to repurchase.

In the result, I would order that the appeal be dismissed with costs.

Sir Kenneth O'Connor P: I have come to the same conclusion.

Only one point is raised in the memorandum of appeal, namely that the learned trial judge erred in holding that the transaction evidenced by the documents produced constituted an outright sale followed by a conditional option to repurchase, and should have held that they constituted a mortgage and that the appellant retained an equity of redemption. I have little doubt that the transaction evidenced by exhibits A and B, was intended by the parties to take effect as a mortgage. But, under s. 59 (1) of the Transfer of Property Decree, a mortgage for one hundred rupees or upwards can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. Exhibit A is registered, and it is signed by the mortgagor and attested by two witnesses. But exhibit A is an outright conveyance to a purchaser: it is not an instrument which could, by itself, effect a mortgage. Exhibit B is not attested or registered. Accordingly, under s. 59 (1) of the Transfer of Property Decree, it cannot effect a mortgage by itself. Neither, in my opinion, having regard to that sub-section, can a mortgage be effected by combining an unregistered and unattested instrument with another which is registered and attested. (*Harkisondas v. Bai Dhanu* (2) (1926), 50 Bom. 566, 586). In my view, the English authorities on mortgages by conditional sale must give way to the express statutory provision of s. 59 (1). Accordingly, the documents produced were not capable of effecting a mortgage and the learned chief justice was right in so holding.

I have come to this conclusion with some reluctance and I desire to endorse what has been said by the learned justice of appeal as to the desirability of requiring applicants for consent to alienations to disclose to the Land Alienation Board any collateral arrangement under which an option to repurchase has been, or will be, given. It seems to me that it would be highly desirable, if not essential, that the board should have this information to enable it to exercise its functions under s. 5 (1) (*c*) of the Land Alienation Decree.

Gray Ag J: I have come to the same conclusion, though I have reached it with considerable reluctance. It appears to me that between them the parties have succeeded–to use a colloquialism–"in driving a coach and six" through the provisions of the Land Alienation Decree, 1939, which had for one of its reasons and objects the protection of Arabs and Africans against entering into transactions of the nature disclosed by the oral evidence in this case.

I do not know the reason for the repeal without re-enactment of s. 18 of the Alienation of Land (Restriction and Evidence) Decree, 1934, which would have enabled the High Court to receive oral evidence in the present case. That enactment and the provisions of the Land Protection (Debt Settlement) Decree, 1938, which enabled a soi-disant purchaser to take advantage of the provisions of that Decree if he acknowledged in writing that the purported sale had "been intended by the parties to operate as a mortgage", clearly show that transactions such as that alleged by the appellant in this case have been very rife in the past.

Personally I would welcome in such cases as this to see the introduction of the English rules as to parol evidence on this subject, but as the President has

Said, English rules of equity cannot override the express statutory provisions of s. 59 (1) of the Transfer of Property Decree and any change in the relevant law, which may be deemed desirable, must be left to the legislature.

Appeal dismissed.

For the appellant:
WD Fraser Murray
Fraser Murray, Thornton & Co, Dar-es-Salaam

For the respondent:
NN Parikh
NN Parikh, Zanzibar

Ramdev Malik v Lionel Albert Callow
[1958] 1 EA 99 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	14 February 1958
Case Number:	2/1958
Before:	Crawshaw J
Sourced by:	LawAfrica

[1] Res judicata – Action to set aside a judgment alleged to have been secured by fraudulent evidence – Evidence which could have been challenged in earlier action – Indian Evidence Act, 1872, *s.* 44.

Editor's Summary

In an action before a magistrate at Tanga judgment was given for the respondent for arrears of salary claimed by him from the appellant. The appellant did not appeal. Instead he brought a new suit against the respondent alleging that the judgment in the earlier suit had been obtained by a fraudulent false statement made by the respondent in the course of his evidence and asked, *inter alia*, that the judgment be set aside. The alleged false statement was that certain forms had been signed by the respondent which in fact had not been signed by him, regarding the completion of certain works, and it was contended that this evidence was most material to the court in coming to a decision. The second suit was undefended but, after hearing proof, the magistrate came to the conclusion that the court had no jurisdiction as the matter was res judicata. On appeal the argument was whether, assuming there had been fraud as alleged, the fraud was of such a nature as to take the earlier decree out of the category of res judicata.

Held – the alleged fraud was included in something which had already been adjudged; to entertain the

new action would be to reopen the issue already decided and to test again the evidence of the respondent and that of the appellant and his witnesses thereon which the appellant could have done in the earlier suit.

Appeal dismissed.

Case referred to in judgment:

(1) *Kadirvelu Nainar v. Kuppuswami Naicker* (1918), 41 Mad, 743; (1919), A.I.R. Mad. 1044.

(2) *Baker v. Wandsworth* (1898), 67 L.J. Q.B. 301.

(3) *Flower v. Lloyd* (1877), 6 Ch. D. 297.

(4) *Mohammed Golab v. Sulliman* (1894), 21 Cal. 612.

(5) *Cole v. Langford*, [1898] 2 Q.B. 36.

(6) *Priestman v. Thomas* (1884), 9 P.D. 210.

(7) *Bhikaji Mahadev Gund v. Balvant R. Kulkarni* (1927), A.I.R. Bom. 510.

(8) *Nanda Kumar Howladar v. Ram Jiban Howladar and Another* (1914), A.I.R. Cal. 232.

(9) *Patch v. Ward* (1867), L.R. 3 Ch. D. 203.

(10) *L. Chinnayya v. K. Ramanna* (1915), 38 Mad. 203.

Judgment

Crawshaw J: In Tanga Civil Case No. 80 of 1955 the respondent sued the appellant for arrears of salary during the period July 1, 1954, to the end of April, 1955. The learned resident magistrate, Mr. Williams, found that salary had been paid by the appellant to the respondent at the rate of Shs. 800/- per month up to the end of June, 1954. On the first issue, "In what capacity did plaintiff work for defendant prior to 30.6.54?", the learned magistrate said,

> "I find that the plaintiff was employed on a salary basis prior to 30.6.54, the work to include the work of an electrical contractor for as long as he was employed by defendant."

The second issue was, "Did plaintiff work for defendant after that?", to which the learned magistrate replied, "I infer that the plaintiff worked for the defendant after 30.6.54". The third issue became irrelevant, and on the fourth issue, "To what relief, if any, is plaintiff entitled?", the learned magistrate said,

> "I find it not proved that there was any agreement to pay a particular amount of salary for the second period. I infer an acceptance by the defendant of the work done by the plaintiff even if there was no agreement in advance that he should continue the work which I consider is likely that there was."

Owing, it seems, to the vagueness of the respondent as to exactly what work he did do after June 30, 1954, the learned magistrate allowed him salary at only Shs. 400/- per month, and added,

> "As it would appear likely that after 30.6.54 about six weeks elapsed before there was even an agreement that plaintiff should stay on at defendant's premises I reduce the period in respect of which the rate is payable from the ten months claimed to eight and a half months."

Judgment was given on December 13, 1955, and a decree issued for Shs. 2,307/-.

The respondent's work with the appellant had, it seems, been concerned with electrical installations in connection with the appellant's business, described as iron and steel rolling mills. In considering issue 2, the learned magistrate said as follows:

> "Issue 2. Did plaintiff work for defendant after that? Plaintiff continued to sign Tanganyika Electric Supply Company's forms for notice of completion of installations (exhibit A) for a further period ending April, 1955, although his signature does not usually appear alone but with that of another electrical contractor. It would appear that there was no objection to plaintiff doing this from defendant himself, Mr. Sarjit Singh (P. 2), his mechanical engineer, or anyone else. It is admitted that plaintiff was resident at defendant's premises, being provided with food and accommodation and paid other expenses by defendant. Mr. Sarjit Singh stated that defendant used to go into the mill. Further, as this witness was apparently also resident, his odd statement that he did not remember if plaintiff worked during this period, should in my view be taken against defendant. I infer that plaintiff worked for defendant after 30.6.54."

Later, when dealing with issue 4, the learned magistrate observed in relation to the work of the respondent after June 30, 1954:

> "Plaintiff's evidence is vague as to what work he did other than to continue to assist in the electrical work but on the other hand defendant's evidence is in the circumstances of no assistance at all as to this. (D. 2's evidence has already been referred to in this connection). Considering that defendant had to employ another electrical contractor (see exhibit A), I am not satisfied that the value of plaintiff's work during the second period was more than half its value during the first period."

Against this judgment there was no appeal, but on April 24, 1956, the appellant filed a suit against the respondent, being Tanga Civil Case No. 263 of 1956, in which para. 4, para. 5, and the relevant part of para. 6, read:

> "4. The defendant on the 21st day of October, 1955, produced and exhibited to D. J. Williams, Esq., the presiding resident magistrate, at Tanga, the duplicate book of Notice of Completion of Installation and *inter alia* stated that all the forms had been signed by him in that book. This statement was false to the knowledge of the defendant and the defendant made this false statement with the intention of causing damage to the plaintiff.
>
> "5. The plaintiff has subsequently found out that the forms Nos. 2308 to 2311 inclusive were all fabricated in that the original forms sent to the Tanganyika Electric Supply Company, Limited, bore the signatures of one Hari Singh only and form No. 2312 was never sent to the said company.
>
> "6. The defendant by reason of his fraud as mentioned in para. 4 and para. 5 obtained a judgment and decree against the plaintiff for the sum of Shs. 2,307/- and Shs. 1,098/- as costs."

The appellant prayed that the judgment and decree in Civil Case No. 80 of 1955 be set aside and that in addition damages be awarded.

It seems that the plaint was duly served but that the respondent failed to appear or to submit any statement of defence and the suit was heard *ex parte* by another resident magistrate, Mr. Platt. The appellant adduced evidence in support of his plaint and his case is, as I understand it, that the originals of the installation forms concerned did not in fact bear the signature of the respondent, and that the forms produced by the respondent in Civil Case No. 80 of 1955 were duplicates on which the respondent, for the purpose of associating himself with the installation work in respect of which he claimed salary, signed his name. It was denied that he in fact did this work, and that the only genuine signature on the forms was that of Mr. Hari Singh. The following issues were framed:

(1) Was the learned resident magistrate influenced by the document produced by defendant before him?

(2) Was the document fraudulent?

(3) If so ought the case to be set aside?

(4) What damages should be awarded?

On September 25 the learned magistrate dismissed the suit with no order as to costs. Paragraph 1 of his judgment reads as follows:

> "This interesting case has been really framed upon the wrong issues, or at any rate the issues are framed in the wrong order. As I understand the case now, upon the authorities that I have found, a preliminary issue should have been framed whether the pleadings really raised an issue which this court had jurisdiction to hear from the point of view of s. 9, Civil Procedure Code or whether the whole case was not res judicata from s. 11, Civil

> Procedure Code viewpoint. The issue shortly is whether, assuming that the fraud alleged is true, is it such a fraud as will allow this court to entertain a suit to set aside the earlier decree of this court, passed on December 13, 1955, in a suit between these parties. If it is not, then the court has no jurisdiction or alternatively the matter is res judicata. If it is such a fraud then the court can entertain the suit, and the questions then arise whether damages follow as a result. Issues 2 and 3 more or less cover this field."

The learned magistrate then goes on to differentiate between fraud which would vitiate proceedings and perjury which would not. He refers to Indian cases which he says show that

> "no suit lies on the ground that the decree was obtained by perjured evidence; no suit lies for reversal of a former decree on the allegation of falseness of a fact which that decree establishes as true; or no suit to set aside a decree lies on the ground that it was obtained by suppression of evidence."

He then says:

> "The rationale, so the commentators all point out, is that where 'the parties have had the opportunity of putting their respective cases before the court and the court has come to a conclusion on the evidence, the rule of res judicata comes into operation and it is not open to the defeated party to reopen the matter by merely alleging that the evidence and the averments which the court believed were untrue'. (See Chitaley, p. 211, Vol. I, 2nd Edition)."

Paragraph 3 of the judgment reads:

> "The question therefore is whether the fraud alleged in this case is anything more than perjury. In that Mr. Callow made statements that he was being employed at the particular time in question that may be perjury. In that he must have written over the duplicates produced to court in carbon, but which signatures did not and could not have properly appeared upon the originals he appears to have fabricated evidence to support his perjured statements. Both these acts contravene the provisions of the Penal Code. The second is in the nature of perjury and in my opinion is not different in principle. If that is so then this present suit is not competent. I think it must be that they both relate to a fact which the court considered was true, but which now appears false. These acts do not appear upon the face of the decree. It may be that the word 'contrivance' may have led to some confusion in that the fabrication of this evidence might be termed, rather loosely, a contrivance, but I think that the quotations used above discredit such a construction. It follows therefore that this court has no jurisdiction to hear this case."

Finally, in para. 6, the learned magistrate comments:

> "This opinion is on the basis that the acts alleged are false, but that even so I have no jurisdiction to hear the case. The evidence before me bears out that assumption in my view."

Following this judgment the appellant made application to the learned magistrate on December 4, 1956, that the court should send its decision to the High Court for consideration in revision, and his counsel complained that he had not developed his legal argument on the question of jurisdiction as the court had given the impression that this was not in issue. In his ruling the learned magistrate very fairly admits that

> "the court gave counsel a false impression quite unintentionally, that it thought it had jurisdiction";

that is I suppose until he came to write his judgment. In his ruling he compared what he regarded as an apparent conflict between English and Indian law as to when a case involving fraud or perjury should be set aside or sent back for re-trial, and, in having allowed himself in the circumstances to be guided by the Indian cases, he came to the conclusion that he was not in error (if in error at all) so obviously as to send the case to the High Court. In this respect I would observe that it is not for the subordinate court to send proceedings to the High Court for revision. What s. 10 of the Subordinate Courts Ordinance (Cap. 3) says is,

> ". . . the High Court may, on application being made in that behalf by any party" (not be it noted by the trial court) "or of its own motion, . . . revise the proceedings."

The application therefore by the appellant to the trial court was incompetent and the trial court should not have entertained it.

The present position is that the appellant has appealed to this court against the judgment of the learned magistrate of September 25, 1956, in Civil Case No. 263, and the question of revision does not arise. His counsel has in this appeal been able to argue the question of jurisdiction and res judicata as fully as he has liked and in the light of the learned magistrate's judgment and ruling. The respondent was neither present nor represented.

Mr. Platt, in his judgment, correctly posed the question, whether,

> "Assuming that the fraud alleged is true, is it such a fraud as will allow this court to entertain a suit to set aside the earlier decree of this court?".

That fraud can vitiate a decree would appear from s. 44 of the Indian Evidence Act, which reads:

> "44. Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a court not competent to deliver it, or was obtained by fraud or collusion."

The question for this court on appeal to decide is whether the learned magistrate was right in holding that the alleged fraud was not of such a nature as to take the earlier decree out of the category of res judicata.

I am not sure that there is the "marked divergence" between English and Indian law which the learned magistrate thinks there is. Kerr on Fraud (7th Edn.), at p. 417, says:

> "The court has jurisdiction to set aside a judgment obtained by fraud in a subsequent action brought for that purpose, the proper remedy being an original action and not a re-hearing, but such a judgment will not be set aside upon mere proof that the judgment was obtained by perjury."

The words

> "such a judgment will not be set aside upon mere proof that the judgment was obtained by perjury"

are very similar to the head note in *Kadirvelu Nainar v. Kuppuswami Naicker* (1) (1919), A.I.R. Mad. 1044, cited by the learned magistrate, which reads,

> "No suit can be instituted to set aside a decree on the ground that it was obtained by perjured evidence";

in this case English and Indian cases were extensively considered. Kerr refers to *Baker v. Wandsworth* (2) (1898), 67 L.J. Q.B. 301, and *Flower v. Lloyd* (3) (1877), 6 Ch. D. 297. In Sarkar on Evidence it is said,

> "A decree cannot be set aside on mere proof that it was obtained by perjured evidence. If evidence not originally available comes to the knowledge of a litigant and he can show thereby that evidence on which a

decree

> against him was obtained, was perjured, his remedy lies in seeking a review of judgment."

Admittedly in the *Kadirvelu* case (1) it is suggested that in India the rule of res judicata is applied more rigidly to cases of fraud by perjury than perhaps in England, for in the opinion of the Full Bench it was said:

> "On reference, however, to the printed papers it appears that the alleged suppression of evidence consisted merely in the non-production of a promissory note the very existence of which the defendant denied when giving evidence in the case. There has been considerable difference of opinion in England as to whether an action would lie to set aside the judgment of an English court on the ground that it had been obtained by perjured evidence. In India the weight of authority appears to be in favour of holding that such a suit will not lie . . ."

In the same case, Sadasiva Aiyar, J., expressed the view that,

> "the considerations mentioned by James, L.J., in *Flower v. Lloyd* (3) apply with very great force in India."

In the commentary to s. 44 in Woodroffe's Law of Evidence, (9th Edn.) James, L.J., is quoted at length. That case concerned the infringement of a patent. An expert was sent by the court to inspect the patented process, and the defendant fraudulently concealed from him certain parts. James, L.J., observed, Thesiger, L.J., concurring, but Baggallay, L.J., dissenting:

> "Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants sui juris and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action or that false answers had been given to interrogatories, or a misleading production of documents or of a machine, or of a process, had been given? There are hundreds of actions tried every year, in which the evidence is irreconcilably conflicting and must be on one side or the other wilfully and corruptly perjured."

Also quoted in Woodroffe is the following extract from the judgment of Petheram, C.J., in *Mohammed Golab v. Sulliman* (4) (1894), 21 Cal. 612:

> "The principle upon which these decisions rest is that where a decree has been obtained by a fraud practised upon the other side, by which he was prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him and may be set aside in a separate suit, and not only by an application made in the suit in which the decree was passed to the court by which it was passed; but I am not aware that it has ever been suggested in any decided case, and in my opinion it is not the law, that because a person against whom a decree has been passed alleges that it is wrong and that it was obtained by perjury committed by, or at the instance of, the other party, which is of course fraud of the worst kind, that he can obtain a re-hearing of the questions in dispute in a fresh action by merely changing the form in which he places it before the court and alleging in his plaint that the first decree was obtained by the perjury of the person in whose favour it was given. To so hold would be to allow defeated litigants to avoid the operation, not only of the law which regulates appeals, but that which relates to res judicata as well. The reasons why this cannot be the case are very clearly stated by James, L.J., in the passage I have quoted . . ."

In *Cole v. Langford* (5), [1898] 2 Q.B. 36, the fraud was the production of certain false and counterfeit documents and certain memorandum books containing false and fraudulent entries. *Ex parte* judgment was given that the previous suit be set aside. The learned judges gave no reason for their decision, though Phillimore, J., said,

> "There are several cases since *Flower v. Lloyd* (3) in which this jurisdiction has been exercised."

He mentioned the case of *Priestman v. Thomas* (6) (1884), 9 P.D. 210, but the circumstances of that case do not appear to be particularly relevant to those in the instant case. Of *Cole v. Langford* (5), Sadasiva Aiyar, J., observed in the *Kadirvelu* case (1) that it merely followed old English precedents and did not attempt to tackle the weighty reasons given in *Flower v. Lloyd* (3).

In the later Indian case of *Bhikaji Mahadev Gund v. Balvant R. Kulkarni* (7) (1927), A.I.R. Bom. 510, where English and Indian cases were also considered, Marten, C.J., said:

> "It is clear that some limitation must be put upon that section (i.e. s. 44 of the Indian Evidence Act). For instance, if party A and his witnesses in a particular suit came into the box and committed deliberate perjury on material points, that is clearly fraud. On the other hand, if a decree is eventually passed in favour of that party, even on that perjured evidence, it cannot be open for the opponent to start a new action on exactly the same evidence, on the sole allegation that the previous evidence was wrongly believed by the court."

A little further on the learned chief justice says:

> "Consequently, the authorities show, I think, that if the case merely turns on, in effect, a re-hearing of the previous suit on substantially the same evidence, then the court will not hear the second suit. On the other hand, it is to my mind clear that in a proper case the court has jurisdiction to set aside a decree which has been obtained by fraud practised on the court. If, for instance, the existence of certain evidence has been stoutly denied by one party, and the court has been induced to frame its decree on the basis that that evidence did not exist, then, if that evidence is afterwards discovered, and it is of such a nature that if it had been before the first court, the probabilities are that the court would have arrived at a different conclusion, then, it may be, when all the circumstances are looked at, that in that case the court would set aside the original decree."

In spite of this expression of view, however, the learned chief justice approved the decision in the *Kadirvelu* case (1). In effect he seems to suggest that no hard and fast dividing line can be prescribed as to when a decree may or may not be set aside for fraud, but that "all the circumstances" must be looked at, and that in certain circumstances even perjured evidence as to the non-existence of material evidence would be sufficient to avoid a judgment. If this was so, it would be a fair corollary I suppose that perjured evidence as to the authenticity of existing material evidence (e.g. the signed duplicate installation forms in the instant case) might, in certain circumstances at any rate, also be sufficient. Marten, C.J., cites with approval the case of *Nanda Kumar Howladar v. Ram Jiban Howladar and Another* (8) (1914), A.I.R. Cal. 232, in which reference is made to *Patch v. Ward* (9) (1867), L.R. 3 Ch. D. 203, where Sir John Rolt, L.J. said,

> "The fraud must be actual, positive fraud, a meditated and intentional contrivance to keep the parties and the court in ignorance of the real facts of the case and obtaining that decree by that contrivance."

In *L. Chinnaya v. K. Ramanna* (10) (1915), 38 Mad. 203, which quotes the *Mohammed Golab* case (4) quoted above and is cited in the *Kadirvelu* case (1), the court put it like this at p. 208:

> "The test to be applied is, is the fraud complained of not something that was included in what has already been adjudged by the court, but extraneous to it? If, for instance, a party be prevented by his opponent from conducting his case properly by tricks or misrepresentation, that would amount to fraud . . . where two parties fight at arm's length, it is the duty of each to question the allegations made by the other and to adduce all available evidence regarding the truth or falsehood of it. Neither of them can neglect his duty and afterwards claim to show that the allegation of his opponent was false."

It seems to me that in the circumstances of the instant case the weight of authority is strongly against the admission of a new suit for the setting aside of the original suit, and I think the learned magistrate was correct in dismissing it. In my opinion the fraud, assuming it was a fraud, was included in something which had already been adjudged. To allow the new action would be to re-open the issue already decided, whether the defendant had in fact worked for the plaintiff after the end of June, 1954, and to test again the evidence of the respondent and that of the appellant and his witnesses thereon. There were other reasons which the learned magistrate in the first suit gave for inferring that the respondent did so work, although it might well be that the respondent's signature on the duplicate forms was the most cogent, especially as they appear to have been signed over carbon paper which would give the impression that they had appeared also on the originals. This was evidence, however, which the plaintiff could well have tested. The installation book was presumably the property of the appellant, or anyway in his actual or constructive custody or, alternatively, in the custody of Hari Singh, who, the appellant says, did the work for him after June, 1954. The appellant having denied that the respondent continued to work for him, it seems extraordinary that he failed in the original suit to adduce either the evidence of Hari Singh who was carrying out the installation or the originals of the forms or both. One would have thought that at least, on seeing in court the respondent's name on the duplicates and knowing that the respondent's signature on the forms was not acceptable to the Electric Supply Company and, as he says, that anyway the respondent had done no work, the appellant would have asked the court's permission for an adjournment, if such was necessary, to obtain production of the originals; incidentally I should have thought the respondent himself should have been required to produce these as being the best evidence.

In the result I dismiss this appeal and make no order as to costs.

Appeal dismissed.

For the appellant:
RN Donaldson
Donaldson & Wood, Tanga

The respondent did not appear and was not represented.

R v Ahmed Deedar Gadabursi Jibrain

[1958] 1 EA 107 (CAH)

Division: Court of Appeal at Hargeisa

Date of judgment: 24 January 1958

Case Number:	200/1957
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Somaliland Protectorate–Greene, J

[1] Criminal law – Intimidation – Intent in uttering threats material to issue of guilt – Indian Penal Code, s. 503 *and s.* 506 *– Appeals to the Court of Appeal Ordinance,* 1950, *s.* 4 (*Som.*) *– Cultivation and Use of Land Ordinance* (*Cap.* 119), *s.* 2, *s.* 3 *and s.* 4 (*Som.*).

Editor's Summary

Under s. 3 of the Cultivation and Use of Land Ordinance the district commissioner may make such orders as he considers necessary to secure undisturbed possession for persons cultivating ground within a demarcated area in his district. The complainant, Sheikh Ibrahim, applied to an agricultural officer at Borama for a piece of land to be used as a garden. The agricultural officer visited the site and decided that it was suitable subject to certain works being carried out there. The respondent, however, objected that the land was part of his garden and said he had a certificate for the area but it was with his wife who was visiting Jibouti. Inquiry was made, but in the absence of the certificate the respondent was disbelieved and a certificate was issued to the complainant who started work on the land. The respondent continued to protest and, as later found by a magistrate, uttered threats against the complainant which resulted in a prosecution of the respondent in the Borama District Court for "criminal intimidation by threatening Sheikh Ibrahim Sheikh Omer with injury to his person with intent to cause alarm" to the complainant. At the trial the respondent produced a paper purporting to be a "permission to farm with undisturbed possession a parcel of land . . . in the place known as Hayaba". The agricultural officer in his evidence suggested that this document might not be genuine but it was not proved or found by the magistrate to be a forgery. From his judgment the magistrate appeared to consider that the respondent had a duty to satisfy the court beyond doubt that he was the owner of the land before the ownership thereof could be taken into account, and that the question of ownership might affect the question of sentence but not the issue of guilt of the respondent. He, accordingly, convicted and sentenced the respondent. Later when the High Court reduced the sentence the Crown sought to appeal. The Court of Appeal intimated at the hearing that having regard to s. 4 of the Appeals to the Court of Appeal Ordinance, 1950, which allows an appeal on a matter of law only and excludes any appeal on severity of sentence, the appeal filed by the Crown was not competent. The court, however, considered that the judgment of the magistrate contained serious misdirection's, drew the attention of the acting attorney-general to the points and then invited the respondent to appeal against his conviction. It was argued for the Crown that the offence fell under the first part of s. 503 of the Indian Penal Code which reads:

> "Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation",

and if the respondent's intention was to cause alarm, the reasons for the threats were immaterial.

Held –

(i) the magistrate's view that it was the duty of the respondent to satisfy him "beyond doubt" that he was in fact the "owner" of the property before a magistrate could take the fact into account, was a serious misdirection: the onus is never upon an accused person to prove any matter of defence "beyond doubt" or even beyond reasonable doubt;

(ii) if the threats made by the respondent were uttered with intent to cause the complainant to desist from cultivating the land in question in the bona fide belief that the right to occupy the land was vested in the respondent and there was a reasonable doubt whether the complainant was legally entitled to cultivate the land, then the respondent was entitled to acquittal;

(iii) the first part of s. 503 of the Indian Penal Code could not be viewed entirely in isolation and where a threat is uttered the primary object of which is to induce a person to abstain from doing something which he had no legal right to do, the fact that the threat might incidentally be calculated to cause alarm would not normally bring it within the first part of the section;

(iv) although the respondent was charged with threatening the complainant with intent to cause alarm, the magistrate's finding appeared to be that the primary intent was to stop the complainant from ploughing the disputed garden.

Appellant's appeal dismissed. Respondent's appeal allowed.

Conviction and sentence set aside.

No cases referred to in judgment

Judgment

Forbes JA: read the following judgment of the court: This was an appeal by the Crown against a decision of the High Court of Somaliland reducing the sentence which had been imposed by the Borama District Court on the respondent when the respondent was convicted by the District Court of the offence of criminal intimidation contrary to s. 506 of the Indian Penal Code.

Section 4 of the Appeals to the Court of Appeal Ordinance, 1950, provides that any party to criminal proceedings held before the High Court in its appellate jurisdiction may appeal to this court

> "on a matter of law but not on a matter of fact; provided that for the purposes of this section a matter of law shall not be taken to include severity of sentence".

We had no doubt that the proviso applied in this case and that the appeal filed by the Crown was not competent. It did, however, appear to us from the record that the judgment of the learned trial magistrate contained serious misdirection's, and we were in some doubt whether the conviction could be supported. We accordingly drew the attention of the acting attorney-general, Mr. Carrick-Allan, to the points we had in mind, and invited the respondent to appeal against his conviction–an invitation which he accepted with alacrity. After hearing argument, we concluded that the misdirection's were fatal and accordingly quashed the conviction and set aside the sentence. We now give our reasons.

The offence with which the respondent was charged was

> “criminal intimidation by threatening Sheikh Ibrahim Sheikh Omer with injury to his person with intent to cause alarm to the said Sheikh Ibrahim Sheikh Omer”–

thereby committing an offence contrary to s. 506 of the Indian Penal Code.

It appeared from the evidence that the complainant, Sheikh Ibrahim, had applied to the assistant agricultural officer at Borama for a new garden. The system for the allocation and occupation of gardens in operation in the area was apparently that laid down by s. 3 and s. 4 of the Cultivation and Use of Land Ordinance (Cap. 119). It did not appear from the record that the area in question had been "demarcated" as an agricultural area under s. 2 of that Ordinance, but certainly it was treated by everyone concerned as a "demarcated area". Section 3 of the Ordinance provides:

> "The District Commissioner of any district may make such orders as he considers necessary to secure undisturbed possession to persons cultivating ground within a demarcated area in his district so long as such ground is in the opinion of the Director of Agriculture and Veterinary Services being beneficially cultivated."

Section 4 in effect provides for the termination of a right of occupancy conferred under s. 3 for reasons such as lack of cultivation or bad cultivation subject to the giving of twelve (since amended to six) months' notice to the occupier of the intention to terminate.

On the complainant's application, the assistant agricultural officer visited the site in question and decided that it was suitable for a garden subject to certain works being carried out on it. However, shortly after this visit to the site the respondent called at the office of the agricultural officer and objected that the land in question formed part of his garden. He apparently stated that he had a certificate for the area but that it was with his wife who was visiting Jibouti. Some investigation was made into the matter, but in the absence of a certificate the respondent's story was disbelieved, a certificate was issued to the complainant in respect of the disputed land, and the complainant commenced to carry out work on the land. The respondent continued to protest that the land was part of his garden, and, as found as a fact by the learned magistrate, he uttered threats against the person of the complainant. Three threats were mentioned in evidence, two to "kill" the complainant and one to "hurt" the complainant, and it was in respect of these threats that the respondent was charged and convicted. At the trial the respondent produced a paper (which he also produced to us) which purported to be a

> "permission to farm with undisturbed possession a parcel of land measuring 186 British paces by 182 British paces, in the place known as Hayaba".

The document contained a condition as regards satisfactory cultivation, but there was no suggestion of there ever having been any termination of the "permission" under s. 4 of the Cultivation and Use of Land Ordinance. It was suggested in evidence by the agricultural officer, Mr. Willcox, that the certificate might not be a genuine one as it appeared to be in different writing from other certificates in his office. However, it was not proved or found by the magistrate that the certificate was a forgery. The magistrate did examine the other certificates in the possession of Mr. Willcox and agreed that the writing on them differed from that on the certificate produced by the respondent, but that is far from establishing that the respondent's certificate was a forged one. No doubt the identification of the particular parcel of land described in the respondent's certificate presented considerable difficulty.

The learned magistrate in his judgment considered the question of "ownership" ("right of occupancy" would perhaps have been a more accurate term) but it seemed that he misdirected himself both as to the effect of "ownership" and as to onus of proof. After expressing doubts as to the genuineness of respondent's certificate, though making no definite finding of falsity, he proceeds:

> "The court also visited the area in question in an endeavour to ascertain the exact ownership of the garden but did not find the ownership of the garden by the accused established to its satisfaction.
>
> "Nevertheless the court is not trying a case of ownership although had the ownership been proved beyond doubt it would have been the duty of the court to take this into consideration. Ownership of land may be disputed in the civil courts and this court must decide whether criminal intimidation was against P.W. 1 by the accused."

It seems clear from this passage that the learned magistrate regarded it as the duty of the accused (the respondent) to satisfy him "beyond doubt" that he (the accused) was in fact the "owner" of the property before he could take that fact into account. We were of the opinion that this was a serious misdirection. The onus is never upon an accused person to prove any matter of defence "beyond doubt" or even beyond reasonable doubt. If the fact of ownership was material it was the duty of the court to take it into account if there was a reasonable doubt whether or not that ownership was vested in the respondent.

Furthermore, the learned magistrate appears to have considered that the question of ownership was one possibly affecting sentence but not affecting the issue of the guilt or otherwise of the respondent. Section 503 of the Indian Penal Code, which defines the offence of criminal intimidation, reads as follows:

> "Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation."

It appeared to us that if the threats made by the respondent were uttered with the intent to cause the complainant to desist from cultivating the land in question in the bona fide belief that the right to occupy the land was vested in the respondent, and that there was a reasonable doubt as to whether or not the land was so vested, that is to say, there was a reasonable doubt as to whether the complainant was legally entitled to cultivate the land, then the respondent was entitled to acquittal.

Mr. Carrick-Allan argued that the offence as charged fell under the first part of the section, and that if it was shown that the respondent's intent had been to cause alarm the offence was established regardless of any other reason there may have been for the threats. We felt, however, that the first part of the section could not be viewed entirely in isolation, and that where a threat was uttered the primary object of which was to induce a person to abstain from doing something which he had no legal right to do, the fact that the threat might incidentally be calculated to cause alarm would not normally bring it within the first part of the section. In the instant case, although the respondent was charged with threatening the complainant with intent to cause alarm, the learned magistrate's finding appears to be that the primary intent was to stop the complainant from ploughing the disputed garden. The magistrate's judgment concludes with the words:

> "the court is in no doubt that the accused did not seek redress of his grievance in the proper way and did in fact utter threats against the person of P.W. 1 in the knowledge and intent that his threats would come to the ears of P.W. 1 and thereby prevent him from carrying out his lawful occupation of ploughing his garden and finds the accused guilty of the charge."

On this view of the respondent's intent in uttering the threats, the question whether the respondent or the complainant possessed the legal right to occupy and cultivate the garden was clearly most material to the issue whether or not the respondent was guilty of criminal intimidation, but this aspect was ignored by the learned magistrate. In the circumstances we felt that the conviction could not stand.

We would add that of course this decision has no bearing whatever on legal rights of the respondent and complainant respectively to the disputed land.

Appellant's appeal dismissed. Respondent's appeal allowed. Conviction and sentence set aside.

For the appellant:
NP Carrick-Allan (Acting Attorney-General, Somaliland)
The Attorney-General, Somaliland

The respondent in person.

Shah Kachra Merag v Lakhamshi Khimji
[1958] 1 EA 111 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	17 January 1958
Case Number:	6/1957
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Harley, Ag. J

[1] Landlord and tenant – Monthly tenancy – Withdrawal or waiver of notice to quit – Whether old tenancy continued or new tenancy created – Indian Transfer of Property Act, 1882, *s.* 106 *and s.* 113 – *Eastern African Court of Appeal Rules,* 1954, *r.* 56 *and Third Schedule, para.* 11.

Editor's Summary

The appellant had sublet to the respondent certain premises on a month to month basis at a monthly rental of Shs. 325/-. On November 24, 1955, he served a valid notice to quit on the respondent expiring on December 31, 1955. Certain negotiations then took place between the parties at about the time of expiry of the notice, though it was not established exactly when, as a result of which the respondent was in occupation of the premises when the appellant left for India on January 25, 1956. The appellant returned at the end of March and in April wrote to the respondent referring to an alleged promise that he (the respondent) would vacate the premises by the end of March, and asking for possession. In reply the respondent forwarded a cheque for rent from January to April at the rate of Shs. 325/- per month. The

appellant returned the cheque on April 20, 1956, and alleged that the respondent had agreed to pay Shs. 1,000/- per month from January or to vacate the premises, and asked the respondent either to pay a sum of Shs. 4,000/- or to vacate the premises at the end of that month. After further correspondence the appellant on May 31 commenced proceedings for possession, mesne profits Shs. 5,000/- from January 1, 1956, to May 31, 1956, and thereafter at Shs. 1,000/- per month until possession should be recovered, costs and other relief. The trial judge held that the notice to quit was, in fact, withdrawn or waived; that there was no agreement as to what rent should be paid; that he was not satisfied that the

value to the appellant or to anyone else of the suit premises was any more than Shs. 325/- per month and ordered that the respondent pay the appellant Shs. 1,950/- for rent, that the appellant pay to the respondent one-half of the respondent's costs and that the two sums may be set off against each other. The appellant having appealed, the respondent cross-appealed asking that the order for payment of arrears of rent be set aside and that he be awarded the full costs of the action. It was argued for the appellant that the trial judge was wrong in holding that the notice to quit was withdrawn or waived; that on the facts found there could be no new tenancy, since the trial judge found that there had been no agreement as to rent; that, in view of the trial judge's findings, the appellant could not claim that the respondent was a trespasser from January to March, but that during that period he was there merely by the "indulgence" of the appellant; that this "indulgence" could not operate as a waiver of the notice to quit; that the "indulgence" was withdrawn on the appellant's return from India; and that, thereafter, the respondent was a trespasser.

Held –

(i) there was an agreement between the parties that the notice to quit was withdrawn or waived, with the implicit result that the tenancy continued on the old terms;

(ii) while in English law waiver of a notice to quit operates as an agreement to create a new tenancy at the expiry of the old tenancy, s. 113 of the Indian Transfer of Property Act, 1882, treats waiver as an agreement to restore the old tenancy;

(iii) the question whether mere permission to stay on could amount to waiver did not arise;

(iv) as there was no claim for rent in the plaint, it was not open to the trial judge to make an order for payment of the rent, nor could the defence of tender be properly put forward by the respondent, and therefore,

(v) the award of half costs only to the respondent was based on a misconception.

Appeal dismissed. Cross-appeal allowed.

Case referred to:

(1) *Whiteacre d. Boult v. Symonds*, 103 E.R. 680.

January 17. The following judgments were read by direction of the court.

Judgment

Forbes JA: This is an appeal from a judgment of the Supreme Court of Kenya. The appellant is the tenant of certain premises situated on Plot No. 209/136/86 off Imtiazali Road, in Nairobi. In 1955 he was subletting part of the premises, variously described as a godown, warehouse or store, to the respondent on a month to month basis at a monthly rental of Shs. 325/-per month.

On November 24, 1955, the appellant served on the respondent a "notice to quit" requiring the respondent to vacate the premises on December 31, 1955, or any other day on which the respondent's monthly term of tenancy should expire next after service of the notice. It is not disputed that this notice was a valid notice to quit.

Certain negotiations then took place between the appellant and the respondent at about the time of expiry of the notice, though it is not clear whether they actually took place before or after the expiry of the notice. The appellant left for India on January 25, while, as a result of the negotiations, the respondent remained in occupation of the premises.

The appellant returned from India on March 28, 1955, and on April 6 wrote to the respondent in the following terms:

> "With reference to my notice to quit dated November 24, 1955, you promised to vacate the premises in your occupation by the end of March, 1956, before I left for India, when I came back from India, I found that you have not vacated the premises. I shall be glad to know when you are going to vacate the premises, failing to receive your reply within three days hereof, I shall have no alternative but will file appropriate proceedings against you."

On April 16 the respondent wrote to the appellant forwarding a cheque for Shs. 1,300/- in payment of rent for January to April inclusive, at the rate of Shs. 325/- per month. On April 20 the appellant wrote returning the cheque. In the letter he said, *inter alia*:

> "You have told us that from January you would pay us at shillings one thousand per month and that if you would not pay the one thousand shillings rent you would vacate; therefore please send four thousand shillings as rent for four months from January, and if the rent is not acceptable, please vacate at the end of the month."

Further correspondence followed, and on May 31 the appellant commenced proceedings claiming an order for possession of the suit premises, mesne profits Shs. 5,000/- from January 1, 1956, to May 31, 1956, and thereafter at Shs. 1,000/- per month until possession recovered, costs, and further or other relief.

On June 5, the advocates for the respondent wrote to the advocate for the appellant, once again tendering rent at Shs. 325/- per month from January to May, and informing him that the respondent proposed to vacate the premises on June 30. The rent was refused, and in subsequent correspondence the advocate for the respondent made it clear that there was no question of the respondent consenting to judgment for possession, but that irrespective of the result of the proceedings it was the respondent's intention to vacate the premises on June 30. The written statement of defence was filed on June 11, and in para. 4 it was pleaded that:

> "the defendant will contend that the alleged notice to quit, referred to in paragraph 4 of the plaint, was waived by the plaintiff granting to the defendant a new tenancy at the same rent of the suit premises."

At the trial conflicting evidence was given by the appellant on the one hand, and the respondent and a witness (another tenant of the appellant's) called by the respondent, on the other. It appeared that, as I have already mentioned, some negotiations had taken place between the appellant and the respondent in either December or January, and it had apparently been agreed that the respondent should continue in occupation of the suit premises until the appellant's return from India, but the appellant maintained that the respondent had agreed to pay Shs. 1,000/- per month rent if he should stay on, while the respondent maintained that the appellant had agreed to let him stay on at the old rent.

In the course of his judgment the learned trial judge says:

> "I regret to say that I put no particular faith in the credibility of any of the three witnesses. I have formed the view that it was agreed between the parties that the sub-tenants should stay on while the plaintiff was in India, but that there was no agreement as to the figure payable for rent as from January 1, 1956";

and the learned judge relied on the appellant's letter of April 6 in support of the view that the appellant was expecting the respondent

> "to continue his tenancy of the suit premises at least until the end of March."

The learned judge then considered the other correspondence which was in evidence, and the pleadings, and continued:

> "I have already stated my conclusion that the notice to quit was, in fact, withdrawn or waived and further that there was no agreement as to whether rent should be paid at the old rate or at the rate of Shs. 1,000/- or at any other rate.
>
> "Evidence has been given on both sides as to the actual market value of the premises, that is to say, as to the expected rent, free from control, in the open market. Whether I consider the figure for rent or mesne profits on this basis or on the basis of the definition set out in s. 3, Cap. 5, Laws of Kenya, or on any other basis, I am certainly not satisfied that the value to the plaintiff or to any one else of the suit premises is any more than Shs. 325/- per month. In the result the plaintiff is not entitled to more than Shs. 1,950/- (six months at Shs. 325/- per month).
>
> "The defence of tender would have been completely successful if the defendant had brought the Shs. 1,950/- into court with his defence. As I can find in the court file no trace of any payment into court, I now call upon Mr. Khanna for the defendant to show cause, if he can, why his client should not be ordered to pay costs."

After hearing submissions, the learned judge ordered:

> "Defendant owes plaintiff Shs. 1,950/- for rent. I order that plaintiff pay to defendant one-half of his (defendant's) costs. The two sums may be set off against each other."

From this decision the appellant appealed.

Notice of cross-appeal was given by the respondent, asking that the order for payment of arrears of rent be set aside and that the respondent be awarded full costs of the action.

When the appeal first came on for hearing it appeared that no decree had been extracted as required by r. 56 of the Eastern African Court of Appeal Rules, 1954. After hearing Mr. Oulton (who then appeared for the appellant) and Mr. D. N. Khanna for the respondent, it was ordered that the appeal stand over generally pending extraction of the decree and the adding of the decree to the record, and that the appellant pay the costs thrown away in any event. And the question whether Mr. Mandavia (who had been the appellant's advocate for the lodging of the appeal) should be required to show cause under Taxation Rule 11 was reserved for later consideration.

At the subsequent hearing Mr. Quass for the appellant argued that the learned trial judge was wrong in holding that the notice to quit was withdrawn or waived; that on the facts found by the learned judge there could be no new tenancy, since the judge found that there had been no agreement as to rent; that, in view of the judge's findings, he could not claim that the respondent was a trespasser from January to March, but that during that period he was there merely by the indulgence of the appellant, as was held in *Whiteacre d. Boult v. Symonds* (1) (1808), 103 E.R. 680; that this "indulgence" could not operate as a waiver of the notice to quit; that the "indulgence" was withdrawn on the appellant's return from India; and that, thereafter, the respondent was a trespasser.

The first question to be considered on this appeal, as it seems to me, is the effect of the learned trial judge's finding that

> "the notice to quit was, in fact, withdrawn or waived and further that there was no agreement as to whether rent should be paid at the old rate or at the rate of Shs. 1,000/-, or at any other rate."

Does this amount to a finding that there was an agreement to continue the old tenancy, or does it (as argued by Mr. Quass) amount to no more than a finding that the respondent was granted an indulgence by the appellant during the appellant's absence in India?

While the phrasing used by the learned trial judge is, with respect, by no means as clear as it might be, I have no doubt at all that the finding was intended to be a finding that the old tenancy was continued without any variation of the terms. The learned judge clearly states his conclusion that the notice to quit was "withdrawn or waived." This can only mean that he concluded that the old tenancy continued. It is true he goes on to say that there was no agreement as to whether rent should be paid at the old rate or at the rate of Shs. 1,000/- or at any other rate. There had been a conflict of evidence, however, on the question whether, when the appellant agreed to allow the respondent to remain on during his (the appellant's) absence in India, there had been an agreement that rent should be paid at the rate of Shs. 325/- or Shs. 1,000/- per month. In my view the learned judge's finding is merely to the effect that he is not satisfied that a figure of rent was specifically mentioned in the negotiations; that he considered there was merely an agreement to continue the old tenancy, which naturally implied payment of rent at the same rate, without any *express* reference to the rate of rent. I am fortified in this view by the learned judge's subsequent statement in making his order that "defendant owes plaintiff Shs. 1,950/- *for rent*." It is true the learned judge says:

> "Evidence has been given on both sides as to the actual market value of the premises, that is to say, as to the expected rent, free from control, in the open market. Whether I consider the figure for rent or mesne profits on this basis or on the basis of the definition set out in s. 3, Cap. 5, Laws of Kenya, or on any other basis, I am certainly not satisfied that the value to the plaintiff or to anyone else of the suit premises is any more than Shs. 325/- per month. In the result the plaintiff is not entitled to more than Shs. 1,950 (six months at Shs. 325/- per month)."

Mr. Quass argued that in this passage the learned judge was himself assessing the rent, which clearly it would not be open to him to do. It appears to me, however, that the learned judge is doing no more than examining the probability of there having been an agreement to pay rent at a higher rate than Shs. 325/- per month on the basis of the evidence given as to the rental value of the premises.

I would, accordingly, construe the learned judge's finding as a finding that there was an agreement between the parties that the notice to quit was withdrawn or waived, with the implicit result that the tenancy continued on the old terms.

The next question for consideration, as it seems to me, is whether this finding can be supported by the evidence. Mr. Quass argued that the learned judge had rejected the evidence of the parties as untrustworthy, that the correspondence exhibited was equally consistent with the respondent having been allowed to remain on in the suit premises as a matter of indulgence and (relying on *Whiteacre d. Boult v. Symonds* (1)) that such indulgence could not operate as a waiver of the notice to quit. He also drew attention to the fact that in both Mulla's Transfer of Property Act (3rd Edn.) and Gour's Law of Transfer (7th Edn.) the instances of waiver considered all appeared to depend on either the acceptance of rent or the giving of a second notice to quit.

To take the latter point first, no doubt the commonest instances of waiver of notice to quit arise where rent has been accepted after expiry of the notice to quit, or where a second notice to quit has been given. But s. 113 of the Indian Transfer of Property Act (which in Kenya governs the question of waiver of a notice to quit) is certainly not limited by its terms to such cases.

"Any act . . . showing an intention to treat the lease as subsisting" is sufficient under the section. Here the learned judge has found that the "act" of waiver was express agreement between the parties. I see no reason why such an agreement should not constitute a waiver.

As to the learned judge's finding, I accept on the authority of *Whiteacre d. Boult v. Symonds* (1) that there is no waiver of notice to quit if a tenant is allowed to stay on after expiry of the notice as a matter of mere indulgence. Here, however, the learned judge has found that there was an agreement that the tenancy should continue at least until the appellant came back from India. And I am certainly not prepared to say that there was no evidence on which he could reasonably reach that conclusion. The facts of the case here are wholly different from those of *Whiteacre's* case (1), and the principal conflict between the parties was not so much whether or not the respondent continued as a tenant, but whether the agreed rent was Shs. 325/- or Shs. 1,000/- per month. On the evidence as a whole it seems to me that the learned judge's finding was not unreasonable, and I am not prepared to differ from it. The question, therefore, of whether mere permission to stay on could amount to waiver does not arise. The finding, which I consider there was evidence to support, was that there was an agreement that the old tenancy should continue, and I agree with the view that such an agreement would operate as waiver of the notice to quit.

The point was taken that there could be no such waiver if the notice to quit had already expired at the date of the agreement. As I have already mentioned, it was not clear whether the relevant negotiations took place before or after the notice to quit expired. However, I do not think the point is material. The first illustration to s. 113 of the Transfer of Property Act deals with the tender and acceptance of rent after expiry of the notice to quit, from which it is evident that notice may be waived notwithstanding its expiry.

Mr. Quass, as I understand him, also argued that even if there was an agreement for the tenancy to continue, that agreement, on the judge's own findings, was only for the period January to March, and that the tenancy would automatically determine at the end of March in any event. I am unable to accept this argument. It is true the appellant returned from India at the end of March, but it appears from his own evidence that at the time of his departure he did not know how long he would be away. I accept that the agreement was that the tenancy should continue while the appellant was in India, but I see no reason to suppose that it was contemplated by the parties at the time the agreement was made that this period would terminate at the end of March. In any case the agreement found by the learned judge was for the waiver or withdrawal of the notice to quit, and continuation of the old tenancy. That was a month to month tenancy, and would require a fresh notice to quit to terminate it (Transfer of Property Act, s. 106). It has not been contended that any of the letters written by the appellant to the respondent after March, 1956, amounted to a fresh notice to quit.

To sum up, therefore, I think that the learned judge found the notice to quit was waived by an agreement that the old month to month tenancy should continue during the appellant's absence in India, and on the evidence I am not prepared to say that that finding was wrong. The result would be that a new notice to quit would be necessary to terminate the tenancy and no such notice was ever given.

It is true that in para. 4 of the defence it is pleaded that

> "the alleged notice to quit . . . was waived by the plaintiff granting to the defendant *a new tenancy* at the same rent of the suit premises."

This is not in accordance with the learned judge's findings, but I do not think that it is fatal to the

respondent’s case. Section 113 of the Transfer of Property

Act differs from the English law. While in English law waiver of a notice to quit operates as an agreement to create a new tenancy at the expiry of the old tenancy, s. 113 treats waiver as an agreement to restore the old tenancy. Here all the necessary facts have been pleaded and it appears to me that the allegation of "a new tenancy" amounts to no more than a mistaken statement as to the effect in law of the facts relied on.

In the result, therefore, I would dismiss the appeal with costs.

As regards the cross-appeal, it appears to me that this must succeed. There was no claim for rent made in the plaint, and therefore, although it was conceded by the respondent that rent at Shs. 325/- per month was due in respect of the period January to June inclusive, it was not open to the learned judge to make an order for the payment of the rent to the appellant, and this part of the learned judge's order should, I think, be set aside. The learned judge seems to have considered that the amount of the rent owing ought to have been brought into court, and, on this basis, awarded only half the respondent's costs against the appellant. Since rent was not claimed by the appellant the defence of tender could not properly be put forward by the respondent and the award of half costs only to the respondent was therefore based on a misconception. The respondent, in fact, has been completely successful, and, I consider, is entitled to his full costs in the court below. I would order that the cross-appeal be allowed with costs, and that, for the order made in the court below, an order dismissing the suit with costs be substituted.

As to the question whether Mr. Mandavia should be called on to show cause under Taxation Rule 11, the costs involved are unlikely to amount to much, and I do not think there is any need to pursue the matter further.

Sir Kenneth O'Connor P: I agree.

Briggs V-P: I agree.

Appeal dismissed. Cross-appeal allowed.

For the appellant:
Phineas Quass QC (of the English Bar) and *PI Patel*
GR Mandavia, Nairobi

For the respondent:
DN Khanna
DN & RN Khanna, Nairobi

The Fort Hall Bakery Supply Company v Frederick Muigai Wangoe
[1958] 1 EA 118 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	25 March 1958
Case Number:	974/1957
Before:	Edmonds J

Sourced by: LawAfrica

[1] Practice – Setting aside judgment – Formal decree in existence – Whether correct procedure is by r. 10 *or r.* 24 *of O.* 9, *Civil Procedure* (*Revised*) *Rules,* 1948 (*K.*).

Editor's Summary

The defendant moved the Supreme Court under O. 9, r. 10 of the Civil Procedure (Revised) Rules, 1948, to set aside the *ex parte* judgment entered against him for default in filing a defence within the time allowed. The plaintiff opposed the application and the preliminary question before the court was whether the motion was competent. Counsel for the plaintiff contended that as a formal decree was already in existence the rule applicable was r. 24 which begins "In any case in which a decree is passed . . .", but that as the defendant had already applied under this rule previously and through a mutual misapprehension had had his motion dismissed the defendant's only remedy was by way of review or appeal.

Held –

(i) the defendant's correct remedy in the circumstances was to ask for a review of the order dismissing the previous motion;

(ii) the word "decree" in r. 24 of O. 9 must be taken to mean "judgment", with a result that the provisions of this rule are made superfluous and of no useful effect in view of the provisions of r. 10; and therefore,

(iii) the motion was competent.

Per Curiam – "This is not the first occasion on which this court has met with confusion resulting upon the imprecise use of the word 'decree' in the rules."

Preliminary objection overruled.

No cases referred to in judgment

Judgment

Edmonds J: This is a motion by the defendant/applicant under O. 9, r. 10 of the Civil Procedure (Revised) Rules, 1948, for an order setting aside the *ex parte* judgment entered against the defendant on October 10, 1957, upon the failure of the latter to file his defence. Mr. Cockar in opposing the motion has not as yet argued the merits of the application beyond contending that the motion cannot lie on the grounds that it should have been brought under r. 24, and that as an application under that rule was made to and dismissed by the court on February 6, 1958, the defendant's only remedy is by way of review or appeal. I reserved my ruling on this preliminary submission, at the same time intimating to Mr. Cockar that, should I be against him, he would have an opportunity of arguing the merits of the application on the facts.

The defendant's earlier application was made under r. 24 and at the hearing, so I am informed by counsel, Mr. Cockar in all good faith suggested to Mr. de Souza, who appeared for the applicant, that his

motion was out of time as it was barred by limitation. Mr. de Souza, thinking and accepting the suggestion as correct, informed the court accordingly and stated that he could not pursue the motion, which was thereupon dismissed. Subsequently, upon

studying the relevant law as to limitation, Mr. de Souza realised that in fact his motion had not been out of time. His remedy in the circumstances was to ask for a review of the order dismissing the motion, but he has chosen instead to move the court under r. 10.

As regards the present motion, Mr. Cockar argued that as the formal decree in the suit had been signed and sealed by the registrar, a motion to set aside the decree can be made only under r. 24. Rule 10 provides that:

> "Where judgment has been passed pursuant to any of the preceding rules of this Order, or where judgment has been entered by the registrar in cases under O. XLVIII, r. 2, it shall be lawful for the court to set aside or vary such judgment upon such terms as may be just."

In this case judgment was entered by the registrar under O. 48, r. 2. Rule 24 of O. 9 provides, *inter alia*, that:

> "In any case in which a decree is passed *ex parte* against a defendant he may apply to the court by which the decree was passed for an order to set it aside, . . ."

It is Mr. Cockar's contention that there is a clear distinction between the two provisions and that if a defendant wishes to act under r. 10 he must do so before the formal decree is issued.

This is not the first occasion on which this court has met with confusion resulting upon the imprecise use of the word "decree" in the rules. At first sight it would appear that the intention of r. 24 was as is suggested by Mr. Cockar–namely, that once a decree is signed and sealed a defendant may move only under that rule. But upon a further study of this provision in comparison with other provisions, it seems clear that what is meant is "judgment" and not "decree". I will take two instances where the word decree is used, yet where the reference, in my view, is manifestly to the judgment and not to the decree of the court. Rule 19 of O.9 provides that:

> "Where the defendant appears and the plaintiff does not appear, when the suit is called on for hearing, the court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the court shall pass a decree against the defendant upon such admission and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder."

The reference there is clearly to action which the court may take at the time the case is called on for hearing, and when it is stated in the rule that "the court shall pass a decree" the reference must be to the pronouncement of judgment. Rule 11 of O. 20 is an even clearer example of the misuse by the draftsman of the word "decree". It is provided *inter alia* in sub-r. 1 of r. 11 that:

> "Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments . . ."

and in sub-r. 2:

> "After the passing of any such decree, the court shall, on the application of the judgment-debtor, and with the consent of the decree-holder, order that payment of the amount decreed be postponed or be made by instalments . . ."

Now if the provisions of r. 7 of O. 20, as to the drawing up of a decree and as to the duty of the registrar to sign and seal the decree, are borne in mind, it becomes manifest that the provisions of these sub-rules refer to the powers of the court, first, at the time that the court enters judgment for the plaintiff and,

secondly, after judgment has been entered. It is not the court in that context which passes the decree. It is the registrar. It is the function of the court to pronounce judgment, and it is the function of the registrar to satisfy himself that a decree is drawn up in accordance with the judgment. I am firmly of the view that the provisions of these sub-rules and of r. 19 of O. 9 relate to the functions and powers of a judge in court (or in chambers) and have no relation to the later steps to be taken in connection with the issue of a decree. I am equally of the view that the word "decree" in r. 24 of O. 9 means judgment. This view no doubt has the result of making the provisions of that rule superfluous and of no useful effect in view of the provisions of r. 10, but that is a consequence which is inevitable where drafting has been inexact.

I accordingly overrule Mr. Cockar's objection to the motion and will now hear counsel as to the merits of the application on the facts.

Preliminary objection overruled.

For the defendant:
Ralph C de Souza
Stephen & Roche, Nairobi

For the plaintiff:
SR Cockar
Cockar & Cockar, Nairobi

Pells v R
[1958] 1 EA 121 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	5 April 1958
Case Number:	69/1958
Before:	Sir Ronald Sinclair CJ and Templeton J
Sourced by:	LawAfrica

[1] Criminal law – Trial – Magistrate aware of previous conviction of accused – Conviction admitted at trial – Evidence alleged to be attack on accused's character – Whether accused prejudiced or magistrate disqualified to try case – Criminal Procedure Code, s. 159 (6) (*K.*).

Editor's Summary

On appeal from a conviction by a resident magistrate of unlawfully doing grievous harm contrary to s. 230 of the Penal Code, the appellant urged (*inter alia*) that (*a*) the prosecutor wrongly provided the Court during a bail application and before the conviction of the appellant with information that he had a

previous conviction in a criminal case and (*b*) the resident magistrate admitted irrelevant inadmissible and prejudicial evidence that contraceptives had been found in appellant's luggage, which amounted to an attack on his character within the meaning of s. 159 (6) of the Criminal Procedure Code.

Held –

(i) the disclosure of the previous conviction on the bail application was in this case entirely proper. It may in certain cases be undesirable for a magistrate, who has knowledge of the previous bad character of an accused person, to try him if arrangements can be made for the case to be transferred. On the other hand a magistrate tries an accused on evidence given before him in that trial only, excluding from his mind any personal knowledge having any bearing on the charge, or which he may have acquired when an application is made to him for bail. A magistrate, and particularly one sitting in a small township, must of necessity through his office alone acquire some knowledge of the character of some of the persons he is called upon to try, and if he must disqualify himself for such reasons it would result in chaos in the administration of justice.

(ii) there can be no inference of adultery, or of bad character, merely form the possession of contraceptives.

Appeal dismissed.

No cases referred to in judgment

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court: The appellant was convicted on January 31, 1958, by the Resident Magistrate, Nyeri, of unlawfully doing grievous harm contrary to s. 230 of the Penal Code. We dismissed his appeal against conviction and now give our reasons.

Mr. Gledhill for the appellant informed the court that he was not proceeding with grounds 4, 7, 8 and 9 of the memorandum of appeal and that his two main grounds of appeal were–

3. The learned resident magistrate erred in admitting irrelevant inadmissible and prejudicial evidence that contraceptive devices had been found in the luggage of the appellant; and

10. The prosecutor wrongly provided the court before the conviction of the accused with information that the accused had a previous conviction in a criminal case.

Dealing first with ground 10, it is not in dispute that on January 15, 1958, the appellant made an application to the learned trial magistrate for bail pending trial, and that one of the reasons put forward by the prosecutor why bail should not be granted was that there had been previous trouble in connection with accused's wife as a result of which he had been fined Shs. 200/- and bound over to keep the peace for creating a disturbance.

Mr. Gledhill submitted that by reason of this disclosure to the trial magistrate the appellant was gravely prejudiced. He referred us to various cases on the point and also to the magistrate's interrogation of the appellant at the end of his evidence with regard to the previous conviction which, he submitted, indicates that the magistrate allowed the disclosure during the bail application to influence his mind in deciding to convict the appellant.

The learned deputy public prosecutor submitted that it was the duty of the prosecutor to inform the magistrate of the previous conviction to enable him properly to deal with the application for bail; that no reference was made to the previous conviction during the trial by either the prosecutor or the magistrate until after evidence regarding it had been elicited by the defence counsel first in cross-examination of Mr. Thompson (P.W. 4) and later in the appellant's own evidence in chief, and that objection to the fact that the trial magistrate knew of the previous conviction was not taken at any stage in the trial. On this latter point it is clear from the record that the appellant relinquished his rights as a European and elected to be tried by the learned resident magistrate well knowing he was aware of the previous conviction.

We have considered all the cases cited by counsel on both sides. In our view the disclosure of the previous conviction on the application for bail in this particular case was entirely proper. The magistrate having been made aware of a previous conviction, what then are the consequences that ensue? In the light of the principle that justice shall not only be done but should also be seen to be done, it may in certain cases be undesirable for a magistrate, who has knowledge of the previous bad character of an accused person, to try that person if arrangements can be made for him to be tried by another magistrate. On the other hand it must be appreciated that a magistrate tries an accused person on the evidence given before him in that trial only. He excludes from his mind any personal knowledge he may have as to any circumstances which may have a bearing on the charge before him. In like manner he is required to exclude from his mind any knowledge which he may have acquired when an application is made to him for bail. Again it must be appreciated that a magistrate, and particularly one sitting in a small township, must of necessity through his office alone acquire some knowledge of the character of some of the persons he is called upon to try. For a magistrate to be held to disqualify himself from trying such cases on account of his previous knowledge would result in chaos in the administration of justice. In our view each particular case must be considered on its own merits having regard to the two, somewhat opposing, principles we have outlined. In the present case it was defence counsel who first referred at the trial to the previous conviction, the trial magistrate made no reference to it in his judgment and we have no reason for thinking that it influenced his mind in any way when considering the innocence or guilt of the appellant.

With regard to ground 3 of the memorandum of appeal, the submission on behalf of the appellant was that this was an attack on his character within the meaning of s. 159 (6) of the Criminal Procedure Code and was not justified since the nature or conduct of the defence was not such as to involve imputations on the character of the complainant or the witnesses for the prosecution.

It appears from the record that a question regarding the finding of contraceptives in the appellant's luggage was put by the prosecutor because of a passage in the letter, exhibit B, written by the appellant's

wife, who was not a witness at the trial, in which she stated she would have to divorce the appellant if he

would not divorce her. The appellant had stated that his wife had no grounds for divorcing him and that he had not committed adultery. He was then asked about three contraceptives found in his luggage and he said they were used by himself and his wife. It was argued by Mr. Gledhill that this evidence was elicited by the prosecutor for the purpose of suggesting that he had committed adultery, since he had admitted he was not then having sexual relations with his wife. Whatever may have been the purpose of the prosecutor in eliciting this evidence, we do not think that any inference of adultery, or of bad character, could be drawn merely from the possession of contraceptives. It is difficult to see how this question comes within the provisions of s. 159 (6) of the Criminal Procedure Code, but even if we were disposed to accept Mr. Gledhill's submission there is nothing in the judgment to indicate that the magistrate was in any way influenced by it and we are satisfied that the appellant was not in fact prejudiced by the introduction of this evidence.

Mr. Gledhill's remaining arguments were directed to ground 2 of the memorandum of appeal that the magistrate erred in not allowing the appellant's plea of combined self defence and accident to succeed. He pointed to discrepancies in the evidence of Mr. Thompson and Mr. Bramston and suggested that the appellant's account of the events leading up to the stabbing was the more likely one.

The learned trial magistrate devoted a large part of his judgment to a careful analysis of the evidence. He was unable to believe the appellant's version of the incident and said that having seen Thompson and Bramston in the witness box he saw no reason to believe the circumstances were anything other than those testified to by these witnesses. The discrepancies referred to by Mr. Gledhill were not specifically mentioned in the judgment, but some were referred to by Mr. Little, the appellant's advocate at the trial, and it is clear the magistrate considered that such discrepancies as there were did not weaken the case for the prosecution. We see no reason for differing from the conclusion to which the learned magistrate came with regard to the discrepancies and the credibility of the witnesses. On the evidence which he accepted it is clear that the appellant was the aggressor and was not acting in self defence.

Appeal dismissed.

For the appellant:
J Gledhill
Gledhill & Oulton, Nairobi

For the respondent:
AP Jack (Deputy Public Prosecutor, Kenya)
The Attorney-General, Kenya

Wongo v Dominiko Manano
[1958] 1 EA 124 (HCU)

Division:	HM High Court for Uganda at Arua
Date of judgment:	11 April 1958
Case Number:	84/1956

Before: Sir Audley McKisack CJ

Sourced by: LawAfrica

[1] Justices – Jurisdiction – Magistrates – Revision of revisional order – Validity – Native Courts Ordinance (*Cap.* 76), *s.* 24 (*U.*).

[2] Evidence – Native marriage – Bride-price – Observance of native custom.

Editor's Summary

The petitioner having taken the respondent's wife was ordered by the Jago's Court at Parombo to pay compensation to the respondent. On appeal to the County Court at Okoro that decision was upheld but on further appeal to the Native Central Court the decision was reversed on the ground that the respondent not having paid the bride-price in full could not be regarded as married. The respondent then petitioned the West Nile magistrate who rejected his appeal on the ground that as the marriage had not been registered it could not be recognised. Later the magistrate varied his order and the petitioner appealed to the High Court against that variation. At the hearing the High Court decided to review the merits of the case as a whole.

Held –

(i) under the Native Courts Ordinance, s. 24 (3) a magistrate is not empowered to vary his own revisional order and therefore his revision of his own order must be set aside;

(ii) the court is not obliged to look only to registration to ascertain whether the respondent is married; the bride-price paid although less than that demanded by the bride's father was greater than that permitted by the District Council's by-law and, according to native custom of which the court takes notice, that is sufficient evidence of the woman's marriage to the respondent.

Appeal allowed. Order of the Jago's Court restored.

No cases referred to in judgment

Judgment

Sir Audley McKisack CJ: The petitioner, Wongo, was sued by the present respondent, Dominiko Manano, in the Jago's Court, Parombo, for compensation for having taken Dominiko's wife. That court awarded Dominiko Shs. 300/- compensation. On appeal to the County Court, Okoro, that decision was upheld, but, on further appeal, it was reversed by the Central Native Court. Dominiko then petitioned the magistrate (West Nile District), who, in April, 1956, rejected the petition. On July 4, 1956, however, the same magistrate made a further revisional order varying his previous order and requiring Wongo to pay Shs. 300/-, and court fees, and sustenance and travelling expenses, to Dominiko. Wongo has now petitioned the High Court.

Section 24 of the Native Courts Ordinance (Cap. 76), which confers powers of revision on magistrates, provides (in sub-section (3)) that

> ". . . no proceedings shall be further revised under this section in respect of any matter arising thereon which

has previously been the subject of a revisional order under this section."

In the instant case the magistrate has revised his own revisional order. I think it is quite clear that the Native Courts Ordinance does not empower a magistrate to revise his own revisional order. Consequently the order made by the magistrate in the instant case on July 4, 1956, must be set aside.

But I do not think I can leave the matter there. Since all the proceedings leading up to that order have come to my notice, I think it is incumbent on me to consider whether the magistrate's order of April, 1956, upholding the

Central Native Court's decision involves (in the words of s. 26 of Cap. 76)

> ". . . an error material to the merits of . . . (the) case or . . . a miscarriage of justice . . ."

The Jago's Court does not appear to have recorded any reasons for the decision it gave in favour of Dominiko. But a letter in the file dated December 24, 1956, from the Rwoth, Okoro County, records that the County Court upheld that decision because

> "it was found officially that he (Dominiko) has paid his dowry mahl in full and in excess. Dominiko was punished by a fine of Shs. 50/- for breach of district council's bye-law re dowry mahl being in excess and the woman remains according to native custom his wife."

The grounds recorded by the Central Native Court for allowing the appeal were:

> "Wongo cannot pay (compensation) to Dominiko because he (i.e. Dominiko) did not marry Madalena d/o Ketho. Even the witnesses have said that he had not finished paying the dowry. Dominiko can now accuse Ketho to refund the remainder of his mahl if he so wishes."

The magistrate's revisional order of April, 1956, upheld the Central Native Court on the ground that Dominiko had never registered his marriage, and that the courts could not recognise a marriage that was not registered. He further held that it was immaterial how much "dowry money" had been paid. It is thus seen that the magistrate, though upholding the Central Native Court, did so for quite different reasons.

In his second revisional order (which I have now set aside) the magistrate says that, where the legal "mahl" (i.e. bride-price, which has also been translated as "dowry") has been paid, compensation should be payable if the wife has been taken by another man, even though the complainant's marriage was never registered. This view of the relevant customary law agrees with that which the County Court took, since that court looked only to the question of lawful bride-price and not to the question of registration. Nor did the Central Native Court concern itself with the question of registration. And the magistrate himself stated no authority in his first revisional order for the proposition (which he appears to have retracted in his second order) that the court looks only to the question whether the marriage was registered or not.

From the record of the proceedings in the Central Native Court, it is clear that that court was not then aware that Dominiko had been convicted and fined for paying a bride-price in excess of the permitted maximum. The court appears to have relied on a statement by the bride's father that Dominiko had not paid as great a bride-price as he (the father) had demanded. Had the Central Native Court realised that, whatever the cupidity of the father may have thought a proper bride-price, the husband had paid as much as the law permitted and required, and had in fact paid more than that, I think that that court must have come to a different decision.

I accordingly vary the decision of that court and the order of the magistrate upholding it, and restore the decision of the Jago's Court, Parombo, as upheld by the County Court, Okoro. Wongo must accordingly pay Dominiko Shs. 300/- as compensation, together with the court fees and reasonable expenses properly incurred by Dominiko in respect of proceedings in the three native courts, these amounts to be certified by a magistrate of the West Nile District Court. In view of the fact that Wongo has succeeded before me to the extent that the magistrates' second revisional order has been set aside, each party must bear his own disbursements and expenses incurred in respect of the proceedings before the magistrate and before the High Court.

Appeal allowed. Order of the Jago's Court restored.

The petitioner in person.

The respondent in person.

Abdulrasul G Sabur v R
[1958] 1 EA 126 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	14 April 1958
Case Number:	29/1958
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Criminal law – Charge citing wrong section of Ordinance – Particulars of offence giving details of offence alleged – Whether any failure of justice has occurred – Criminal Procedure Code, s. 347 (*U.*).

[2] Criminal law – Plea – Summons served containing offer to withdraw one count on accused pleading guilty to another – Whether plea of guilty is free and voluntary.

Editor's Summary

The appellant was served with a summons to answer two charges preferred against him under the Traffic Ordinance, 1951. The first count charged the appellant with exceeding the speed limit for commercial vehicles and the second count charged him with reckless driving. Written upon the face of the summons before service were the words

> "Written plea of guilty on Count 1 will be accepted in which case Count 2 will be withdrawn by police."

The appellant endorsed on the summons when it was served upon him a plea of guilty to the first count as a result of which the magistrate entered a conviction on that count and fined the appellant Shs 150/-. On appeal against both the conviction and sentence it was contended on behalf of the appellant that he should have been charged under s. 40 (1) of the Ordinance instead of s. 39 (1) and therefore the charge was defective, and that in any event the appellant had been offered an inducement to plead as he did.

Held –

(i) since the particulars of the offence were adequate to inform the appellant of the offence with which he was charged, there had been no failure of justice and the defect was curable under s. 347 of the Criminal Procedure Code.

Walidad Khan v. R., Uganda High Court Criminal Appeal No. 209 of 1952 (unreported) distinguished.

(ii) However in view of the inducement held out to the appellant to plead guilty to the first count, his plea was not free and voluntary and the conviction must be quashed.

Appeal allowed.

Case referred to:

(1) *Walidad Khan v. R.*, Uganda High Court Criminal Appeal No. 209 of 1952 (unreported).

Judgment

Sir Audley McKisack CJ: The appellant pleaded guilty (in writing) to a charge of driving a motor vehicle at a speed exceeding the permissible maximum, and was sentenced to a fine of Shs. 150/-. He entered an appeal against both conviction and sentence.

As regards the sentence, Mr. Virani, for the appellant, argues that the learned trial magistrate exceeded his jurisdiction in imposing a fine greater than that which is permitted by s. 199 (3) of the Criminal Procedure Code. That section prescribes the procedure in the trial of "petty cases", and limits the punishment

where a case is tried under the provisions of that section; in the case of a fine the maximum is Shs. 100/-. The gist of the procedure prescribed by this section is that the magistrate need not record the evidence of the witnesses but in such case must record certain prescribed particulars. It appears that the instant case was labelled as a "petty" case and entered in the register in which such cases are registered. But in this case there were no witnesses, because there had been a plea of guilty. Consequently there was no question of recording or not recording the evidence. It follows, in my view, that the limitation as to punishment does not apply. It applies only where there has been evidence and the evidence has not been recorded. The mere fact that the case is numbered, or described, in the manner appropriate to cases tried under the "petty" procedure is not sufficient to import the restriction on punishment imposed by s. 199 (3), if there has been a plea of guilty and no evidence has been led.

As regards the conviction, no appeal lies where there has been a plea of guilty (s. 324 (1) of the Criminal Procedure Code), but it is argued that the summons and the charge in the instant case did not disclose a criminal offence and, consequently, appellant pleaded guilty to something to which it was not possible to plead guilty, with the result–in law–that there was no plea of guilty. If it were established that there was a plea to an act or omission which did not amount to a criminal offence, I agree with Mr. Virani that there would be a right of appeal. But I do not think that that is the position in the instant case. The count to which the appellant pleaded guilty, in writing, was as follows:

> "Count 1. Speed of Motor Vehicles C/s. 39 (1) Traffic Ord. Abdulrasul G. Sabur, on October 30, 1957 at the time between 13.30 and 14.00 hrs. between Nagongera Township and Busolwe Bukedi District, being the driver of Bedford Commercial Van Reg. No. UKB 29, did drive the said vehicle at speed greater than 30 m.p.h. which is the maximum speed for such class of vehicle."

Mr. Virani does not quarrel with the particulars of the offence as set out in this count, but says that the appellant was charged under the wrong section. Section 39 (1) of the Traffic Ordinance, 1951, (which is the section specified in the count) does not, he says, create an offence; the proper section was s. 40 (1). Section 39 (1) and s. 40 (1) are as follows:

> "39. (1). No person shall drive a motor vehicle of any class or description on a road at a speed greater than the maximum speed prescribed for such a vehicle in the Second Schedule to this Ordinance.
>
> "40. (1). Any person who drives or who aids, abets, counsels or procures any other person to drive a motor vehicle at a speed in excess of a speed limit lawfully imposed shall be guilty of an offence and shall be liable on conviction to a fine not exceeding Shs. 1,000/- or to imprisonment for a period not exceeding three months."

It will be seen that s. 39 (1) imposes a prohibition on excessive speed, and that s. 40 (1) declares it to be an offence to contravene the speed limit and prescribes the penalty therefor.

Mr. Virani referred me to s. 136 (*a*) (ii) of the Criminal Procedure Code, which, in setting out the rules for framing charges, provides that

> "If the offence charged is one created by enactment it shall contain a reference to the section of the enactment creating the offence."

I agree that the charge (which was in the same terms as the summons served on the appellant) was defective in that it cited the wrong section, and that the proper section to have cited was s. 40 (1). But s. 347 of the Criminal Procedure Code provides that

> ". . . no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge . . . unless such error, omission, irregularity or misdirection has, in fact, occasioned a failure of justice."

The same section provides that, in determining whether any error, etc., has occasioned a failure of justice, the court shall have regard to the question whether the objection could, and should, have been raised at an earlier stage in the proceedings. It seems to me that the instant case is one eminently appropriate for the application of this section. The objection could have been, and was not, taken at an earlier stage. And in any event I do not think that the appellant can have been under the slightest misapprehension as to the offence with which he was charged. The particulars of the offence set out in the summons and charge were adequate, and no criticism of them has been raised by Mr. Virani. The section cited in the summons is one forbidding driving at a speed exceeding the maximum. The appellant cannot possibly have been left in any doubt as to the charge which he had to face. Quite clearly, in my view, there has been no failure of justice. Consequently the appeal cannot succeed on this ground. Mr. Virani, in arguing this point, referred me to a decision of Griffin C.J. in *Walidad Khan v. R.*, (1) Uganda High Court Criminal Appeal No. 209 of 1952 (unreported), which was an appeal against a conviction under an Ordinance entitled the Native Foodstuffs Ordinance, to be found at chapter 113 of the 1935 revised edition of The Uganda Laws. In that case it was held that the charge disclosed no offence, because it alleged a contravention of s. 5 of that Ordinance instead of s. 3 and s. 4, and it was further held that s. 347 of the Criminal Procedure Code could not be called in aid. The learned Chief Justice did not, however, give reasons for that decision, beyond stating that s. 5 was merely a penalty section. Sections 3 and 4 of that Ordinance provided the machinery for imposing prohibitions on the purchase of certain foodstuffs in certain circumstances and for fixing maximum prices, and s. 5 provided that a person purchasing foodstuffs in contravention of the terms of the Ordinance "shall be deemed to be guilty of an offence" and shall be liable to certain penalties. It is not clear to me why s. 5 of the Ordinance, which is closely similar in effect to s. 40 (1) of the Traffic Ordinance, was not to be regarded as creating an offence but, in any event, I am concerned only with the construction of the latter Ordinance. In the case before Griffin C.J., moreover, the particulars of the offence set out in the charge were clearly inadequate, and it was no doubt for that reason that section 347 was held to be inapplicable. The position is very different in the case now before me.

It thus appears to me that the appellant did plead guilty to an offence, and that he was convicted of that offence. Consequently, it would not be open to him to appeal against the conviction if the matter rested there. But there is a third point raised in the appeal. The summons served on the appellant contained two counts. The first was the count with which I have already dealt; the second count was for reckless driving, contra s. 43 (1) of the Traffic Ordinance. This offence carries a heavier penalty than the offence of exceeding the speed limit which was charged in count 1. The summons had written upon it the following words, which appear on the face of the summons at the foot–

> "Written plea of guilty on count 1 will be accepted in which case count 2 will be withdrawn by police."

This addition appears to have been initialled by the learned trial magistrate and, from enquiries I have caused to be made, there seems no doubt that these words were added to the summons before it was sent out for service. On the back of the summons the appellant wrote

> "I hereby plead guilty for the 1st count of driving a commercial vehicle exceeding speed limit of 30 m.p.h. and sincerely apologise for it."

There can be no doubt–and Crown counsel fully concedes that this is so–that the words I have quoted were a most improper addition to make to a summons. They might well be construed by the person summoned as an inducement to plead guilty to the lesser charge with a view to avoiding trial for the more serious offence. They could also be construed by him as suggesting that the police were prepared to "bargain" with the accused and that the magistrate was countenancing, if not actually encouraging, such dealings. How these words came to be added to the summons is not material to this appeal, but I hasten to add that there is no reason to suppose that the police were in fact at fault. It seems (from inquiries made) that the words were added by a clerk dealing with the summons, but the fact remains that the magistrate appears to have approved them by adding his initials. The facts of the case may have been such that, had these words not been added to the summons, and had the accused come to court, it would have been perfectly proper for the police to have withdrawn the second count upon the accused pleading guilty to the first count. But that is a very different matter. On the face of it there was an inducement held out to the appellant by the magistrate to plead guilty to one count. I cannot, therefore, regard the appellant's plea of guilty as a free and voluntary one. In the result, I have no choice but to quash the conviction and sentence. The appeal is accordingly allowed. The fine, if paid, must be refunded, and the endorsement of the appellant's driving permit must be cancelled accordingly.

Appeal allowed.

For the appellant:
J Virani
J Virani, Kampala

For the respondent:
HSS Few (Crown Counsel, Uganda)
The Attorney-General, Uganda

Gabuliel Sebankirya and others v The Lukiko
[1958] 1 EA 130 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	14 May 1958
Case Number:	300–304/1957
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Criminal law – Native law and custom – Deportation by riotous crowd of suspected witch doctor and family – Whether custom can justify forcible removal and ill-treatment – Uganda Order in Council,

1902, *Article* 20 – *Buganda Courts Ordinance, s.* 10 (*b*) (*U.*)

Editor's Summary

The complainant was suspected of having caused the death of certain people by witchcraft as a result of which he was set upon, deported with his family by a riotous crowd in defiance of their chiefs and left in the open. The first three appellants were subsequently convicted in the Principal Court of Buganda of offences including conspiring together and setting upon the complainant and burning his houses, and the fourth and fifth appellants of conspiring together and deporting the complainant and his family and of injury to his health and the health of his family contrary to custom and s. 10 (*b*) of the Buganda Courts Ordinance. The appellants appealed to the judicial adviser who sustained these convictions but quashed a conviction on another count. On a second consolidated appeal it was contended that discrepancies in the prosecution evidence before the principal court were such that the convictions were unjustifiable in law, that native custom permitted the deportation of a practitioner of witchcraft, that since the fourth and fifth appellants did not go with those who deported the complainant and his family they were only guilty of conspiracy and not for the injury to health and that all the appellants were grossly prejudiced by the reference in the charges to s. 10 (*b*) of the Buganda Courts Ordinance.

Held –

(i) the argument that the lower courts were wrong in law in holding that the discrepancies in the prosecution case were not such as to render that evidence unreliable is an attempt to clothe a question of fact with the appearance of a question of law and on a second appeal such a submission cannot be entertained,

(ii) the real issue as shown by the particulars of the offence charged was not whether there existed a custom of deportation but whether custom could justify the brutal removal of the complainant and his family and the abandonment of them all in the open to the injury of their health,

(iii) the treatment of the complainant and his family could only be justified under native custom if the custom is in accordance with natural justice and "not repugnant to justice and morality";

(iv) the fourth and fifth appellants were clearly responsible for the forcible removal by a riotous crowd of the complainant and his family and could not escape responsibility for the ill-treatment which resulted;

(v) although there was no prejudice whatsoever by the reference to s. 10 (*b*) of the Buganda Courts Ordinance in the charges, the reference was unnecessary and should be omitted in future when charges of this kind are framed.

Appeals dismissed.

Case referred to:

(1) *Kigozi v. The Lukiko* (1943), 6 U.L.R. 113.

Judgment

Sir Audley McKisack CJ: The appeals by these five men, who were convicted in the Principal Court of Buganda in criminal case No. 274 of 1956, have been consolidated. They appealed to the judicial adviser, and from his decision an appeal lies to the High Court on matters of law only. The judicial adviser quashed their convictions on one count (which was for moving cattle without a permit), but otherwise upheld the convictions had in the principal court. The result is that appellants Nos. 1, 2 and 3 stand convicted on the following counts (as set out in the first paragraph of the judicial adviser's judgment):

(A) Conspiring together and setting upon the complainant Erasto Kimbowa in his home and burning 13 of his houses, contrary to customary law and sub-s. 10 (*b*) of the Buganda Courts Ordinance.

(B) Conspiring together and deporting the same complainant from his home together with his family and dumping him at Katebo in the open and injuring his health and that of his family, contrary to customary law and sub-s. 10 (*b*) of the Buganda Courts Ordinance.

Appellants Nos. 4 and 5 stand convicted on count (*B*) above only. The appeals of all five appellants are brought on the same grounds in respect of the counts concerned. Mr. Kiwanuka appeared for all the appellants. The first ground is that both of the lower courts

> "were wrong in law in holding that the discrepancies which existed in the prosecution case were such as could not have raised such doubt as precluded them from convicting on count (A)."

This appears to me to be a rather transparent attempt to clothe a question of fact with the appearance of a question of law. As I understand his argument, Mr. Kiwanuka did not contend that either of the lower courts had ignored the existence of discrepancies in the prosecution evidence, but that those courts should have held that the discrepancies were so serious as to render the prosecution evidence too unreliable to justify a conviction. This, however, is a question of fact and an appeal from the judicial adviser on such a ground is not competent. Mr. Kiwanuka eventually abandoned this ground.

At the trial it formed part of the defence of some of the accused that native custom permitted a practitioner of witchcraft to be deported from the area in which he lived. In the instant case the complainant, Erasto Kimbowa, was suspected of having caused the death of certain people by witchcraft, and the resultant action taken by those who suspected him is adequately summarised in the two counts which I have already set out. The second ground of appeal is that, in view of the defence that the deporting of the complainant was sanctioned by native custom, the prosecution ought to have called evidence that this custom did not in fact exist, and that in the absence of such evidence the appellants ought not to have been convicted. On this point the learned judicial adviser observed

> "the Principal Court of Buganda, which must be regarded as an authority in deciding on Buganda customary law, found no hesitation in admonishing the people of Ssingo for their unlawful action on this occasion,"

and that

> "while ostracism from the tribe was undoubtedly a sanction in primitive Africa, if it was ever part of the Buganda customary law at any rate it has fallen into desuetude and would be undesirable to resurrect."

This ground of appeal relates to count (B) only. It is not contended that the acts of arson referred to in count (A) are in any way sanctioned by native custom. On the question of proof of native custom generally, the decision of this court in *Kigozi v. Lukiko* (1) (1943), 6 U.L.R. 113 is relevant. In the course of his judgment in that case Whitley, C.J., said as follows:

> "In British Courts questions of custom rarely arise and when they do arise the court probably has no definite personal knowledge as to what the custom is and unless the custom has become notorious it must be formally proved by evidence. In the Native Courts of Buganda the position is quite different. They have few written laws and no reported case law and consequently they are for the most part administering customary law. Justice is administered by high officials and chiefs who are themselves familiar with the customs of their people and generally speaking require no evidence to inform them what those customs are. In the great majority of cases in their courts turning upon customs it would be unreasonable to expect evidence as to custom. In a few cases where there might be a doubt as to what the custom actually is it might be desirable or even necessary that evidence be adduced on the point. It would I think be dangerous to lay down any hard and fast rule. Each case must be considered on its own facts but generally speaking where a native court has held that a certain act is contrary to custom an appellate court should I think be reluctant to hold otherwise except upon very substantial grounds and should unless it be repugnant to natural justice, give effect to the custom in its judgment, provided of course that it agrees with the native court's finding as to custom. In the present case the principal court found that the acts complained of against and admitted by the appellant were contrary to custom and on the record before me as a whole, I, like the learned judicial adviser, find it quite impossible to say that they were not fully justified in so holding."

It happens every day in the courts of Buganda, and other African courts, that persons are convicted of crimes without any proof of customary law being adduced and without any question being raised whether the acts charged do or do not amount to offences recognised by customary law. The position in the instant case, however, is that the appellants have been convicted of an offence against customary law, whereas they contended at the trial that they were acting in accordance with customary law. This might therefore be one of those exceptional cases to which Whitley, C.J., referred as making it necessary for evidence to be adduced concerning the existence or nature of a custom. But it is only necessary to look at the particulars set out in count (B) to see that the real issue in the instant case was not whether there was in existence a custom of deporting practitioners of witchcraft. As the particulars in count (B) show, the "deporting" of the complainant involved the removal not only of the complainant himself but also of his family and abandoning them all to exposure in the open and causing injury to their health. The evidence on the record further shows that this "deporting" was forcibly and, indeed, brutally effected by a riotous crowd in defiance of attempts by their chiefs to restrain them. It is difficult to see how it could be contended that such actions were sanctioned by any native custom or that, if they were so sanctioned, the custom was not repugnant to natural justice; and, of course, a court can only

> "be guided by native law so far as it is . . . not repugnant to justice and morality"

(Uganda Order in Council, 1902, art. 20). The principal court's judgment did not discuss this question of custom, except to refer to the accuseds' defence that there was a precedent for deportation of witchcraft practitioners. But, in view of the real nature of the offence laid in count (B), I do not think it was any more incumbent on that court to do so in this case than in any other case of assault or other ill-treatment of a complainant. And I think it was perfectly competent for the principal court to find, without evidence having been led for that purpose, that these acts of violence, so far from being

sanctioned by customary law, were, in fact, an offence against that law. The second ground of appeal accordingly fails.

It was also argued on behalf of the two appellants who were convicted on count (B) only that, although they conspired with others to effect the deporting of the complainant and were present when he was removed from his house, they did not go with those who took the complainant and his family to another place and "dumped" him in the open; consequently they were not responsible for the injury to the health of the complainant and his family which resulted therefrom, and were guilty of nothing more than a conspiracy. I see no merits in this contention. On the evidence the appellants are clearly responsible for causing the complainant and his family to be forcibly removed by a riotous crowd, and they cannot be heard to say that they are not also responsible for the resultant ill-treatment of those persons inflicted in pursuance of that removal.

The third ground of appeal is that the appellants were "grossly prejudiced" by reason of s. 10 (*b*) of the Buganda Courts Ordinance being specified, in counts (A) and (B), as the law which was contravened. In what way the appellants were prejudiced I was unable to understand, and the most that Mr. Kiwanuka was able to make of this ground of appeal was that an accused person might be misled into thinking he was being charged with a statutory offence. But the particulars in the counts were quite sufficient to show the nature of the offence charged and, in the case of an illiterate accused, the reference to the section in question would mean nothing. If he was literate, and looked at the Ordinance, he would soon discover that the reference does in fact mean nothing. Section 10 of the Buganda Courts Ordinance (Cap. 77) (so far as it is relevant to this point) reads as follows:

> "Subject to the provisions of this Ordinance, a court shall administer and enforce only–
>
>
>
> "(*b*) the native customary law prevailing in Buganda on or after the commencement of this Ordinance;".

Why the principal court includes a reference to this provision when it frames charges of this kind against an accused person is not clear, and I think that it would be preferable if, in future, the principal court omitted it. It is quite sufficient to allege a contravention of customary law without any reference to the provision in the Buganda Courts Ordinance which empowers the court to administer that law.

The fourth and last ground of appeal was that, although the principal court had, at the request of the accused persons, visited the scene of the crime (i.e. the complainant's homestead), and made a written report thereon, they failed to take this report into consideration when deciding the case. But the principal court did in fact refer to this report in their judgment (see p. 31 of the typed copy of the judgment), so it cannot be said that they ignored it. It is argued, however, that, as this report on the scene contains the observation that

> "generally there are many mituba trees, it is a dark place not an open place,"

the court ought not to have believed the witnesses' assertions that they saw various people doing various things at that place. That is a question of fact and not of law. And, in any event, the crime took place at 8 o'clock at night, so the fact that the place was "dark" in the daytime as well as at night seems quite immaterial.

All the appeals are dismissed.

Appeals dismissed.

For the appellants:
BKM Kiwanuka
Advocate: *BKM Kiwanuka*, Kampala

The respondent did not appear and was not represented.

Erenesti K Sajjabi v R
[1958] 1 EA 134 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	26 June 1958
Case Number:	10/1956
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Criminal law – Confiscation of firearm in accordance with Firearms Ordinance, s. 33 (*U.*) *– Whether order of confiscation mandatory or discretionary.*

Editor's Summary

In sentencing the accused one Jamaldin Uppal, an unregistered repairer of firearms of offences under the Firearms Ordinance, the magistrate under s. 33 confiscated all the firearms at the accused's premises including that of the applicant who had innocently handed it to the accused for repair.

Held – the provision under s. 33 for confiscation is mandatory and has replaced the discretion allowed under s. 33 (4) of Cap. 225, and *R. v. Erika Kamya* (1950), 6 U.L.R. 249 is no longer good law. The applicant's only remedy is to petition the Governor for revision of forfeiture under s. 17 of the Uganda Order-in-Council, 1920.

No order made.

Case referred to:

(1) *R. v. Erika Kamya* (1950), 6 U.L.R. 249.

Judgment

Sheridan J: I am treating this application as a petition for revision.

On May 10, 1956, the resident magistrate Kampala convicted one Jamaldin Uppal of offences under the Firearms Ordinance and he made an order for the confiscation of firearms found at the accused's premises. The accused is an unregistered repairer of firearms. Among the firearms confiscated was a shotgun No. 23914 belonging to the applicant. The applicant states that he had handed it over to the

accused to repair in the belief that he was a registered repairer of firearms. At the trial this was not disputed by the prosecution. In sentencing the accused the learned magistrate invited the owners of the confiscated firearms, who were not before the court, to take appropriate steps to appeal against his order.

The firearms were confiscated under s. 33 of the Ordinance. This provision is mandatory and it has replaced the discretionary provision of s. 33 (4) of Cap. 225. Hence *R. v. Erika Kamya* (1) (1950), 6 U.L.R. 249 which decided that where a person is convicted of possession of a firearm without a licence, and the firearm is the property of a third person, and that person is known, the court should not make an order of forfeiture in respect of the firearm without first hearing the owner is no longer good law on this point. The applicant's only remedy is to petition the Governor for remission of forfeiture under s. 17 of the Uganda Order-in-Council, 1920.

This application has been to the attorney-general and he has replied that he agrees with the view expressed above.

For these reasons I make no order in revision.

No order made.

The applicant in person.

The respondent did not appear and was not represented.

Lalji Meghji Patel v R
[1958] 1 EA 135 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	2 April 1958
Case Number:	70/1958
Before:	Sir Ronald Sinclair CJ and MacDuff J
Sourced by:	LawAfrica

[1] Street traffic – Motor vehicle on footpath – Whether causing obstruction – Charges under Nairobi Municipality (*General*) *By-Laws,* 1948–*By-Law* 623 *and By-Law* 416 *– Principles applicable to construction of By-Laws.*

Editor's Summary

The appellant had been convicted and fined by the city magistrate of (*i*) driving a motor vehicle upon a footpath within the city of Nairobi contra By-Law 623 as amended by Government Notice No. 109/50 of the Nairobi Municipality (General) By-Laws, 1948; (ii) leaving a motor vehicle liable to cause an obstruction upon a footpath within the City of Nairobi contra By-Law 416. Under By-Law 623 . . . "A person . . . shall not drive any vehicle on any footpath . . . reserved for the use of foot passengers only". The element of reservation was not considered by the magistrate, and no proof of reservation was placed before the court. Under By-Law 416 . . . "A person shall not leave upon any street . . . or public

place . . . any article which is likely to obstruct or cause any obstruction in or upon such street . . . or public place Provided that this by-law shall not apply to any motor car . . . or vehicle which is left standing for the user's temporary convenience in a street or public place in such a position as not to cause any obstruction to traffic". In considering the words "likely to cause an obstruction upon a footpath" no reference was made by the magistrate as to whether the area referred to as a footpath was a street or public place within the meaning of these two terms. The city magistrate having found the area on which the motor vehicle was parked to be a footpath applied principles applicable to footpaths and not those in regard to streets or public places.

Held –

(i) the words in By-Law 623 "reserved for the use of foot passengers only" which qualify the word "footpath" connote an element of reservation whether express by way of notices or implied by way of the method of construction of the path itself, and must be considered. Proof of such reservation must also be available;

(ii) one must first consider the proviso to By-Law 416 and whether the vehicle and its user came within the proviso. To come within the proviso it must be shown (*a*) that the vehicle was left standing for the user's temporary convenience and (*b*) that the vehicle was left standing in such a position as not to cause any obstruction to the traffic. The magistrate by restricting his consideration to the principles applicable to obstruction of footpaths failed to appreciate that the obstruction in this by-law is a matter of fact to be considered on the circumstances of each case.

Appeal allowed. Conviction quashed. Order for fines to be refunded.

No cases referred to in judgment

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court: The appellant has been convicted on the following two counts:

> "COUNT I. Driving a motor vehicle upon a footpath within the City of Nairobi contra By-Law 623, as amended by Government Notice No. 169/50 of the Nairobi Municipality (General) By-Laws, 1948.

> "In that on 11th day of December, 1957, at about 10.15 a.m. you did drive motor vehicle No. KFD 328 upon footpath in Khan Road, Nairobi, the said footpath being reserved for the use of foot-passengers only.
>
> "COUNT II. Leaving a motor vehicle liable to cause an obstruction upon footpath within the City of Nairobi contra By-Law 416, of the Nairobi Municipality (General) By-Laws, 1948.
>
> "In that on 11th day of December, 1957, at about . . . you did leave motor vehicle No. KFD 328 liable to cause an obstruction upon footpath in Khan Road,"

and was fined Shs. 60/- on each count. He has appealed against both conviction and sentence.

The learned deputy public prosecutor for the complainant, the City Council of Nairobi, has not sought to support the conviction on the first count. The by-law under which this was laid reads:

> "623. A person shall not lead, ride or drive any horse, mule, donkey or ox on any footpath reserved for the use of foot passengers only, or allow any such animal to remain on the footpaths: nor shall any person ride a bicycle or drive or propel any vehicle on any such footpath."

He has accepted the view that the words "reserved for the use of foot passengers only" which qualify the word "footpath" connote an element of reservation whether express by way of notice or implied by way of the method of construction of the path itself. This element of reservation not having been considered by the learned magistrate, and in fact no actual proof of any such reservation having been placed before the court, he admits that the conviction cannot stand. With that we agree. The conviction on the first count is quashed, sentence is set aside, and the fine if paid is to be refunded to the appellant.

The by-law under which the second count is laid is:

> "416. A person shall not leave upon any street or public passage or public place any handcart, box, crate, dustbin or any article which is likely to obstruct or cause any obstruction in or upon such street or public passage or public place.
>
> "Provided that this by-law shall not apply to any motor-car or cycle or vehicle which is left standing for the user's temporary convenience in a street or public passage or public place in such a position as not to cause any obstruction to traffic."

The use of the words "liable to cause an obstruction upon a footpath" without reference to whether the area referred to as a footpath is a street or public place within the meaning of those two terms in the by-law has resulted in a number of misconceptions not only during the trial but also in the judgment of the learned magistrate. In the result most of the argument before the learned magistrate was directed to the question of what is a footpath, and he having found the area to be a footpath then based his decision on the question of obstruction in this manner:

> "The accused's car was something in the region of twelve feet long and though it may not have totally blocked the footpath there can be no doubt that it obstructed it. For an obstruction is no less an obstruction because some people are not incommoded by it (*Read v. Perrot*, 1 Ex. D. 349). In my view a car parked upon a footpath is both liable to cause an obstruction and does in fact cause an obstruction."

Counsel for the appellant first submitted that a motor vehicle does not come within the scope of the words "any article" in the by-law. His argument is that these words must be interpreted ejusdem generis with the specific words

"handcart, box, crate, dustbin" preceding them. In referring to the application of the ejusdem generis rule Maxwell on the Interpretation of Statutes (10th Edn.) at p. 342 says:

> "Of course, the restricted meaning which primarily attaches to the general word in such circumstances is rejected when there are adequate grounds to show that it has not been used in the limited order of ideas to which its predecessors belong. If it can be seen from a wider inspection of the scope of the legislation that the general words, notwithstanding that they follow particular words, are nevertheless to be construed generally, effect must be given to the intention of the legislature as gathered from the larger survey."

Applying this principle the proviso to the by-law clearly indicates that a motor vehicle is contemplated by the by-law as being within the meaning of the words "any article" and the ejusdem generis rule is excluded.

The appellant's next submission was that in considering whether the motor vehicle in question was likely to cause any obstruction the learned magistrate having found the area on which the motor vehicle was parked to be a footpath has erred in that he has applied principles which in his view apply to footpaths and not those which should be applied in regard to streets or public places. In our view the proper manner in which this problem should be approached is first to consider the proviso to the by-law and to consider whether the vehicle and its user come within the proviso. To come within the proviso it is required to be shown:

(*a*) that the vehicle is left standing for the user's temporary convenience, and

(*b*) that the vehicle is left standing in such a position as not to cause any obstruction to traffic.

The first of these conditions was not considered by the learned magistrate, and before we proceed to the second condition we are compelled to do so. The evidence for the prosecution was to the effect that this motor vehicle was parked for half an hour. The appellant denied this and gave evidence to the effect that he had parked the vehicle for a quarter of an hour while he was in his office. Under either of these circumstances the learned deputy public prosecutor was constrained to admit that he could not submit that this was any more than for the user's temporary convenience. In view of the looseness of the wording used in the by-law we are in agreement with him.

The second condition was considered by the learned magistrate in the manner to which we have referred earlier. The facts proved show that at this point the area found by the learned magistrate to be a footpath, and on which the vehicle was parked, consisted of a width of twenty-five feet from the curb stones which marked the edge of the tarmac carriage way. Of this twenty-five feet there was eighteen feet of murram, then seven feet of pavement fronting some shops. The vehicle was twelve feet long and one end was three feet from the curb stones, with the result that the other end must have been three feet from the pavement. This would leave clear of the vehicle a pavement seven feet wide on which one would ordinarily expect foot passengers to walk, and three feet of murram near to the pavement. In view of this width the evidence of the city council inspector that there was room for two people only to pass would appear to be suspect. The second condition requires that there be proof that the vehicle has not been left in such a position as not to cause an obstruction to traffic. In our view the learned magistrate by restricting his consideration to the principles having to do generally with obstruction of footpaths has failed to appreciate that the obstruction in this by-law is a matter of fact to be considered on the circumstances of each particular case.

We are unable to say that had the learned magistrate applied his mind to the proper principles according to which he was required to decide the question of obstruction he would have arrived at the same decision. Accordingly the conviction on the second count cannot be allowed to stand. Conviction on the second count is also quashed, sentence in respect thereof set aside and the fine, if paid, is to be refunded.

Appeal allowed. Conviction quashed. Order for fines to be refunded.

For the appellant:
MK Bhandari
Bhandari & Bhandari, Nairobi

For the respondent:
AP Jack (Deputy Public Prosecutor, Kenya)
The Attorney-General, Kenya

R v Lokidilio s/o Laitogou
[1958] 1 EA 138 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	25 April 1958
Case Number:	344/1958
Before:	Edmonds J
Sourced by:	LawAfrica

[1] Criminal law – Sentence – Payment of compensation ordered and imprisonment in default – Whether sentence lawful – Criminal Procedure Code, s. 331 *and s.* 335 (*K.*).

Editor's Summary

The resident magistrate at Rumuruti convicted the accused of killing an animal with intent to steal and passed sentence of eighteen months' imprisonment and also ordered the accused to pay Shs. 250/- compensation in default of which the accused was to serve a further three months imprisonment. The record was then transmitted to the Supreme Court for confirmation.

Held –

(i) there is no authority in the Criminal Procedure Code for ordering imprisonment in default of payment of compensation at the same time as the order for payment of compensation is made and accordingly the order for imprisonment in default of distress was at that stage illegal;

(ii) where an order for compensation is made, the court should enquire first whether distress and sale of the accused's property would be ruinous to the accused or his family, and secondly whether the accused is entirely without property on which distress could be levied; if either of these questions is decided in the affirmative or if there is any other good and sufficient reason for not selling up the accused's property, the court has a discretionary power under s. 335 of the Criminal Procedure Code to commit the accused to prison;

(iii) if, however, the enquiry shows that the accused has or may have property on which distress can be levied, the proper course is to issue a warrant of distress under s. 331;

(iv) thereafter, if the officer to whom execution of the warrant is entrusted reports that there is no or no sufficient property upon which to distrain, the court may in its discretion commit the accused to prison.

Order for three months' imprisonment in default of distress set aside. Remaining sentence confirmed.

No cases referred to in judgment

Judgment

Edmonds J: The accused was convicted of the offence of killing an animal with intent to steal contrary to s. 284 of the Penal Code, and was sentenced to eighteen months' imprisonment. In addition to this sentence, the learned magistrate ordered the accused to pay compensation in the sum of Shs. 250/-, and in default of distress to serve a further three months' imprisonment. The order for imprisonment in default of distress at that stage is illegal. There is no authority in the Criminal Procedure Code for awarding imprisonment in default of payment of compensation at the same time as the order for compensation is made.

The first step upon making an order for compensation is to enquire into and decide two questions, in accordance with the provisions of s. 335 of the Criminal Procedure Code. The first question is whether distress and sale of the accused's property would be ruinous to the accused or his family, and the second is whether the accused is entirely without property on which distress could be levied. If either question is decided in the affirmative, or if there is any other good and sufficient reason for not selling up the accused's property, then the court has a *discretionary* power under s. 335 to commit the accused to prison. This course, commitment in lieu of distress, is the first course to which consideration should be given where an order for distress is made and the order is not satisfied by voluntary payment forthwith.

But if the enquiry made as above has shown that the accused has, or may have, property on which distress can be levied, then the proper course is to issue a warrant of distress under s. 331. It is then only upon the officer who has the execution of the warrant, reporting that he can find no property, or no sufficient property upon which to levy distress, that the court may, *in its discretion*, under s. 334, commit the accused to prison.

I stress the word "discretion" as a court may ultimately decide that a term of imprisonment in lieu or for want of distress may not meet the justice of the case.

I accordingly set aside the order for three months' imprisonment in default of distress. This order is, of course, no bar to the magistrate ultimately imposing a sentence of imprisonment should distress fail. The sentence is in other respects confirmed.

Order for three months' imprisonment in default of distress set aside. Remaining sentence confirmed.

R (at the Instance of Official Receiver) v Ratilal Amarshi Lakhani
[1958] 1 EA 140 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	23 May 1958
Case Number:	11/1958
Before:	Lewis J

Sourced by: LawAfrica

[1] Criminal law – Sentence – Bankruptcy – Convictions for failing to keep books of account and proper accounts – Whether fine or imprisonment appropriate punishment – Bankruptcy Ordinance, s. 140 *and s.* 145 (*U.*) – *Criminal Procedure Code, s.* 3 (2) *and s.* 300 (3) (*U.*) – *Bankruptcy and Deeds of Arrangement Act,* 1913, *s.*1 (1) – *English Summary Jurisdiction Act,* 1879, *s.* 4.

Editor's Summary

The accused, a bankrupt, was convicted on his own plea on two counts of failing to keep any books of account in respect of one business and on two counts of failing to keep proper books of account in respect of another business. He was fined Shs. 500/- on each count. The fines were duly paid. The official receiver, however, applied to the High Court under s. 339 of the Criminal Procedure Ordinance to review the sentence passed and argued that fining a bankrupt was no punishment as the fine was either paid from the general funds in the official receiver's hands in which case the creditors suffered, or it was paid by relatives or friends of the bankrupt. He also argued that s. 145 of the Bankruptcy Ordinance seemed to contemplate only imprisonment.

Held –

(i) the test a court of trial should apply is whether justice would be better met by fine than imprisonment; and

(ii) it is wrong in principle to impose a fine for bankruptcy offences: the reason being that as a bankrupt cannot pay his debts he cannot pay a fine without obviously further prejudicing his creditors, and this could not have been the intention of the legislature.

Per Curiam **–** "I would, therefore, lay it down that only in the most exceptional cases and when the justice of the case will be better met should a fine be imposed for the bankruptcy offence set out in Part VIII of the Ordinance."

Sentence of fine set aside. Sentence of six months' imprisonment without hard labour on each count (to run concurrently) substituted.

Case referred to:

(1) *R. v. Inderchand* (1934), 36 Bom. L.R. 174.

Judgment

Lewis J: This was an application by the official receiver under s. 339 of the Criminal Procedure Ordinance to review the sentences passed against Ratilal Amarshi Lakhani by the Mbale District Court in Criminal Case No. 588 of 1957.

The bankrupt was convicted under s. 140 (1) of the Bankruptcy Ordinance on two counts of failing to keep any books of account in respect of his business of a kerosene and beer distributor and on two counts of failing to keep proper books of account in respect of his shop at Mbale and Gulu.

The bankrupt pleaded guilty to these offences and was sentenced to pay a fine of Shs. 500/- on each

count. The fines were duly paid. The bankrupt’s deficit amounted to the sum of Shs. 140,000/-.

The learned magistrate gave no reason for imposing the sentences he did, but it must be assumed that he took into account the facts put before him in mitigation by Mr. Russell.

The official receiver argued that there was no punishment in the imposition

of a fine as a penalty. The fine was either paid from the general funds in the hands of the official receiver, in which case it is the creditors who suffer, or it is paid by the relatives or friends of the bankrupt. Further, the provisions of s.145 of the Bankruptcy Ordinance (the general penalty section applicable in the absence of a specific penalty under s. 140) seemed to contemplate only a penalty of imprisonment. I agree that a fine is no real punishment, but that is not a reason for interfering with a sentence allowed by law. On the face of it s. 145 provides for imprisonment only. However, this section must be read with s. 3 (2) and s. 300 (3) of the Criminal Procedure Code. The latter section gives a court the power to impose a fine instead of imprisonment in all cases where a person is liable to imprisonment.

I have not been referred to any authority on the question of the appropriate sentence for bankruptcy offences, but according to Roome's Criminal Offences in Bankruptcy, for example, a court of summary jurisdiction had not express authority under s. 1 (1) of the Bankruptcy and Deeds of Arrangement Act, 1913, to impose a fine instead of imprisonment for bankruptcy offences, but might notwithstanding, if of opinion that the justice of the case will be better met by fine than imprisonment impose a fine not exceeding £25 (Summary Jurisdiction Act, 1879, s. 4).

I consider that the subordinate courts in Uganda should follow this practice. I will not attempt to lay down any guiding rule as each case must be decided on its special facts.

In this case under review the bankrupt pleaded guilty, so it must be assumed that his omission to keep proper accounts was neither honest nor excusable. A perusal of the record in the lower court and the bankruptcy case file does not enable me to say that the justice of the case would be better met by fine than imprisonment. However, that is the test which the trial court should apply.

This court's powers on revision are laid down in s. 341 of the Criminal Procedure Code, which is similar to s. 439 of the Indian Code of Criminal Procedure. It has been laid down in India that the High Court does not exercise the power of enhancing a sentence in every case in which the sentence passed is inadequate. The mere fact that the High Court would itself, if it had been trying the case, have passed a heavier sentence than that which the trial court had passed, is no reason for enhancing the sentence. The High Court will interfere only where the sentence passed is manifestly and grossly inadequate. *R. v. Inderchand* (1) (1934), 36 Bom. L.R. 174. The same principle guides this court when exercising the power of enhancing sentences imposed, as was in *R. v. Inderchand* (1), under the Penal Code. However, different principles must, in my view, apply to offences under the Bankruptcy Ordinance. There the test must be whether the sentence is also right in principle.

In my opinion it is wrong in principle to impose a fine for bankruptcy offences. The reason being that as a bankrupt cannot pay his debts he cannot pay a fine without obviously further prejudicing his creditors, and this could not have been the intention of the legislature. I would therefore lay it down that only in the most exceptional cases and when the justice of the case will be better met should a fine be imposed for the bankruptcy offence set out in Part VIII of the Ordinance.

For these reasons I set aside the sentences imposed and substitute a sentence of six months without hard labour on each count. The sentences to be concurrent and to run from today's date.

Sentence of fine set aside. Sentence of six months' imprisonment without hard labour on each count (*to run concurrently*) *substituted.*

For the Official Receiver:
D Hughes

For the accused:
REG Russel
Russell & Co, Kampala

For the applicant:
The Official Receiver, Uganda

R v Burns
[1958] 1 EA 142 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	5 April 1958
Case Number:	108/1958
Before:	Sir Ronald Sinclair CJ and Templeton J
Sourced by:	LawAfrica

[1] Criminal law – Conversion – Unlawful use of government vehicle – Whether circumstances of use constituted conversion – Penal Code, s. 289 (*K.*).

Editor's Summary

The accused, a police officer, took a government vehicle which was on charge to his police station with the driver to Nairobi and returned a day later. He had no authority and would not have been given authority to take the vehicle if he had asked for it. He was charged with the unlawful use of the vehicle contrary to s. 289 of the Penal Code and was convicted on his own plea. The case came before the Supreme Court for revision and counsel for the Crown stated that he did not support the conviction.

Held – The use of the vehicle by the accused was unlawful and without colour of right; he deprived his police station of the use of the vehicle for two days and his conduct was inconsistent with the owner's right and constituted conversion.

(Definition of "conversion" in *Lancashire and Yorkshire Ry. Co. v. MacNicoll* (1918), 88 L.J.K.B. 601 quoted by Lord Porter in *Caxton Publishing Co. v. Sutherland Publishing Co.*, [1938] 4 All E.R. 389; [1939] A.C. 178 adopted.)

No order made.

Case referred to in judgment:

(1) *Mowe v. Perraton*, [1952] 1 All E.R. 423; 35 Cr. App. R. 194.

(2) *Caxton Publishing Co. Ltd. v. Sutherland Publishing Co. Ltd.*, [1938] 4 All E.R. 389; [1939] A.C. 178.

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court: The accused was convicted on his plea of unlawful use of a motor vehicle contrary to s. 289 of the Penal Code. The question for decision is whether on the admitted facts the accused was guilty of the offence charged, notwithstanding his plea of guilty.

Section 289 of the Penal Code reads:

> "Any person who unlawfully and without colour of right, but not so as to be guilty of stealing takes or converts to his own use or to the use of any other person, any draught or riding animal or any vehicle or cycle, however propelled, or any vessel, shall be guilty of a misdemeanour, and shall be liable to imprisonment for six months, or to a fine of three thousand shillings, or to both such imprisonment and such fine."

The accused, who is a police officer stationed at Mwingi, on December 8, 1957, decided to go to Nairobi for personal reasons. He took a Government vehicle, which was on charge to Mwingi police station, and a driver. He returned on the night of December, 9th/10th. He had no authority to take the vehicle and he would not have been given authority had he asked for it.

The learned deputy public prosecutor, relying on the decision in *Mowe v. Perraton* (1), 35 Cr. App. R. 194, stated that he did not support the conviction. In that case, the defendant, who was employed to drive his master's vehicle,

instead of driving the vehicle back to his master's garage when he had finished work, went on a frolic of his own. It was held that he did not thereby become guilty of the offence of taking and driving away a motor vehicle without the consent of the owner contrary to s. 28 of the Road Traffic Act, 1930, in as much as he was in lawful possession of the vehicle before he started on his unauthorised journey. We do not think that decision has any application to the present case; the accused did not merely go off on a frolic of his own when he was lawfully in possession of the vehicle.

It is common ground that the use of the vehicle by the accused was unlawful and without colour of right. The question to be decided is whether he converted it to his own use within the meaning of s. 289. To be guilty of an offence under the section it is not necessary that the person converting the vehicle should intend permanently to deprive the owner of the thing of it. If he had that intent he would be guilty of stealing. We think that the word "convert" should be given the same meaning as it has in the law of tort, subject to the qualifications that the conversion does not amount to stealing and that it is unlawful and without colour of right. In *Caxton Publishing Co. v. Sutherland Publishing Co.* (2), [1939] A.C. 178 at p. 201, Lord Porter said:

> ". . . conversion was defined by Atkin, J., as he then was, in *Lancashire and Yorkshire Ry. Co. v. MacNicoll.* (1) "Dealing", he said, 'with goods in a manner inconsistent with the right of the true owner amounts to a conversion, provided that it is also established that there is also an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right.'
>
> "This definition was approved by Scrutton, L.J., in *Oakley v. Lyster*. (1)
>
> "Atkin, J., goes on to point out that, where the act done is necessarily a denial of the owner's right or an assertion of a right inconsistent therewith, intention does not matter. Another way of reaching the same conclusion would be to say that conversion consists in an act intentionally done inconsistent with the owner's right, though the doer may not know of or intend to challenge the property or possession of the true owner."

In Clerk and Lindsell on Torts (10th Edn.) p. 416, the following passage in Rolle Ab. tit. Action sur Case at p. 5 is quoted with approval:

> "If a man takes my horse and rides it and then redelivers it to me nevertheless I may have an action against him, for this is a conversion, and the redelivery is no bar to the action but shall be merely a mitigation of damages."

On the view which we have taken of the meaning of the word "convert" in s. 289, we find it impossible to say that on the admitted facts the accused could not be guilty of the offence to which he pleaded guilty.

Unlawfully and without colour of right he took a government vehicle and used it for his own purposes for two days. He thereby deprived the Mwingi Police Station of the use of the vehicle for that period. His act was inconsistent with the owner's right and in our opinion amounted to conversion. We therefore see no reason to interfere in revision with the conviction.

No order made.

For the Crown:
AP Jack (Deputy Public Prosecutor, Kenya)
The Attorney-General, Kenya

The accused in person.

Saint Benoist Plantation Limited (In Voluntary Liquidation) v Alexander
[1958] 1 EA 144 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	11 April 1958
Case Number:	3/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Sir Owen Corrie JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Miles, J

[1] Company – Receiver for debenture holder – Agent of company – Sale of assets – Remuneration claim by receiver disputed by company – When court has power to fix remuneration of receiver – Companies Ordinance (*Cap.* 288), *s.* 290 (*K.*).

[2] Pleading – Company disputing sum retained by receiver for his remuneration – Plaint claiming amount retained less sum to be fixed by court as proper remuneration – Whether plaint in form is a suit for money had and received.

Editor's Summary

The respondent had been appointed receiver under a debenture issued by the appellant company. Having sold some property secured by the debenture he satisfied the debenture holder's claim, deducted £10,000 for his remuneration and expenses and a further £200 against the costs of litigation with the company which appeared imminent and paid the balance in his hands to the company. The company and its liquidator commenced proceedings against the receiver claiming the sums retained less such sum as the court should decide to be the receiver's proper remuneration. A preliminary point taken for the receiver, that the court had no power to fix the remuneration of the receiver for past services and that the action was wrong in form, was upheld. The company appealed.

Held –

(i) the Companies Ordinance, s. 290 applies only to applications to the court in its special winding up jurisdiction; in such an application the company is not a party to the application and s. 290 is not applicable where the company seeks by ordinary suit to bring an action for money had and received before the court;

(ii) whereas the relief sought by the company could not be obtained by a winding up summons under s. 290, the company was entitled to bring an action for money had and received as in this case;

Re Vimbos Ltd., [1900] 1 Ch. 470 considered.

(iii) the suit in this case was in fact and in form an action for money had and received and apart from one formal denial in the defence, which would probably not have been pursued, the pleadings raised one issue only, the assessment of the amount properly to be retained by the receiver i.e. a

quantum meruit;

(iv) whereas an agent who claims payment form his principal on a quantum meruit should state the amount of his claim, a principal or employer claiming a balance subject to remuneration is not necessarily required to state the remuneration he is willing to pay.

Appeal allowed.

Order that the Supreme Court decree be set aside and that the suit do proceed.

Case referred to in judgment:

(1) *Re Greycaine Ltd*., [1946] 2 All E.R. 30.

(2) *Re Vimbos Ltd*., [1900] 1 Ch. 470.

(3) *Lodge v. National Union Investment Co. Ltd*., [1907] 1 Ch. 300.

Judgment

Briggs V-P: read the following judgment of the court: The respondent, who is a chartered accountant, was appointed receiver under a debenture issued by the appellant company, and as such was, under the terms of the debenture, the agent of the company. He sold certain property subject to the debenture, satisfied the claim of the debenture-holder, and held the balance of the proceeds of sale as money had and received to the use of the company, which was by then in voluntary liquidation, subject to questions of his own remuneration, expenses and costs. The company and he disagreed as to the amount of these. He claimed about £10,000 and the company, through its liquidator, said that this was excessive. The debenture merely provided for "reasonable" remuneration. By agreement the respondent retained the amount he claimed, plus £200 against costs of litigation which then appeared inevitable, and paid the balance to the company, which reserved its right to contend that the amount retained was excessive. The company then sued the respondent for the amount retained, less such sums as the court might decide to be the remuneration and expenses properly due to him. The plaint asked that those sums should be determined by "inquiry" in each case. The defence contended that the amounts retained were not excessive and were therefore properly retained, and also that the suit would not lie, on grounds unspecified, but presumably of law. Under this plea, the respondent took a preliminary point at an early stage, and succeeded in having the suit dismissed with costs. The company appealed, and we allowed the appeal. We now give our reasons and details of the order, which were not worked out at the time of hearing. Counsel for the respondent raised in the Supreme Court two distinct objections to the competence of the suit, but in argument the two points appear to have overlapped, and this may well have obscured the issues, and made it more difficult to see that neither objection was well-founded.

The first objection was that these proceedings were an application by the liquidator brought under s. 290 of the Companies Ordinance (Cap. 288), and counsel argued at some length that in the circumstances of this case the provisions of s. 290 could not be applied, since it dealt with remuneration, not for past, but only for future services, or at least with remuneration not yet received. *Re Greycaine Ltd*. (1), [1946] 2 All E.R. 30. No doubt the latter part of this contention would be sound, but the first part was wholly incorrect. Section 290 deals only with an application by the liquidator as such to the court in its special winding-up jurisdiction. Such an application is intituled "In the matter of (the company in liquidation)" and the company as such is not a party. This, on the other hand, was an ordinary suit by the company brought before the court in its ordinary civil jurisdiction, and intituled accordingly "between (the company) plaintiff and (the receiver) defendant". It is difficult to see how this submission could have been entertained, for counsel for the company made it perfectly clear that he did not rely on s. 290, and claimed that his remedy was at common law. He cited *Re Vimbos Ltd*. (2), [1900] 1 Ch. 470, but only to distinguish it generally, and for the narrow point that in a case such as this the correct procedure is by ordinary suit.

The second objection raised was that the suit was incorrectly framed. It was said that the court was not asked to assess a quantum meruit, and that, if such a claim had been made, it would have required that the company should itself state in the plaint the sum which it considered reasonable and would submit to pay. It was also said that this was in essence a claim for inquiries, and that the court had no jurisdiction either to order, or itself to make, such inquiries: it might have been possible to succeed in a suit for an account, or in a suit for money had and received, claiming the whole sum in the receiver's

hands and leaving him to counterclaim for remuneration, but this suit did not fall within either class. As regards the last point, reliance was placed on the remarks of Cozens-Hardy, J., as he then was, in *Re Vimbos Ltd*. (2), [1900] 1 Ch. at p. 474. We thought that this contention was ill-founded. It is true that if an agent or similar person claims to be paid on a quantum meruit he should state the amount of his claim. It is by no means established that a principal or employer claiming a balance, subject to remuneration, must similarly state the amount of remuneration he submits to pay. The only authority which counsel could find to support this submission was Form 18 in Atkin's Encyclopaedia of Court Forms, Vol. 15, p. 736. In the circumstances contemplated there the employer was in as good a position to assess a fair price as the contractor was; but in many agency cases it would be almost impossible for the principal to make a just assessment. In this case it would seem that assessment might turn largely on evidence as to the professional practice among chartered accountants specializing in this kind of work. We could not accept that it was essential that the company should state a figure in its plaint, though it might have done so. Such a figure would in any event be material only as to costs of the suit, and it will not be difficult at the proper time to discover whether the company was, or was not, really willing to pay reasonable remuneration without litigation. As regards the inquiries, it is true that the claim for these is set out first; but it is quite wrong to say that they are the principal relief claimed. They are set out in that position merely because they must be antecedent in time to the grant of the substantial relief, namely, an order for payment to the company of a net balance. It is also true that the suit might have been framed as one for an account, but where, as here, the account has been rendered and is agreed, subject only to falsification of part of one item, this would have been a very artificial and extravagant form of proceeding. In fact and in form this is a suit for money had and received. If the court was of opinion that the claim for "inquiries" could not be granted, it was left with a claim for the gross amount retained, and should have proceeded on that, leaving the receiver to counterclaim for remuneration, as contemplated by Cozens-Hardy, J. But this again would merely have caused unnecessary complication. Apart from one formal denial in the defence which would probably not have been insisted on, the pleadings raised only one issue, assessment of the amount properly to be retained by the respondent. Both parties agreed that this issue ought to be determined by the trial judge himself, and it was never intended to ask for an order for inquiries by the registrar or any other person. The court was clearly being asked to assess the quantum meruit, and the wording of the plaint was sufficient, if not the most artistic, for the purpose.

We have set out the objections raised and our opinions concerning them at the outset, because it is not quite clear from the judgment what view the learned judge took of them. He stated,

> ". . . it is quite clear that what the court is being asked to do is in fact to fix the remuneration of the defendant and to order payment of the balance to the plaintiff company."

He noted that the company's counsel did not seek to rely on s. 290. He then referred to *Re Vimbos Ltd*. (2), and stated that, whereas the company claimed to be entitled to sue "at common law", the decision in that case,

> ". . . is authority for the proposition, that apart from statute, the court has no jurisdiction at common law to fix the remuneration of a receiver. It is true that in the present case the position is not quite the same as in *Re Vimbos Ltd.*, in that in the winding-up the plaintiff company had not proceeded by way of summons but by an ordinary suit against the receiver, but does that make any difference? I think not. The point

> is that the liquidator now claims precisely what *Re Vimbos Ltd*. says could not be claimed. It is unnecessary to consider what the position would have been if the liquidator had adopted the suggestion of Cozens-Hardy, J., and brought an action at common law claiming this money as the money of the company because he has not done this. What he has done is to claim as did the liquidator in *Re Vimbos Ltd*.;
>
> "(1) that the remuneration be ascertained and
>
> "(2) that the balance be paid over to the company."

This passage appeared to us to be based on misapprehension of the true effect of *Re Vimbos Ltd*. (2) in some or all of the following respects. The central point of that case, in which it differed from this, was that the debentures did not constitute the receiver an agent for the company or provide for his remuneration by the company or out of its funds. He was therefore not a party to the liquidation proceedings. There was no provision in the debentures that he should pay any surplus to the company, and accordingly he must be taken to hold it for the debenture-holders. In these respects the facts were unusual and their full consequences were not explored. But, if the facts had been similar to the facts in this case, although a winding-up summons would not have been an effective remedy for the company, an ordinary action would. This is clear from the final passage of the judgment of Cozens-Hardy, J. Accordingly *Re Vimbos Ltd*. (2) is certainly not

> "authority for the proposition, that apart from statute, the court has no jurisdiction at common law to fix the remuneration of a receiver."

It suggests precisely the contrary. The fact that the company has here proceeded by ordinary suit does indeed make all the difference. A winding-up summons must have failed, but a suit can succeed. It is misleading to say that the liquidator "now claims precisely what *Re Vimbos Ltd*. (2) says could not be claimed", for though he claims the same relief he claims it in a different way. Setting aside the special facts, *Re Vimbos Ltd*. (2) decided, not that the relief here claimed could not be obtained, but only that it could not be obtained by winding-up summons. We were quite unable to follow the reasoning on which the learned judge holds that this is not "an action at common law claiming this money as the money of the company". It is possible that the words "at common law", coupled with the claim for inquiries, misled the learned judge. It might be better to say that this is a suit brought in the ordinary, as opposed to the winding-up, jurisdiction, in which a claim at common law for money had and received (which is in its nature an equitable action, *Lodge v. National Union Investment Co. Ltd*. (3), [1907] 1 Ch. 300) is elaborated by reference to ancillary equitable remedies (i.e. inquiries) for an incidental purpose. But this makes no difference. To say that the liquidator in this case has claimed "as did the liquidator in *Re Vimbos Ltd* (2)" was in our view wholly erroneous.

We did not hear counsel for the appellant company on the substantive appeal. The respondent's counsel argued that there had been no confusion in the learned judge's mind between proceedings in the winding-up and ordinary jurisdictions. We were unable to say whether this was correct or not, but it was clear that he had overlooked or misunderstood the different consequences of proceeding in the two different ways. Counsel devoted more time to the second argument, that the form of the action was wrong. We have already set out our reasons for rejecting this contention.

A subsidiary point arose as to the form of the record. The whole record consists of forty-nine pages. Of this pp. 13-35 inclusive consist of copies of an *ex parte* summons filed by the liquidator in the winding-up proceedings for leave to appeal at the expense of the company against the decree, and of the affidavit in support and exhibits thereto. The order made on the summons

(if any) was not included. Counsel for the company submitted that these documents were within the provisions of para. (*g*) of sub-r. (4) of r. 62 of the rules of this court, and so properly included. We were clearly of opinion that they should not have been included. If counsel had wished to obtain from us for the liquidator an order of recourse to the company's funds for costs, it might have been proper to include a copy of the order made on the summons; but he did not ask for any such order, and the other documents were in any case irrelevant. One of the exhibits to the affidavit was an opinion of counsel in England advising an appeal, and this might even have been considered embarrassing. In taxing costs of preparing the record, the costs of these unnecessary documents must be disallowed.

The order will be that the appeal be allowed with costs; that the judgment and decree of the Supreme Court be set aside, and that the suit do proceed; that the respondent do pay to the appellant company the costs of the unsuccessful preliminary points in the Supreme Court, such costs to be taxed on the higher scale; and that in taxing the costs in this court no costs be allowed in respect of the unnecessary documents comprised in pp. 13-35 inclusive of the record.

Appeal allowed. Order that the Supreme Court decree be set aside and that the suit do proceed.

For the appellant:
JPG Harris
Robson, Harris & Co, Nairobi

For the respondent:
CW Salter QC and *DF Shaylor*
Buckley, Hollister & Co, Nairobi

Taj Deen v Dobrosklovsky and Bhalla & Thakore
[1958] 1 EA 148 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	3 April 1958
Case Number:	32/1956
Before:	Briggs V-P
Sourced by:	LawAfrica

(Reference on taxation under r. 6 (2) of the Eastern Africa Court of Appeal Rules, 1954, from the Taxing Officer's decision.)

*[1] Costs – Reference on taxation – Disbursement claimed in bill paid after bill lodged – Two counsel appearing but no certificate granted – Fees allowable – Court of Appeal Practice Note No.*7 *of* 1956, *para.* 4 *and para.* 6.

[2] Costs – Reference on taxation – Drawing interlocutory order and attending judge to settle order –

Whether cost allowable.

Editor's Summary

The bill of costs of the second respondent included an item of Shs. 7,500/- for "brief fee paid" to leading counsel when lodged for taxation. On taxation an application was made to amend this by substituting the sum of Shs. 8,500/- in order to claim two refreshers of Shs. 500/- each paid to leading counsel after the bill had been lodged. The amendment was allowed but since the item was taxed down to Shs. 4,800/- the amendment had no practical effect. Two other items which the taxation officer had allowed were for drawing an interlocutory order and for attending before the judge to settle the order made on the hearing of the appeal which counsel had been unable to agree. On reference to a judge objection was taken to the amendment allowed by the

taxing officer on the ground that the fee was only paid after the bill had been filed, and it was contented that since no certificate for two counsel had been given by the court, the bill of costs must relate only to the services of the advocates on the record; that no fee should have been allowed for drawing an interlocutory order because such orders are not normally drawn up and that in the circumstances no fee should have been allowed for attending the judge to settle the order made on the hearing of the appeal.

Held –

(i) where brief fees are not paid until after a bill has been filed, they should be shown as disbursements "by anticipation" and should only be admitted where payment has been made in pursuance of an antecedent liability;

(ii) where two counsel appear but no certificate is granted, the total amount of the bill must not be larger than if one advocate only appeared but it is permissible to allow fees to counsel if no instructions or hearing fee is charged for junior counsel; the argument that the bill must relate only to the services of the advocate on the record is in flat contradiction of para. 6 of Practice Note No.7 of 1956;

(iii) Since the interlocutory order was not a mere order for adjournment but gave certain special instructions to the registrar relative to the record a fee for drawing this was properly allowed;

(iv) no order for costs having been made by the judge for the attendance before him to settle the order, no fee for this should have been allowed.

Taxing Officer's decision varied accordingly.

No order made for the costs of the reference.

No cases referred to in judgment

Judgment

Briggs V-P: This is a reference to me arising from taxation of the second respondents' advocates' bill of costs. The first item in question is the fees paid to leading counsel. On taxation Mr. Maini applied to amend item 13, "brief fee paid to J. M. Nazareth Esq., Q.C.–Shs. 7,500/-" by substituting the figure Shs. 8,500/- for Shs. 7,500/-. What Mr. Maini really wished to do, although he did not say so, was to add an additional item of 1,000/- for two refreshers of Shs. 500/- each paid to Mr. Nazareth. The amendment was allowed, but the item in question was taxed down to Shs. 4,800/-, so the amendment had no practical effect. Since the refreshers were not paid before the filing of the bill it would have been necessary, if they had been included in it in the first place, to show the payment as "by anticipation". I desire to stress that the use of these words, or similar words, to distinguish disbursements actually paid before the bill is filed from those intended to be paid before taxation, is not a mere formality, and taxing officers should insist at least on amendment if they are incorrectly omitted. On the other hand, in view of para. 4 of Practice Note No.7 of 1956 there is no objection to such an amendment being allowed. I stress again, however, that a disbursement shown as "by anticipation" can only be admitted where the payment has been made in pursuance of an antecedent liability.

It was further objected that in the circumstances of this case, where leading and junior counsel appeared, the junior counsel being a member of the firm of advocates on the record, but no certificate for

two counsel was granted, the bill of costs must relate, only to the services of the advocates on the record and the member of the firm appearing as junior counsel. This is in flat contradiction of para. 6 of Practice Note No.7 of 1956 and counsel asked me to say that the Practice Note was incorrect, and that the practice laid down in the latter part of the paragraph was contrary to the Rules of the Third Schedule governing costs. It is common ground that where two counsel appear, but no certificate is granted, the total amount of the bill must not be larger than it would have

been had only one advocate appeared; but this principle was clearly in the taxing officer's mind and he intended to apply it, whether or not in fact the amount allowed was excessive. As regards the form of the bill, however, I am of opinion that it is permissible under the Rules to allow fees to counsel if no hearing fees or instruction fee are charged in respect of the junior counsel. In other words, I think the Practice Note is perfectly correct. The amount of the brief fee was also objected to, but having regard to the length of the hearing I was quite unable to say that it was excessive, much less so excessive as to suggest that a wrong principle had been applied, particularly as no refreshers were separately allowed, but the brief fee was allowed at a sum notionally taking refreshers into account.

The next item objected to was one for drawing an interlocutory order of court. It was said that this was an order for adjournment and such orders are not normally drawn up; but in fact the order gave certain special instructions relating to the record to the registrar, and in my view it was necessary to draw it up. The item was therefore properly allowed.

The next item related to attendance before the judge to settle the order made on the hearing of the appeal when counsel had been unable to agree on its form. This should only happen occasionally, and an appearance before a judge for this purpose must not be taken as a normal proceeding in all appeals. No express order was made as to the costs of the appearance and I think that in the circumstances, and in the absence of such an order, costs of the appearance should not be allowed. If the question of costs had been raised before the judge at the time, he might have ordered that, instead of being costs in the cause, they should be borne by the party who was generally successful on the appeal. I think this item must be disallowed. If any consequential alteration is required as regards costs of taxation or allocatur fee, this will be made by the taxing officer on signing the amended allocatur.

Taxing Officer's decision varied accordingly. No order for the costs of the reference.

For the appellant:
DN Khanna
DN & RN Khanna, Nairobi

For the second respondent:
PL Maini
Maini & Patel, Nairobi

Taj Deen v Dobrosklovsky and Bhalla & Thakore
[1958] 1 EA 151 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	3 April 1958
Case Number:	32/1956
Before:	Briggs V-P
Sourced by:	LawAfrica

(Reference on taxation under r. 6 (2) of the Eastern Africa Court of Appeal Rules, 1954, from the Taxing Officer's decision.)

[1] Costs – Reference on taxation – Instructions fee – Fee claimed for costs thrown away through amendment of record – How such costs should be charged.

Editor's Summary

Before the trial an interlocutory order was made for amendment of the record and that the first respondent should have the costs thrown away. The bill of costs lodged for the first respondent included separately an instructions fee and an item of Shs. 200/- claimed for costs thrown away. On a reference to a judge under r. 6 (2) of the Court of Appeal Rules, counsel for the appellants objected to these charges being allowed.

Held – the amount allowed for instructions was fair but the charge for costs thrown away could not be allowed as a separate item; costs thrown away could only be allowed in assessing the general fee for instructions.

Order accordingly.

No cases referred to in judgment

Judgment

Briggs V-P: This is another taxation reference arising on the first respondent's advocates' bill. It concerns only three items of the bill.

The first is item 7, on which Shs. 3,500/- was allowed for instructions. For reasons which will appear from my judgment on the reference relating to Messrs. Maini & Patel's bill I think this item should stand.

The next item is item 10, a charge of Shs. 200/- for

> "additional costs thrown away relating to perusal of record and getting up appeal."

Some time before the trial an order was made that the record should be amended, and that this respondent should have costs thrown away. I think it must be conceded that some additional work on getting up must have been involved, but I do not think it can be charged for in this way. Mrs. Kean agreed that the only item of the schedule under which this item of the bill could be allowed would be that for the general fee for instructions. But only one such item may be charged in the bill on any one appeal. I think that the true position is that this work was one of the various elements to be considered in assessing the main instruction fee and I have no reason to believe that it was not so considered. If this respondent had been unsuccessful on the appeal and been obliged to pay the general costs of the appeal, it might have been proper to file the bill and to allow a small instruction fee relating to these costs only. But they cannot be separately allowed where the respondent receives the general costs of the appeal.

The only remaining item objected to is No. 13 for attending the judge in chambers for settlement of the order. For the reasons given in my judgment on Messrs. Maini & Patel's bill I do not think this can be allowed. In the result Shs. 250/- will be taxed off and there will be made in addition any necessary consequential amendments as regards items relating to taxation. This will be done by the taxing officer on signing his amended allocatur.

Order accordingly.

For the appellant:
DN Khanna
DN & RN Khanna, Nairobi

For the first respondent:
Mrs L Kean
Sirley & Kean, Nairobi

Pal Singh and Hari Singh v EA Diesel Mart Limited
[1958] 1 EA 152 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	3 April 1958
Case Number:	68/1956
Before:	Briggs V-P
Sourced by:	LawAfrica

(Reference on taxation under r. 6 (2) of the Eastern Africa Court of Appeal Rules, 1954, from the Taxing Officer's decision.)

[1] Costs – Reference on taxation – Certificate for two counsel – Leading counsel only heard – Whether costs for junior counsel allowable.

Editor's Summary

On hearing of this appeal two counsel appeared for the successful respondents and a certificate for two counsel was given. Leading counsel only addressed the court and on taxation and upon the reference under r. 6 (2) of the Court of Appeal Rules it was contended that since junior counsel took no part in the proceedings all costs relating to him as counsel should be disallowed.

Held –

(i) on the facts before the court there was no justification for the contentions advanced; moreover the advocate who advanced these contentions could not know what papers junior counsel had, and since junior counsel was present substantially throughout the hearing it could not be said that he did not appear;

(ii) the taxing officer would not be entitled to enquire how junior counsel was instructed or whether he would have been ready to argue the appeal, if necessary, and his refusal to enquire into this question was entirely proper;

(iii) the judge's notes are conclusive as to the counsel appearing before him in any case and the taxing

officer is bound by these notes.

Objections disallowed. No order for the costs of the reference made.

Case referred to:

(1) *Taj Deen v. Dobrosklovsky and Bhalla & Thakore*, [1958] E.A. 148 (C.A.).

Judgment

Briggs V-P: On this taxation reference the main point taken was as to the practice where a disbursement is charged in the bill, but paid only between the date of filing the bill and the date of taxation. I have dealt with this point in a judgment on a reference in *Taj Deen v. Dobrosklovsky and Bhalla & Thakore* (1), [1958] E.A. 148 (C.A.), and need not repeat what I have said there.

I wish, however, to deal shortly with another point taken. At the hearing of the appeal two counsel appeared, or at least purported to appear, for the successful party, and a certificate for two counsel was given. Only one of them was heard. On taxation and before me it was contended, as I understand it, that junior counsel was a mere lay figure, not properly briefed or instructed, not able or willing to argue the appeal, and present only for the purpose of swelling costs. It was argued that all costs relating to him in his capacity as counsel should be disallowed. I rejected these contentions, and would make two comments on them. First, I saw no justification for them on the facts put before me. Secondly, and more important, I think the point could not properly be taken at all. It was quite impossible for the advocate who took it to know what papers had been in junior counsel's hands, and he was not entitled to enquire into this. Junior counsel had been stated by his leader to be appearing, and had in fact been present throughout, or substantially

throughout, the hearing. In these circumstances it cannot be contended that he did not appear. No adverse inference can be drawn from the fact that only his leader was heard. The taxing officer would not be entitled to embark on any enquiry as to how the junior was instructed, how well he knew his case, or whether he would have been ready to argue it if necessary. The refusal to undertake such an enquiry was entirely proper. The judges' notes are conclusive on the question what counsel have appeared in any case, and the taxing officer is bound by them. Moreover, in this case, a certificate for two counsel had been granted, and the objection taken is, in effect, that it was wrongly granted. Such an argument is clearly incompetent.

If junior counsel had been absent for most of the hearing, or if, in the unexpected absence of his leader, he had been called on, and had been unable or unwilling to address the court, quite different considerations might apply. But in any such event the court would probably have made a different order as to costs.

Under the two-thirds rule junior counsel is sometimes generously remunerated, but one case must be balanced against another, and the rule has general advantages which outweigh any disadvantage of this kind.

Objections disallowed. No order for the costs of the reference made.

For the appellants:
DN Khanna
DN & RN Khanna, Nairobi

For the respondent:
VM Patel
JJ & VM Patel, Nairobi

Re Marles' Application
[1958] 1 EA 153 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	9 May 1958
Case Number:	39/1958
Before:	MacDuff and Edmonds JJ
Sourced by:	LawAfrica

[1] Immigration – Jurisdiction – Appeal to Minister from refusal of entry permit dismissed – Motion for certiorari and mandamus – Whether Supreme Court has jurisdiction to review Minister's decision – Immigration Ordinance, 1956, *s.* 10 (5) (*K.*).

[2] Practice – Application for leave – Material facts not mentioned in supporting affidavit – Effect of

non-disclosure.

Editor's Summary

A British subject by birth entered Kenya Colony in 1953 on a temporary employment pass valid for four years. In 1957, having been offered a permanent post with the Nairobi City Council, he applied to the Principal Immigration Officer under s. 10 (2) of the Immigration Ordinance, 1956, for a Class "G" entry permit which was refused. His appeal to the Minister under s. 10 (5) was also refused and thereafter he was deemed an undesirable immigrant under s. 7 (2) (*f*) of the Ordinance. The applicant then applied for leave to move for orders of certiorari and mandamus and filed an affidavit in support in which no reference was made to the notice served on him that he had been deemed an undesirable immigrant. On the hearing of the motion for orders of certiorari and mandamus it was contended for the applicant that when he appealed to the Minister he was not given an opportunity to state his case and was not allowed to know or to test the evidence against him. For the Crown it was

submitted that the motion was incompetent on the grounds that the Ordinance provided that the Minister's decision should not be questioned in any court, that the applicant having been deemed an undesirable immigrant was not qualified for a class "G" entry permit, that the Minister acts in an administrative and not a judicial capacity when hearing appeals against refusal to grant class "G" permits, that the court requires uberrima fides from an applicant and material facts had been omitted from the applicant's affidavit, and that there was no denial of justice on consideration of the appeal.

Held –

(i) by s. 10 (5) of the Immigration Ordinance, 1956, the jurisdiction of the courts to question a decision of the Minister has been ousted;

(ii) the Immigration Ordinance accords to persons who can establish birth or long residence in the Colony the right to claim a class "A" entry permit, but other persons seeking entry as immigrants have been properly made the subject of careful and jealous scrutiny, and since the discretion of the Principal Immigration Officer to issue or refuse a class "G" permit is governed by consideration of policy and expediency, the Minister's function in considering an appeal from the exercise of that discretion is administrative and he is not bound to act judicially; consequently certiorari will not lie;

(iii) the applicant should have disclosed in his affidavit supporting his application for leave that he had been deemed an undesirable immigrant; the court requires uberrima fides on the part of an applicant for leave and had all the facts been disclosed the application in this case might have been refused;

(iv) the Minister has a discretion on an appeal to him whether to allow an applicant to appear by advocate.

Motion dismissed.

Case referred to in judgment:

(1) *Re Gilmore's Application*, [1957] 1 All E.R. 796.

(2) *Smith v. East Elloe Rural District Council and others*, [1956] 1 All E.R. 855; [1956] A.C. 736.

(3) *R. v. Electricity Commissioners, Ex parte London Electricity Joint Committee Co*. (1920) *Ltd*., [1924] 1 K.B. 171.

(4) *R. v. Manchester Legal Aid Committee, Ex parte R.A. Brand & Co. Ltd.*, [1952] 1 All E.R. 480; [1952] 2 Q.B. 413.

(5) *R. v. London County Council, Ex parte The Entertainments Protection Association Ltd*., [1931] 2 K.B. 215.

(6) *Nakkuda Ali v. M. F. de S. Jayaratne*, [1951] A.C. 66.

(7) *Johnson* (*B.*) *& Co.* (*Builders*) *Ltd. v. Minister of Health*, [1947] 2 All E.R. 395.

(8) *R. v. Inspector of Leman Street Police Station, Ex parte Venicoff*, [1920] 3 K.B. 72.

(9) *Re Bristol & North Somerset Railway Co.* (1877), 3 Q.B.D. 10.

(10) *R. v. Kensington Income Tax Commissioners, Ex parte Princess De Polignac*, [1917] 1 K.B.486.

Judgment

The following judgment of the court was read by **MacDuff J:** The applicant, a British subject by birth, entered Kenya Colony on October 5, 1953 on a temporary employment pass valid for four years. In the latter part of 1957, having been offered permanent employment on the staff of the Nairobi City Council, he applied to the Principal Immigration Officer under s. 10 (2) of the Immigration Ordinance, 1956, for a class "G" entry permit. The application was refused, whereupon the applicant appealed to the Minister, under

the provisions of s. 10 (5) of the Ordinance. This appeal was also dismissed. The applicant now applies, upon leave, for an order of certiorari and mandamus.

Mr. Gledhill, for the applicant, argues this motion upon the general principle that parties to appeals should be allowed to state their case and test the evidence of the other side, and upon the particular grounds that the applicant was denied a hearing by the Minister, was not allowed to know or test the evidence against the applicant, was not informed of the objections raised by the Principal Immigration Officer, or why his entry into the Colony would not be to the benefit of the inhabitants generally, and was not given an opportunity of knowing what case he had to meet or of meeting it. The learned solicitor-general, in an able argument on behalf of the Crown, contended firstly that the motion was incompetent as the Ordinance makes provision for an absolute prohibition against questioning of the Minister's decision in any court; secondly, that certiorari will not lie because the Minister acts in an administrative and not a judicial capacity when hearing appeals against the refusal by the Principal Immigration Officer of a class "G" permit; thirdly, that this motion is an abuse of the process of this court and incompetent because:

(*a*) the court was not informed when leave to move for the present writs was applied for that subsequent to the dismissal of his appeal to the Minister the applicant had been deemed under s. 7 (2) (*f*) of the Ordinance an undesirable immigrant;

(*b*) the applicant consequently is not qualified to be granted a class "G" entry permit; and

(*c*) if the court had been so informed no leave would have been given,

fourthly, the court requires uberrima fides on the part of an applicant, and that where material facts are suppressed in an affidavit supporting an application for leave, a court will refuse to entertain the application; and fifthly, that there was no denial of natural justice on consideration of the appeal.

Section 10 (5) of the Ordinance provides, *inter alia*, as follows:

> "10 (5). Any applicant who is aggrieved by a decision refusing him an entry permit under class . . . "G". . . may, in the manner and within the time prescribed, appeal against such decision to the Minister, whose decision shall be final and conclusive and shall not be questioned in any court."

It is contended for the Crown that the words

> "whose decision shall be final and conclusive and shall not be questioned in any court"

are sufficiently clear and explicit to preclude this Court from issuing certiorari to remove and quash the decision of the Minister. It is well settled law that the jurisdiction of this court to exercise its power of supervision over inferior courts and tribunals will not be taken away unless there are express words clearly defining the intention of the legislature so to do. The expression that decisions of tribunals shall be final and without appeal or final and conclusive have effect, it has been held, only so far as an appeal on the facts are concerned, but do not preclude the issue of certiorari for excess of jurisdiction or for error of law (*Re Gilmore's Application* (1), [1957] 1 All E.R. 796). The question whether a statute precludes the jurisdiction of the courts depends upon the words used and upon the clear construction to be placed upon those words:

> "A statute is the will of the legislature, and the fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded 'according to the intent of them that made it'. If the words of the statute are in themselves precise and unambiguous, no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such cases best declaring the intention of the

legislature. The object of all interpretation of a statute is to determine

> what intention is conveyed, either expressly or impliedly, by the language used, so far as is necessary for determining whether the particular case or state of facts presented to the interpreter falls within it. 'If there is one rule of construction for statutes and other documents, it is that you must not imply anything in them which is inconsistent with the words expressly used." (Maxwell on the Interpretation of Statutes, (10th Edn.) 1).

The subject was exhaustively considered by the House of Lords in *Smith v. East Elloe Rural District Council and others* (2), [1956] A.C. 736, which concerned a compulsory purchase order made in pursuance of the powers conferred upon local authorities under the Acquisition of Land (Authorisation Procedure) Act, 1946 (9 and 10 Geo. 6 c. 49). Para. 16 of part 4 of Schedule 1 to the Act provides:

> "Subject to the provisions of the last foregoing paragraph, a compulsory purchase order . . . shall not . . . be questioned in any legal proceedings whatsoever . . .",

and it is the effect of the words "shall not be questioned in any legal proceedings whatsoever" to which the House of Lords gave authoritative expression (per Viscount Simonds, Lord Morton of Henryton and Lord Radcliffe, Lord Reid and Lord Somervell of Harrow dissenting). In the course of his speech, Lord Simonds said (at p. 748):

> ". . . and, secondly, I do not forget that this Act is the last example of a long series of similar enactments, in which by one provision or another Parliament has sought to give finality and security from challenge to compulsory acquisitions of land. I have not myself been able to get any assistance from a comparison of the language of this enactment with that of its predecessors. Counsel on both sides craved such a comparison in aid. I shall be doing no injustice if I say it helps neither of them and base my opinion on the very words of the Act."

He later went on (at p. 750):

> "In this House a more serious argument was developed. It was that, as the compulsory purchase order was challenged on the ground that it had been made and confirmed "wrongfully" and "in bad faith", paragraph 16 had no application. It was said that that paragraph, however general its language, must be construed so as not to oust the jurisdiction of the court where the good faith of the local authority or the Ministry was impugned and put in issue. Counsel for the appellant made his submission very clear. It was that where the words "compulsory purchase order" occur in these paragraphs they are to be read as if the words "made in good faith" were added to them.
>
> "My Lords, I think that anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal. But it is our plain duty to give the words of an Act their proper meaning, and, for my part, I find it quite impossible to qualify the words of the paragraph in the manner suggested. It may be that the legislature had not in mind the possibility of an order being made by a local authority in bad faith or even the possibility of an order made in good faith being mistakenly, capriciously or wantonly challenged. This is a matter of speculation. What is abundantly clear is that words are used which are wide enough to cover any kind of challenge which any aggrieved person may think fit to make. I cannot think of any wider words. Any addition would be mere tautology. But it is said, let those general words be given their full scope and effect, yet they are not applicable to an order

> made in bad faith. But, my Lords, no one can suppose that an order bears upon its face the evidence of bad faith. It cannot be predicated of any order that it has been made in bad faith until it has been tested in legal proceedings, and it is just that test which paragraph 16 bars. How, then, can it be said that any qualification can be introduced to limit the meaning of the words? What else can "compulsory purchase order" mean but an act apparently valid in the law, formally authorized, made, and confirmed?
>
> "It was urged by counsel for the appellant that there is a deep-rooted principle that the legislature cannot be assumed to oust the jurisdiction of the court, particularly where fraud is alleged, except by clear words, and a number of cases were cited in which the court has asserted its jurisdiction to examine into an alleged abuse of statutory power and, if necessary, correct it. Reference was made, too, to Maxwell on the Interpretation of Statutes to support the view, broadly stated, that a statute is, if possible, so to be construed as to avoid injustice. My Lords, I do not refer in detail to these authorities only because it appears to me that they do not override the first of all principles of construction, that plain words must be given their plain meaning. There is nothing ambiguous about paragraph 16; there is no alternative construction that can be given to it; there is in fact no justification for the introduction of limiting words such as "if made in good faith", and there is the less reason for doing so when those words would have the effect of depriving the express words "in any legal proceedings whatsoever" of their full meaning and content."

Later, in his judgment, Lord Simonds said (at p. 752):

> "I come, then, to the conclusion that the court cannot entertain this action so far as it impugns the validity of the compulsory purchase order, and it is no part of my present duty to attack or defend such a provision of an Act of Parliament."

Lord Morton of Henryton concurred on the grounds that the words of para. 16 of the Act are clear and deprive all courts to try the issue as to the validity of the compulsory purchase order, and he pointed out that, however surprising such a step may be, it is within the powers of the legislature to achieve the result of depriving a subject from access for relief to the courts. Lord Radcliffe also agreed with these conclusions, and we think the following passage from his speech (at p. 769) should be quoted:

> "Further, it is said that it would be an outrageous thing if a person who by ordinary legal principles would have a right to upset an order affecting him were to be precluded from coming to the courts for his right, either absolutely or after six weeks, when the order is claimed by him to have been tainted by bad faith. And perhaps it is. But these reflections seem to me to be such as must or should have occurred to Parliament when it enacted para. 16. They are not reflections which are capable of determining the construction of the Act once it has been passed, unless there is something that one can lay hold of in the context of the Act which justifies the introduction of the exception sought for. Merely to say that Parliament cannot be presumed to have intended to bring about a consequence which many people might think to be unjust is not, in my opinion, a principle of construction for this purpose."

Reverting now to the words used in s. 10 (5) of the local Ordinance, namely,

> "whose decision shall be final and conclusive and shall not be questioned in any court",

they are, we think, of equal clarity and precision as those discussed in the *Smith* case (2) (supra). The plain meaning of those words must, in our view, result in depriving this court of any jurisdiction to question the decision of the

Minister or the method by which it was reached, and we have no doubt that such was the deliberate intention of the legislature, a view which we shall elaborate later in this judgment. If the view we take as to the want of jurisdiction of this court be correct, then that is an end of the matter and the motion must be dismissed. However, in case our decision be held elsewhere to be wrong, we propose to deal with the further submissions of the learned solicitor-general.

The second limb of the contention for the Crown is that certiorari will not lie because the Minister, under the provisions of s. 10 (5) of the Ordinance, acts in an administrative and not in a judicial or quasi-judicial capacity when hearing appeals; and mandamus will not lie because the Minister has not refused or failed to exercise his jurisdiction. In considering whether the remedy of certiorari lies in this case, we think it as well if we start by setting out the statement of the guiding principles by Atkin L.J. in *R. v. Electricity Commissioners, Ex parte London Electricity Joint Committee Company* (1920) *Ltd*. (3), [1924] 1 K.B. 171 at p. 204:

> "The question now arises whether the persons interested are entitled to the remedy which they now claim in order to put a stop to the unauthorised proceedings of the commissioners. The matter comes before us upon rules for writs of prohibition and certiorari which have been discharged by the Divisional Court. Both writs are of great antiquity, forming part of the process by which the King's Courts restrained courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; certiorari requires the record or the order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, courts of justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

The test as to when and whether there is need for a tribunal to act judicially was expounded in *R. v. Manchester Legal Aid Committee, Ex parte R. A. Brand & Co. Ltd*. (4), [1952] 2 Q.B. 413. Parker J. said (at p. 425):

> "The real contest in the present case is whether they also had the duty to act judicially. It was contended on behalf of the committee that there is no duty to act judicially unless the proceedings are judicial or quasi-judicial proceedings in the sense that there is some form of lis and there is a duty to hear both sides."

and the learned judge then quoted a passage from the judgment of Scrutton L.J. in *R. v. London County Council, Ex parte The Entertainments Protection Association Ltd*. (5), [1931] 2 K.B. 215, of which the following is a part–

> "The writ of certiorari is a very old and high prerogative writ drawn up for the purpose of enabling the Court of King's Bench to control the action of inferior courts and to make it certain that they shall not exceed their jurisdiction; and therefore the writ of certiorari is intended to bring into the High Court the decision of the inferior tribunal in order that the High Court may be certified whether the decision is within the jurisdiction of the inferior court. There has been a great deal of discussion and a large number of cases extending the meaning of 'court'. It is not necessary that it should be a court in the sense in which this court is a court; it is enough if it is exercising, after hearing evidence, judicial functions in the sense

> that it has to decide on evidence between a proposal and an opposition; and it is not necessary to be strictly a court; if it is a tribunal which has to decide right after hearing evidence and opposition, it is amenable to the writ of certiorari."

Parker, J., after considering other authorities, then said (at p. 428):

> "The true view, as it seems to us, is that the duty to act judicially may arise in widely different circumstances which it would be impossible, and, indeed, inadvisable, to attempt to define exhaustively. Where the decision is that of a court, then, unless, as in the case, for instance, of justices granting excise licences, it is acting in a purely ministerial capacity, it is clearly under a duty to act judicially. When, on the other hand, the decision is that of an administrative body, and is actuated in whole or in part by questions of policy, the duty to act judicially may arise in the course of arriving at that decision. Thus, if in order to arrive at the decision, the body concerned had to consider proposals and objections and consider evidence, then there is the duty to act judicially in the course of that inquiry."

and later added (at p. 431):

> "If, on the other hand, an administrative body in arriving at its decision at no stage has before it any form of lis and throughout has to consider the question from the point of view of policy and expediency, it cannot be said that it is under a duty at any stage to act judicially."

There is one other case to which we would refer before relating the principles enunciated by the courts to the circumstances of the case before us. In *Nakkuda Ali v. M. F. de S. Jayaratne* (6), [1951] A. C. 66, Lord Radcliffe, delivering the judgment of the Privy Council said (at p. 75):

> "But even in the cases of certiorari and prohibition, the English law does not recognize any distinction for this purpose between the regularly constituted judicial tribunals and bodies which, while not existing primarily for the discharge of judicial functions, yet have to act analogously to a judge in respect of certain of their duties. The writ of certiorari has been issued to the latter since such ancient times that the power to do so has long been an integral part of the court's jurisdiction. In truth, the only relevant criterion by English law is not the general status of the person or body of persons by whom the impugned decision is made but the nature of the process by which he or they are empowered to arrive at their decision. When it is a judicial process or a process analogous to the judicial, certiorari can be granted."

Finally, we think that we cannot do better than to quote from Halsbury's Laws of England (3rd Edn.) Vol. 11, para. 114, where the dicta of the various authorities to which we have been referred are reduced to concise terms:

> "The orders of certiorari and prohibition will lie to bodies and persons other than courts stricto sensu. Any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, is subject to the controlling jurisdiction of the High Court of Justice, exercised by means of these orders. It is not necessary that it should be a court: an administrative body in ascertaining facts or law may be under a duty to act judicially notwithstanding that its proceedings have none of the formalities of, and are not in accordance with the practice of, a court of law. It is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition. A body may be under a duty, however, to act judicially (and subject to control by means of these orders) although there is no form of lis inter partes before it; it is enough that it should have to determine

> a question solely on the facts of the particular case, solely on the evidence before it, apart from questions of policy or any other extraneous considerations.
>
> "Moreover an administrative body, whose decision is actuated in whole or in part by questions of policy, may be under a duty to act judicially in the course of arriving at that decision. Thus, if in order to arrive at the decision the body concerned had to consider proposals and objections and consider evidence, if at some stage of the proceedings leading up to the decision there was something in the nature of a lis before it, then in the course of such consideration and at that stage the body would be under a duty to act judicially. If, on the other hand, an administrative body in arriving at its decision has before it at no stage any form of lis and throughout has to consider the question from the point of view of policy and expediency, it cannot be said that it is under a duty at any time to act judicially."

Having set out the principles which we think must guide us in deciding the motion now before us, we will consider the application of these principles to the particular circumstances of this case. It will be instructive, firstly, to consider the provisions affecting applicants for a class "A" permit under the Ordinance, and those for a class "G" permit. The former relates to what we shall term bona fide residents in the Colony, either by reason of their having been born here or by reason of residence in the Colony for stipulated periods, and it is provided by s. 10 (1) of the Ordinance that any person, other than a prohibited immigrant, who satisfies the Principal Immigration Officer that he belongs to class "A" "shall be entitled" to be granted a class "A" permit. In other words, he merely has to prove birth or sufficiently long residence in the Colony to acquire a right to a class "A" permit. If the Principal Immigration Officer refuses to grant such a permit, which can be only on the grounds that the applicant is a prohibited immigrant or, that he has not proved the facts of such birth or residence, the applicant is given, under s. 10 (4), a right of appeal to the Supreme Court. We will revert to this right of appeal later in this judgment. An application for a class "G" permit is open to one who may be described as a would-be resident. Under the second schedule to the Ordinance, the onus is placed upon such an applicant to satisfy the Principal Immigration Officer that he has been offered and has accepted employment of a permanent nature in the Colony, and that his engaging in such employment will be "to the benefit of the inhabitants generally of the Colony". But it is further provided by s. 10 (2) that the grant of such a permit is at the discretion of the Principal Immigration Officer. If the Principal Immigration Officer refuses the permit sub-s. (5) gives the applicant a right of appeal to the Minister. The applicant in this case was refused such a permit, and his appeal against such refusal was dismissed by the Minister.

It is the applicant's complaint that in dismissing the appeal, the Minister failed to act judicially in that the applicant was not informed of the case against him or of the reasons for the Principal Immigration Officer's refusal of a permit, and was therefore deprived of an opportunity of meeting that case. It is further contended on his behalf that the process by which the Minister must arrive at his decision on an appeal is no different from the process, a judicial one, by which this court must arrive at its decision on an appeal from the refusal of the grant of a class "A" permit. It is, perhaps, unfortunate that the word "appeal" is used in both sub-s. 10 (4) and sub-s. 10 (5), as we think that the use of that word in sub-s. (5) is misleading. In sub-s. (4) the word is used in its ordinary procedural meaning and is obviously intended to give an appeal by due process of law. In sub-s. (5) the appeal, so called, lies in respect of a refusal by the Principal Immigration Officer to grant a permit which is in his discretion. In regard to the exercise of that discretion s. 3 (4) provides as follows:

> "3 (4). The Minister may from time to time give to the Principal Immigration Officer or any other immigration officer or officers general or special directions, not inconsistent with the provisions of this Ordinance or of any regulations made thereunder, as to the exercise of any powers, discretions or functions or the performance of any duties under this Ordinance or any regulations made thereunder, and the Principal Immigration Officer and all other immigration officers shall comply with any such general or special directions so given."

It is clear from this sub-section that the discretion to be exercised by the Principal Immigration Officer is dependent solely upon policy and expediency as dictated to him by the Minister under whom he carries out the functions of his office. Immigration is, and we think must always be, a jealously guarded privilege, and it would seem that the fact that it is a privilege, and not a right is often overlooked. A person who can establish birth or long residence in the Colony has by the provisions of the Ordinance been properly accorded the right to claim a class "A" permit; but a person who seeks entry as an immigrant has been properly made the subject of careful and jealous scrutiny, and may not become a resident if he is considered as offending such precepts which the Government, who is the guardian of the welfare of the inhabitants generally of the Colony, may from time to time consider expedient to impose.

The following passage occurs in the judgment of Lord Greene, M.R. in *Johnson* (*B.*) *& Co.* (*Builders*) *Ltd. v. Minister of Health* (7), [1947] 2 All E.R. 395 (at p. 401):

> "It is obvious to anyone who has any familiarity with the operations of government departments that matters of high public policy, such as this, are, or may be, under constant consideration and review by the necessary Minister. The problem does not, so to speak, arrive suddenly out of the blue by the putting forward by the local authority of a compulsory purchase order for confirmation. The housing conditions in great cities are the subject of continuous consideration, not merely by one Ministry, but by several. Information may have arrived, reports may have been obtained, representations and arguments may have been put forward by other Ministries, and in a great many cases one would expect to find a fairly bulky file, much of which, if not the whole of it, may bear on some particular application. Obviously, it would be absurd to say that a Minister, in considering whether to confirm the compulsory purchase order, must exclude from his mind information and considerations which have come before him in that sort of way. It is on the obligation alleged, viz., to disclose information of that kind, that the present controversy turns. It is not unfair to say that, generally speaking, the idea that a Minister can be compelled to disclose to anybody information of that kind, which he has obtained as a purely administrative person, is alien to our whole conception of government in this country."

Thus it is that, under the Ordinance, not only is the onus placed upon a person seeking entry into the Colony as an immigrant of satisfying certain requirements, but the decision whether entry should be permitted is left to the discretion of the Principal Immigration Officer on grounds of policy and expediency, as intimated to him by the Minister from time to time, and, in any appeal, the Minister may consider extraneous matter and information without any obligation to disclose such to the applicant. It is necessary only to look at the repealed Immigration Ordinance of 1948, (Cap. 51), to appreciate with what deliberation the legislature has acted in drafting the present Ordinance. Section 7 of the repealed Ordinance was the equivalent of s. 10 of the new Ordinance. Under the former it was provided that:

> "7. Any person, other than a prohibited immigrant, who satisfies the prescribed authority that he belongs to any of the following classes shall, upon application being made in that behalf in the manner prescribed, be entitled to a permit to enter the Colony."

There were then set out the various classes, and under class "G" is this provision:

> "A person who has been offered and has accepted employment, other than temporary employment, in the Colony and is in possession of a certificate issued by the prescribed authority that the taking up of such employment by him will not be to the prejudice of the inhabitants generally of the Colony."

It is to be noted (*a*) that provided an applicant satisfied these requirements he was *entitled* to a permit, and (*b*) there was no question of an issue of such permit being at the discretion of the Principal Immigration Officer. Again, under s. 7 (4) provision was made for an appeal against the refusal of such a permit to a tribunal consisting of at least three persons. The new Ordinance does away with the tribunal and makes the decision on any appeal in respect of an application for a class "G" permit the function of the Minister.

It was no doubt thought that the old Ordinance did not sufficiently protect the interests of the inhabitants in that immigrants were not subject to the overriding consideration of policy, or, in other words, the consideration of what was in the best interests of the people. As a consequence the legislature has under the new Ordinance taken away the right of appeal to a judicial or quasijudicial body, and, in our view, clearly leaves the last word with the Minister acting solely administratively. Under s. 7 (4) of the old Ordinance the tribunal appointed to hear appeals had clearly to act judicially because there was before it an appeal inter partes, the board, which was the prescribed authority under the old Ordinance as the Principal Immigration Officer is under the new, was a party to the proceedings, there was a proposal and an opposition, which the tribunal had to consider in addition to evidence. Under the new Ordinance, however, the position is entirely changed. The Principal Immigration Officer in exercising his discretion does so upon his interpretation or application of the policy directive given to him by the Minister. Any appeal from his decision is not an appeal in the form generally understood, as there is no lis between the applicant and the Principal Immigration Officer. A clear distinction has been made in the Ordinance between the right of appeal given to an applicant for a class "A" permit and that given to an applicant for a class "G" permit. The decision of the Principal Immigration Officer in respect of an application for a class "A" permit is not dictated by any consideration of policy; it is based solely on a question of fact and, possibly of law. Hence an appeal to this court is given against the Principal Immigration Officer's finding of fact and law, if any. On the other hand, the exercise of his discretion by the Principal Immigration Officer in respect of an application for a class "G" permit is governed by considerations of policy and expediency, and it is not for this court to pronounce upon either. An appeal has, however, been given to an aggrieved applicant to the Minister and it is our view that that appeal is no more than a prayer in aid of reconsideration, a request to the Minister that he should reconsider the application of his policy directive to the case of the particular applicant. It is manifest to us that, when considering the so-called appeal, the Minister considers the question from the point of view of policy and expediency and decides whether or not the Principal Immigration Officer has properly acted under his instructions. In the *Johnson & Company* case (7), Lord Greene had this to say about the subject ([1947] 2 All E.R. at p. 399):

> "In the language that is used commonly in these cases, there are three phrases which crop up, and which, I think, deserve a little examination to see, at any rate, what they do *not* mean. The first of these phrases I have

> referred to already, viz., the word lis. Lis, of course, implies the conception of an issue joined between two parties. The decision of a lis, in the ordinary use of legal language, is the decision of that issue. The consideration of the objections, in that sense, does not arise out of a lis at all. What is described here is a lis–the raising of the objections to the order, the consideration of the matters so raised and the representation of the local authority and the objectors–is merely a stage in the process of arriving at an administrative decision. It is a stage which the courts have always said requires a certain method of approach and method of conduct, but it is not a lis inter partes, and for the simple reason that the local authority and the objectors are not parties to anything that resembles litigation. A moment's thought will show that any such conception of the relationship must be fallacious, because on the substantive matter, viz., whether the order should be confirmed or not, there is a third party who is not present, viz., the public, and it is the function of the Minister to consider the rights and the interests of the public. That by itself shows that it is completely wrong to treat the controversy between objector and local authority as a controversy which covers the whole of the ground. It is in respect of the public interest that the discretion that Parliament has given to the Minister comes into operation. It may well be that, on considering the objections, the Minister may find that they are reasonable and that the facts alleged in them are true, but, nevertheless, he may decide that he will over-rule them. His action in so deciding is a purely administrative action, based on his conceptions as to what public policy demands. His view on that matter he must, if necessary, defend in Parliament, but he cannot be called on to defend them in the courts."

A case which has some relation to the circumstances and facts of this case is that of *R. v. Inspector of Leman Street Police Station, Ex parte Venicoff* (8), [1920] 3 K.B. 72. The head note reads as follows:

> "Art. 12, para. 1, of the Aliens Order, 1919, which empowers the Secretary of State 'if he deems it to be conducive to the public good' to make a deportation order against an alien is not ultra vires. In acting under the article the Secretary of State is not a judicial, but is an executive officer, and is therefore not bound to hold an inquiry or give the person against whom he proposes to make a deportation order the opportunity of being heard."

It is interesting to note that one of the grounds upon which the applicant in that case applied for certiorari was that he was not aware of the grounds upon which the deportation order had been made against him. Lord Reading, in his judgment, said (at p. 78):

> "Turning now to the statute, art. 12, and the deportation order made under it, I have no doubt that it is not for us to pronounce whether the making of the order is or is not conducive to the public good. Parliament has expressly empowered the Secretary of State as an executive officer to make these orders and has imposed no conditions."

and again later (at p. 80):

> "I therefore come to the conclusion that the Home Secretary is not a judicial officer for this purpose, but an executive officer bound to act for the public good, and it is left to his judgment whether upon the facts before him it is desirable that he should make a deportation order. The responsibility is his."

In the result therefore we are of the opinion that the Minister's function in considering the applicant's appeal from the decision of the Principal Immigration Officer was solely administrative and hence there was no obligation upon him to act judicially. Consequently the writ of certiorari does not lie.

As to the third and fourth points taken for the Crown, we have no doubt that the applicant should have disclosed in his affidavit, supporting his application for leave to apply for the orders of certiorari and mandamus, the fact that after the dismissal of his appeal by the Minister he was notified under s. 7 (2) (*f*) of the Ordinance that he had been deemed by the Principal Immigration Officer to be an undesirable immigrant. This was clearly a matter that should have been disclosed as, had it been, the application for leave may well have been refused (*Re Bristol & North Somerset Railway Company* (9) (1877), 3 Q.B.D. 10). This was a fact which was material both to the application for leave and to the motion now before us, and a court requires uberrima fides on the part of an applicant, particularly in an *ex parte* application. In *R. v. Kensington Income Tax Commissioners, Ex parte Princess De Polignac* (10), [1917] 1 K.B. 486, it was held that where there is a suppression of material facts a court will refuse a writ of prohibition without going into the merits of the case. In the instant case, however, the learned solicitor-general was content to draw our attention to this aspect of the motion without asking for it to be refused on that ground.

Finally, we are satisfied that there was no denial of natural justice on the consideration of the appeal by the Minister. As we have already pointed out there was no lis between the applicant and the Principal Immigration Officer. There was therefore no appeal intra-partes and it is clear that the appeal was considered in the nature of a re-hearing by the Minister in the light of the facts of the application and in the light of policy and expediency and the extraneous matters which the Minister, functioning administratively, was entitled to consider. The complaint that the applicant was not allowed to appear before the Minister is not strictly correct. The Minister declined to allow his advocate to appear on his behalf but did not refuse to allow an appearance by the applicant personally. The Ordinance does not make it incumbent upon the Minister to allow such an appearance, which is a matter solely in his discretion. The applicant was given full opportunity to put forward his case in writing. Nor does the Ordinance make it incumbent upon the Minister to notify an applicant of the reasons for the dismissal of an appeal. The Ordinance casts the whole burden upon the potential immigrant. It is for him to satisfy the Principal Immigration Officer and the Minister that he has accepted the offer of appropriate employment and that he is a desirable immigrant.

The motion is dismissed with costs. We think this matter of sufficient importance to certify for Queen’s Counsel and Junior. We certify accordingly.

Motion dismissed.

For the applicant:
J Gledhill and *RR Shah*
Gledhill & Co, Nairobi

For the respondent:
DW Conroy QC (Solicitor-General, Kenya) and *JS Rumbold* (Crown Counsel, Kenya)

The Attorney-General, Kenya

Ralli Estates Limited v The Commissioner of Income Tax
[1958] 1 EA 165 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	22 May 1958
Case Number:	52/1957
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika–Crawshaw, J

[1] Income tax – Deduction in computing income – Instalments of a variable purchase price payable to Crown for ninety-nine years' right of occupancy – Whether instalments constituted capital or revenue payments – East African Income Tax (*Management*) *Act,* 1952, *s.* 14 (1).

Editor's Summary

In 1950 the appellants negotiated the purchase from the Tanganyika Government of two sisal estates and some additional land adjoining one of these estates. The title offered by the Government and accepted by the appellants was a right of occupancy for ninety-nine years to be guaranteed under the Land Ordinance. Of the total price asked part was originally described as "premium" and the remainder as "balance due on royalty" but in the final negotiations the sum of £491,600 was described as "the full purchase monies" whereof £317,000 was to be payable as premium and "the balance of such purchase monies amounting to £174,600" was to be payable by instalments and was subject to certain variations based on productions and the export price of fibre. The appellants claimed that the instalments paid by them were "outgoings and expenses wholly and exclusively incurred during the year of income . . . in the production of their "income" within the terms of s. 14 of the East African Income Tax (Management) Act, 1952, and deductible in computing their income. The Commission of Income Tax considered the instalments to be capital payments as part of the purchase price for the estates and assessed the appellants on that basis. The appellants, having unsuccessfully appealed to the High Court, appealed again.

Held – the instalments amounting to £174,600 were capital and not income payments and to hold otherwise would ignore the realities of the transaction.

Appeal dismissed.

Case referred to in judgment:

(1) *Minister of National Revenue v. Spooner* (*Catherine*), [1933] A.C. 684.

(2) *Commissioners of Inland Revenue v. Westminster* (*Duke*), [1935] All E.R. Rep. 259; [1936] A.C. 1.

(3) *Ogden v. Medway Cinemas, Ltd*., 18 T.C. 691.

(4) *Commissioners of Inland Revenue v. Ramsay*, [1935] All E.R. Rep. 847; 20 T.C. 79.

(5) *Commissioners of Inland Revenue v. Adam*, 14 T.C. 34.

(6) *Racecourse Betting Control Board v. Wild*, [1938] 4 All E.R. 487; 22 T.C. 182.

(7) *Commissioners of Inland Revenue v. Rustproof Metal Window Co., Ltd*., [1947] 2 All E.R. 454; 29

T.C. 243.

(8) *Paterson Engineering Co., Ltd. v. Duff*, 25 T.C. 43.

(9) *British Insulated and Helsby Cables v. Atherton*, [1926] A.C. 205.

(10) *Bean v. Doncaster Amalgamated Collieries Ltd*., [1944] 2 All E.R. 279; 27 T.C. 296.

(11) *Jones v. Commissioners of Inland Revenue*, 7 T.C. 310.

(12) *Commissioners of Inland Revenue v. British Salmson Aero Engines Ltd.*, [1938] 3 All E.R. 283; 22 T.C. 29.

(13) *Commissioners of Inland Revenue v. Mallaby-Deeley*, [1938] 3 All E.R. 463; 7 T.C. 153.

(14) *Green v. Favourite Cinemas Ltd*., 15 T.C. 390.

(15) *Constantinesco v. R.*, 11 T.C. 730.

(16) *Commissioners of Inland Revenue v. Ledgard*, [1937] 2 All E.R. 492; 21 T.C. 129.

(17) *Commissioners of Inland Revenue v. Hogarth*, 23 T.C. 491.

(18) *Dott v. Brown*, [1936] 1 All E.R. 543.

(19) *Nethersole v. Withers*, 28 T.C. 501.

(20) *Haig's* (*Earl*) *Trustees v. Commissioners of Inland Revenue*, 22 T.C. 725.

(21) *Mackintosh v. Commissioners of Inland Revenue*, 14 T.C. 18.

(22) *Commissioners of Inland Revenue v. Pilcher*, [1949] 2 All E.R. 1097; 31 T.C. 314.

(23) *Stow Bardolph Gravel Co., Ltd. v. Poole*, [1954] 2 All E.R. 661; 35 T.C. 459.

(24) *Mohanlal Hargovind v. Commissioner of Income Tax, Central Provinces and Berar, Nagpur*, [1949] 2 All E.R. 652.

May 22. The following judgments were read:

Judgment

Sir Kenneth O'Connor P: This is an appeal from the judgment and decree dated April 18, 1957, of the High Court of Tanganyika dismissing two appeals by Ralli Estates Limited, the present appellants, against assessments by the Commissioner of Income Tax, the present respondent. The appeals were: Miscellaneous Civil Appeal No. 19 of 1955 in respect of a sum of £80,274 relating to the year of income 1952, and Miscellaneous Civil Appeal No. 20 in respect of a sum of £94,326 relating to the year of income 1951. As precisely the same considerations apply to each appeal, they were heard together in the High Court and have been heard as one appeal in this court.

As found by the learned judge in his judgment, these two sums amounting to £174,600 were paid by the appellant to the Government of Tanganyika as part of the consideration under an agreement whereby the appellant acquired from the Government two sisal estates named Lanconi and Mjesani respectively, and an additional area of land of 6,000 hectares adjoining Lanconi, on a ninety-nine years' right of occupancy, together with the machinery and other property thereon. Briefly, the question for decision before the learned judge and by this court was and is whether this sum of £174,600 was a capital or a revenue payment for the purpose of income tax.

The relevant statutory provision is contained in s. 14 of the East African Income Tax (Management) Act, 1952, sub-s. (1), the material part of which reads:

> "14. (1) For the purpose of ascertaining the total income of any person there shall be deducted all outgoings and expenses wholly and exclusively incurred during the year of income by such person in the production of the income, including–"

Then follow a number of specified deductions. The appellant has not relied on any particular specified deduction but has based its appeal on the general ground that the payments amounting to £174,600 constituted

> "outgoings and expenses wholly and exclusively incurred during the year of income . . . in the production of the income"

of the appellant, and are therefore deductible. The question for decision is whether or not this contention is correct.

There is no substantial dispute about the facts, the correspondence, or the documents. There is, however, considerable difference between the parties as to the interpretation to be put upon them. I take the following statement of the facts and the history of the matter from the judgment of the learned judge:

> "5. Perhaps it might be as well here to refer briefly to the history of the Lanconi and Mjesani Estates (with which one way or another Ralli Brothers Limited have been associated since before the last war when they were German-owned) and to this transaction in particular. Following the outbreak of war, and up to the time of their acquisition by the appellant from Government in 1950, the estates were managed by Ralli Brothers Limited, at times on behalf of the Government and at other times on behalf of the Custodian of Enemy Property. The appellant is a wholly owned subsidiary of Ralli Brothers Limited and was incorporated on December 21, 1950, for the express purpose of acquiring and working the estates. In June, 1948, the Custodian of Enemy Property prepared a memorandum setting out the basis on which it was proposed to dispose of the many sisal estates under his charge. They were to be transferred to the Governor, who would grant long-term rights of occupancy to applicants approved by a selection committee specially to be appointed for that purpose. As to valuation of an estate the memorandum said this:
>
> 'Valuation:
>
> Valuations of properties will be required before the granting of long-term rights of occupancy. Rent will be payable under the rights of occupancy, presumably assessed on the unimproved value of the land. A premium will be fixed for the value of the unexhausted improvements.
>
> Consideration will have to be given to:
>
> 1. Valuation of sisal areas.
> 2. Valuation of machinery equipment.'
>
> It is not, I think, in evidence whether this memorandum was ever made public, but extracts from it appear in the agreed bundle of documents.
>
> "6. On March 7, 1950, the Government wrote a letter to the Tanganyika Sisal Board, of which the following is an extract:
>
> 'It is proposed to base the valuation of each estate on its potential production. The Custodian can arrange for all relevant information.
>
> 'It is proposed to advertise the sisal estates for disposal very shortly, and it would greatly facilitate the disposal of these estates if your board would agree to Mr. Lock's advising on the valuation of the individual estates, and in particular on the assessment of the potential production.'
>
> "On March 17, 1950, the Government published in the Tanganyika press a notice (dated March 14, 1950) of which the first paragraph reads as follows:
>
> 'Applications are invited for the purchase of ex-German Enemy Sisal Estates in Tanganyika Territory, East Africa. Details of the Estates and the mode of disposal are contained in a catalogue which persons interested may obtain from . . .'
>
> and the final paragraph reads:
>
> 'The Estates have not yet been valued, but premia, royalties and rentals payable will be available before the selection committee meets.'

"The following are extracts from the foreword to the catalogue published as 'Land Settlement Pamphlet No. 4' (in which, incidentally, Lanconi is described as Lanzoni):

'History of Short-Term Leases: After the outbreak of war in 1939, the Tanganyika Sisal Growers Association was consulted by Government with regard to the leasing of the enemy-owned sisal estates. The Association advised Government that in the circumstances, the main qualifications for lessees should be that they owned sisal estates in proximity to the enemy-owned properties; that they should be of good repute in the industry; and that they should possess a sufficiency of staff and labour to undertake the leases of the enemy estates. Estates were leased in the first instance for a period of one year, at more or less nominal rents: but royalties were payable to the Custodian of Enemy Properties. These royalties were based on a sliding scale according to the grades of sisal produced and sold. Subsequently, and from time to time, new leases were entered into upon terms and conditions that showed considerable variation from those contained in the original leases. Eventually in 1943, leases were granted for a term of five years, which expired on December 31, 1948: and since the last mentioned date, the leases have been extended for two further periods of one year which as indicated above, will expire on December 31, 1950. These leases contained provision for the payment of a nominal rent and a royalty that is assessed on production at current market prices. The leases also included, *inter alia*, covenants for the maintenance by the lessees of the areas of mature sisal, of the buildings and equipment; and for payment by the custodian, from royalties received, of the cost of necessary capital improvements, e.g. buildings, machinery and replanting. These capital improvements have been, and are, effected in accordance with an annual programme, mutually agreed between the lessees and the custodian.

'Pursuant on these arrangements, most of the royalties received have been "ploughed back" into the land, or expended on the purchase of machinery and, to an even greater extent, utilised to give effect to a large building programme, covering mainly the provision of permanent housing for labour. In the result most of the enemy estates which had deteriorated considerably during the early years after the outbreak of the war, have recovered their pre-war potential, so far as production is concerned.

'Method of Disposal: All these sisal estates are now being advertised for sale in the United Kingdom and in East Africa. Arrangements have been made for the valuation of the estates to be undertaken. Every applicant for the purchase of a sisal estate must submit, with his application, a duly completed questionnaire form, which can be obtained from the Land Settlement Officer, Department of Lands and Mines, Dar es Salaam. Applications should reach the said officer, on or before the closing date for applications, as mentioned in the advertisement of sale. The estates will be allocated to suitable applicants on the recommendations of a selection committee, which will be appointed by Government.

'Conditions of Sale: The conditions of sale will include the offer of a right of occupancy over each estate to the approved applicant, on the basis of a right of occupancy (or lease) for a term of ninety-nine years, subject to payment of a premium, a royalty, and a rent, and to one exception, namely that the "Karanga" Estate will be offered for a term of twenty years only (cf. note appended at foot of relevant entry in catalogue infra). The premium and royalty will be related to the value

of the unexhausted improvements on the land, including leaf, building, machinery and equipment; and the rent will be based on the unimproved value. The premium will take the form of a cash payment; but the royalty will be payable over an indeterminate period, related to the estimated leaf potential on the estate, at the time of disposal. The land rent will be subject to periodical revision in accordance with the terms of the Land Ordinance; and the other conditions of the right of occupancy will also be governed by the said Ordinance, and the regulations thereunder.'

"7. In August, 1950, Ralli Brothers Limited completed the questionnaire and made application for Lanconi and Mjesani Estates, and in a letter of September 30, 1950, to Ralli Brothers Limited (hereinafter referred to as 'the letter of September 30') the Member for Lands and Mines referred to a pending interview of applicants by the selection committee, and then said as follows:

'2. In the meantime, detailed information can now be supplied to applicants regarding the terms of disposal. As explained in the catalogue, the estates will be disposed of on long agricultural leases of ninety-nine years, except where otherwise stated. A yearly rental of Shs. 2/- per acre will be charged. Payment of a premium and a royalty will be required in all but those estates where the capital value is small, in which cases the full value will be payable as premium.

'3. The premium will be payable as follows:

Ten per cent. at the time of allotment, to be forfeited if the purchase is not completed.

Thirty per cent. within twenty-one days of allotment.

Balance within ninety days.

'4. Royalty will be charged on a sliding scale, based on the average f.o.b. price of line fibre, at the rates shown in the attached table of royalties. Royalties will be payable until, *in the case of each* estate, the whole balance due by way of royalty has been extinguished, or until royalty has been paid on the tonnage liable to royalty, whichever occurs the earlier.

'5. The following are the details regarding the estates for which you are an applicant:

Estate.	Catalogue Ref. No.	Total net capital value.	Premium payable.	Balance due on royalty.	Fibre tonnage on which royalty payable.
		£	£	£	Tons
Lanconi	T1512	191,500	121,200	70,300	7,809
Mjesani	T1513	294,100	189,800	104,300	11,588
Kilulu	T1514	134,700	83,800	49,900	6,153

'Other Particulars or Notes: The above valuation figure for Lanconi Estate is only for the area under sisal. The successful applicant will be offered an additional 6,000 hectares at a premium of £1 per hectare and an annual rental of Shs. 2/- per acre.

'Please sign the attached acknowledgment and return at your earliest convenience.

I am, Gentlemen,

Your obedient servant,

Sgd.

Member for Lands and Mines.

Table of Royalties

Price of Sisal per ton f.o.b.	Royalty per ton.
£70–or under.	£1 0*s*. 0*d*.'

Then follows the sliding scale, the last figures being '£146–or over . . . £56 18*s*. 0*d*.' It will be seen that the sum of £174,600 in dispute is the total of the first two items in column 5 in para. 5 above:

"8. Mr. Carson, a director of Ralli Brothers Limited, duly represented his company before the selection committee, but his appearance seems to have been no more than a formality, as the committee already had very full information about the company. He said in evidence: 'there was no amplification of the documents which I had already received, and on the basis of which my application had been made.'

"9. On October 26, 1950, the Member for Lands and Mines wrote to Ralli Brothers Limited referring to his letter of September 30 and saying that on the advice of the selection committee the company had been selected as the future tenants of Lanconi and Mjesani. Paragraph 3 of the letter reads as follows:

'3. In accordance with the conditions of sale as set out in para. 3 of my letter under. reference, I shall be grateful to receive your remittance representing ten per cent. of the premium after which a formal offer of a right of occupancy will be addressed to you as soon as possible. The term of years in the right of occupancy will date from January 1, 1951.'

"10. On December 20, 1950, a further letter was written, this time to appellant company, and signed by the acting land officer (hereinafter referred to as 'the letter of December 20'). It was not sent direct, but under a covering letter of December 27. Although it does not specifically refer to the letter of October 26, one is entitled I think to presume that it is the 'formal offer' mentioned in that letter. This letter of December 20 starts off by saying: 'Your application . . . has been approved . . . subject to the terms and conditions herein contained and to the special conditions annexed hereto.' In fact it would seem that the appellant company was not incorporated until the following day, December 21, and that it was the offer of Ralli Brothers Limited which was meant, although I understand that Government knew that the appellant company was being formed to acquire the estates, and hence, I suppose, this small inaccuracy. The material part of para. 2 of this letter is as follows (the figures are in shillings, but for ease of comparison with other documents I have added the equivalent in pounds also):

'2. This offer is subject to the said land referred to being found available on survey, the final demarcation of the boundaries being determined by Government.

'If you accept this offer payment of the full purchase monies amounting to Shs. 9,832,000/- (£491,600) of which Shs. 8,992,920/-(£449,646) shall be deemed to be in respect of the said land, buildings, immovable machinery, fixtures and effects and Shs. 839,080/- (£41,954) shall be in respect of movable machinery, chattels, vehicles, and other effects capable of manual delivery and purchased by you, together with the first year's rent, fees for preparation and registration of title deeds, stamp duty and survey fees, when demanded shall be made in the manner following:

(i) As to Shs. 6,340,000/- (£317,000) thereof payable as a premium as follows:

(*a*) Ten per cent. thereof amounting to Shs. 654,000/- (£32,700) already paid on allotment, receipt whereof is hereby acknowledged.

(Here I would interpose to say that the figure should surely be 634,000/- (£31,700).)

(*b*) Fifty per cent. thereof amounting to Shs. 3,170,000/- (£158,500) already paid, receipt whereof is hereby acknowledged.

(*c*) Forty per cent. thereof amounting to Shs. 2,536,000/- (£126,800) due and payable on the 24th day of January, 1951.

(ii) The balance of such purchase monies, amounting to Shs. 3,492,000/- (£174,600) shall be paid by monthly instalments. A notice informing you of the amount of such instalment will be sent on or before the 15th day of each month. The first of such payments shall become due and payable on the 15th day of February, 1951, and thereafter on the 15th day of each and every subsequent month, and shall be paid on or before the last day of each month. The amount of such monthly payments shall be assessed by reference to the tonnage of line sisal fibre produced on the said land and exported during the month preceding the dispatch of the notice hereinbefore mentioned. The tonnage exported shall be assessed by reference to the return made under the Sisal Industry Registration Rules, 1946. Provided always that the Governor shall have option to be exercised at his sole discretion, to assess the said tonnage by reference to the tonnage of line sisal fibre produced on the said land by reference to the monthly returns submitted by you, under the Sisal Industry Registration Rules, 1946. Such monthly payments shall be calculated on a sliding scale determined by the average of the monthly sales of all grades of line sisal fibre exported f.o.b. from Tanga and Dar-es-Salaam as set out in the return submitted by the Commissioner of Customs for the East African Territories to the Governor at the rate provided for in the schedule hereto. The said monthly instalments shall be paid until such time as either the said balance of the purchase monies is paid or until the total fibre tonnage of 19.397 tons shall have been cut and accounted for, whichever shall first occur. The occupier agrees to pay interest at the rate of five per cent. per annum on each and every monthly instalment, remaining unpaid after the last day of each and every month, as aforesaid, until the date of payment and to accept as final the figures of the monthly instalment as shown in the said notice.

.

(vi) This offer must be accepted by December 31, 1950, after which date it ceases to be valid.'

Apart from interest on overdue 'instalments', no interest was payable on the balance of £174,600 at any time outstanding. There then follows provisions for the revocation of 'this agreement for sale of a right of occupancy' in certain circumstances. Then comes a heading 'Schedule' with sub-headings as follows:

'Rates at Which Balance of Purchase Monies to be Calculated.

Average f.o.b. price of line sisal fibre.	Amount payable per ton.'

The columns of figures thereunder are identical with those in the letter of September 30, except in two instances where the differences might be unintentional or intentional, I do not know. I have not the originals

before me, and anyway Mr. Newbold for the respondent has not drawn attention to them. 'Special Conditions' follow, which are not material to the appeals. Endorsed at the end is the acceptance by the appellant on December 31, the last date prescribed therefor; it is in the following terms:

> 'Ralli Estates Limited hereby accept a right of occupancy over the said land referred to in the foregoing offer and in the special conditions annexed hereto.
>
> Dated this 31st day of December, 1950.
>
> The common seal of Ralli Estates Limited was hereunto affixed in the presence of: Common seal of Ralli Estates Limited.'
>
> M. A. Carson Directors.'
> G. C. Priest

> This letter with the endorsement does not appear to have been returned until January 31, 1951, for in a letter of that date addressed by the appellant to the Land Settlement Officer the final paragraph reads: 'With regard to the formal offer–without prejudice to the reservations which have already been made–we return the original sealed by us.' The 'reservations' referred to are not, I think, material to this appeal."

It is admitted that the yearly rent of Shs. 2/- an acre is a payment incurred in the production of income for the years in question and deductible under s. 14 of the East African Income Tax (Management) Act. It is agreed that the sum paid by way of premium is or is part of the purchase price of the right of occupancy and unexhausted improvements and is of a capital nature. The dispute is with regard to the sums £70,300 and £104,300 totalling £174,600 expressed in the earlier documents to be "balance due on royalty" and referred to in the letter of December 20 as the "balance of such purchase monies, amounting to Shs. 3,492,000" which were to be "paid by monthly instalments". I will, hereafter, refer to the various sums in pounds and not in shillings, as I think that this is easier to follow. It is common ground that owing to the high price of sisal fibre the whole of. the £174,600 became payable and was, in fact, paid within two years and that the application of the scale resulted in payments totalling £94,326 in the year of income 1951 and £80,274 in the year of income 1952, together making the total of £174,600. It was not necessary to have recourse to the alternative basis of payment based on the cutting of a total fibre tonnage. The question is: Are the payments by the appellant company amounting to £174,600 out-goings and expenses wholly and exclusively incurred during the relevant years of income by the appellant company in the production of the income, that is payments of an income nature, as alleged by the appellant; or are they instalments of the purchase price, part of which was payable by instalments, of two sisal estates and payments of a capital nature, as is alleged by the respondent?

The question whether payments are of an income or a capital nature has frequently been considered under provisions of the English Income Tax Acts and Rules thereunder, for instance under r. 3 (*a*) of Schedule D to the Income Tax Act, 1918, which reads:

> "3. In computing the amount of the profits or gains to be charged no sum shall be deducted in respect of (*a*) any disbursements or expenses not being money wholly or exclusively laid out as expended for the purposes of the trade, profession or vocation."

That is not the same wording as is employed in s. 14 of the East African Income Tax (Management) Act, but I think that it and some of the other provisions are sufficiently similar to enable me to obtain guidance from the

English authorities as to what are the principles which should be observed in deciding whether a particular payment is of the nature of an income, or of a capital payment. I propose, therefore, at this stage to refer to some broad principles established by the English authorities as to the way in which the question must be considered and then to apply those principles to the facts of the instant case.

Before considering the authorities which have been decided upon English Income Tax Acts, I ought to mention the case of *Minister of National Revenue v. Catherine Spooner* (1), [1933] A.C. 684. That was an appeal from the Supreme Court of Canada. The respondent in that case had sold all her right, title and interest in land, which she owned in freehold, to a company in consideration of a sum in cash, shares in the company, and an agreement to deliver to her ten per cent. (described as a royalty) of oil produced from the land. The company struck oil and paid to the respondent, in 1927, ten per cent. of the gross proceeds of the oil produced, which she accepted in discharge of the royalty. The Supreme Court of Canada held that the sum so received was not an annual profit or gain within s. 3 of the Income War Tax Act, but a receipt of a capital nature, and that, accordingly, the respondent was not chargeable to tax in respect of it. It was held by the Judicial Committee of the Privy Council that it was for the appellant to displace the view of the Supreme Court as being manifestly wrong and that he had failed to do so: the judgment of the Supreme Court was, accordingly, affirmed. The facts of that case differed from those of the present case. That was a case of a sale of freehold land: there was no relationship akin to that of lessor and lessee. The bargain was for a sum down, shares and a royalty receivable in oil, though in fact the proceeds were received in cash. Nevertheless, though the facts are different, assistance can, I think, be derived from some of the principles laid down by their lordships in that case. Lord Macmillan delivering the judgment of the Board said, at p. 688:

> "The question whether a particular sum received is of the nature of annual profit or gain or is of a capital nature does not depend upon the language in which the parties have chosen to describe it. It is necessary in each case to examine the circumstances and see what the sum really is, bearing in mind the presumption that it cannot be taken that the legislature meant to impose a duty on that which is not profit derived from property, but the price of it . . ."

and at p. 689 and p. 690:

> "Capital may, no doubt, be expended in the acquisition of an income which, in the recipient's hands, becomes a proper subject of income tax, as was pointed out in the passage quoted . . . from the judgment of Rowlatt, J., in *Jones v. Inland Revenue Commissioners*, [1929] 1 K.B. 711, 714, 715. But in the same volume, in a case where the liquidator of a company had sold its assets, including certain patent rights, to a new company for a sum in cash, a block of shares and a royalty on every machine sold, the same learned judge had characterised the royalties as being 'in effect payment by instalments of part of the purchase price of the property . . .'
>
> "Into which category then does the present case fall? Their lordships agree with Newcombe, J., that 'the case is not without difficulties' as all cases must be which turn upon such fine distinctions, but they are not prepared to differ from the view of the transaction which that eminent judge took, and that with which his colleagues all agreed–namely that 'the respondent has converted the land, which is capital, into money, shares and ten per cent. of the stipulated minerals which the company may win . . . there is no question of profit or gain, unless it be whether she has

> made an advantageous sale of her property.' It was for the Minister to displace this view as being manifestly wrong. In their lordships' opinion he has failed to do so."

If the decision of the present appeal is to rest upon the ground that it is for the appellant to displace the view of Crawshaw, J., that the payments of balance of royalty or balance of purchase price (whichever it be called) were payments of a capital nature "as being manifestly wrong", then my judgment must be for the respondent, because, in my opinion, the appellant has not discharged that onus. Mr. Borneman, however, has attempted to distinguish *Spooner's* case (1) on the facts and has urged us, in any event, not to follow *Spooner's* case (1) on the ground that it has never since been relied on and is out of line with the trend of more modern cases in England. We are, of course, bound to follow a decision of the Privy Council and I should certainly do so; but the question whether the appellant has to displace the learned judge's view as being "manifestly" wrong does not arise in the present case, because the appellant has not even convinced me that the view of the judge that the payments in question were not income payments is wrong. I have, on the admitted facts and correspondence, reached the same conclusion as the learned judge. Apart from the question of what onus lies upon the appellant, there is nothing in *Spooner's* case (1) with which the later English decisions are in conflict and I do not think that I am precluded by *Spooner's* case (1) from deriving additional guidance from those decisions.

A great deal has been said in this case about form and substance. Mr. Borneman has argued that it does not matter what the parties put in their contract: it does not matter whether the sums in question were called royalties or balance of purchase price: what the court has to do is to ascertain the substance of the matter: the form is of little or no consequence. I agree that the substance of a transaction prevails over nomenclature. But that does not mean that, in arriving at the substance of the matter, the contract between the parties and their legal rights under it can be disregarded. As Lord Russell of Killowen said in *Commissioners of Inland Revenue v. Westminster* (*Duke*) (2), [1936] A.C. 1 at p. 25:

> "If all that is meant by the doctrine is that having once ascertained the legal rights of the parties you may disregard mere nomenclature and decide the question of taxability or non-taxability in accordance with the legal rights well and good . . . If, on the other hand, the doctrine means that you may brush aside deeds, disregard the legal rights and liabilities arising under a contract between the parties, and decide the question of taxability or non-taxability upon the footing of the rights and liabilities of the parties being different from what in law they are, then I entirely dissent from the doctrine."

It appears that the true principle is that one must arrive at one's decision by ascertaining the substance of the matter by a careful consideration of the surrounding facts and of the contract which embodies the transaction and of the legal rights of the parties under it. Substance is to be ascertained (*Ogden v. Medway Cinemas Ltd.* (3), 18 T.C. 691, 695) but the form of the contract cannot be ignored and may be a very important means, sometimes the only means available, for ascertaining what the substance of the transaction is. As Lord Wright, M.R., said in *Commissioners of Inland Revenue v. Ramsay* (4), 20 T.C. 79, at p. 92:

> "The decision in any particular case can only be arrived at by considering what is the substance of the transaction in question, and what is the substance of that transaction can only be ascertained by a careful consideration of the contract which embodies the transaction."

Or, as Lord Clyde, L.P., said in *Commissioners of Inland Revenue v. Adam* (5), 14 T.C. 34:

> "A great deal has been said about form and substance. I think that in a question of this sort, both form and substance must be considered . . ."

This passage was cited with approval by Macnaghten, J., in *Racecourse Betting Control Board v. Wild* (6), 22 T.C. 182: The learned judge continued (at p. 187):

> "So, in the case before me, the question whether substance should be preferred to form or form to substance has during the argument emerged. The solicitor-general argued that the substance should govern the decision. Mr. Latter's argument on behalf of the Board was, as I understand it, this. You can only look at the legal obligations of the parties under the document in the case, whatever it may be, and he cited the decision of the House of Lords in the *Duke of Westminster's* case, [1936] A.C. 1, in support of that view. I think Mr. Latter's contention is well founded."

On the other hand, the nature of a receipt or payment–whether it is a capital or an income payment–does not depend on the language in which the parties have chosen to describe it. *Minister of National Revenue v. Spooner* (1); *Commissioners of Inland Revenue v. Rustproof Metal Window Co., Ltd*. (7), 29 T.C. 243. Neither is the court bound to accept a statement in a deed that the consideration for the use of patents is a certain sum, when it appears from an earlier agreement and the surrounding circumstances that the consideration expressed may not be the true consideration and, in such circumstances, the case may be remitted to the Commissioners to decide the true consideration as a question of fact. *Paterson Engineering Co., Ltd. v. Duff* (8), 25 T.C. 50. Nor is the court bound to regard as conclusive a statement in a deed that

> "sums shall be paid to and received by the vendor as capital sums paid in respect of the purchase price."
>
> "That of course is not conclusive of anything, because whether they are capital sums or not must be determined by a consideration of the substance of the transaction, the terms of the contract",

per Lord Wright, M.R., in *Commissioners of Inland Revenue v. Ramsay* (4).

I think that the result of these authorities is that I must consider both form and substance. I must ascertain the substance of the transaction and, in so doing, I must carefully consider the contract between the parties which embodies the transaction and their legal rights and obligations under it; but the description in the documents of the payments in question as "a balance of royalty" or as "balance of purchase moneys" is not conclusive as to their nature.

Whether a payment is in the nature of a capital, or of an income, payment must depend upon the circumstances of each case; but there are certain guides and sign-posts pointing the way to a solution of this much-considered question which can be discovered from a study of the English authorities. I have read all those to which we were referred and many others. I will cite a few which appear to lay down principles of general application.

There is, first, the well-known principle enunciated by Lord Cave, L.C., in *British Insulated and Helsby Cables v. Atherton* (9), [1926] A.C. 205, at p. 213:

> "But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is a very good reason (in the absence of special circumstances leading to the opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

In the *British Insulated and Helsby Cables'* case (9) the payment in question was a lump sum payment, paid once for all; but "once for all" does not exclude

payments by instalments being treated as capital payments. The test (in the absence of special circumstances) is whether the company has secured by the expenditure an advantage for the enduring benefit of its trade. *Bean v. Doncaster Amalgamated Collieries Ltd*. (10), 27 T.C. 296, 305, 309.

In *Commissioners for Inland Revenue v. Adam* (5) the respondent was in business as a carting contractor. It was necessary for him to remove and dispose of earth, slag, etc. For this purpose he entered into an eight years' agreement by which he undertook to deposit on certain land a minimum of 80,000 cubic yards of material in the period, at the rate of 10,000 yards a year. The consideration payable to the landowner was a sum of £3,200, payable by half-yearly instalments of £200 and, in addition, a sum of four shillings for every five cubic yards of material deposited in excess of 80,000. The respondent in his accounts treated the acquisition of this right as an asset worth £3,200, writing off £400 each year and charging £400 to revenue. He contended that for income tax purposes the yearly payments were an expense of his business which should be deducted in computing his assessable profits. For the Crown it was contended that the sum of £3,200 was capital expenditure, or alternatively that the instalments were annual payments deduction of which is prohibited by r. 3 (*b*) of the Rules applicable to Cases I and II of Schedule D. On appeal the Special Commissioners were divided in their opinions and gave a decision in favour of the respondent. It was held (Lord Blackburn dissenting) that the £3,200 was a payment for a capital asset, and that no deduction by reference to it was admissible for income tax purposes.

The Lord President (Lord Clyde) said (14 T.C. at p. 40):

> "The question is whether, in computing the respondent's profits for the purposes of income tax, he is entitled to deduct from the gross profits of his business the two instalments of £200 each payable to account of the total price or consideration of £3,200 in each of the eight years. The answer depends upon whether the instalments are wholly and exclusively laid out for the purposes of the respondent's trade within the meaning of sub-head (*a*) of r. 3 applicable to Cases I and II of Schedule D; or whether on the other hand they are sums employed or intended to be employed as capital in that trade, within the meaning of sub-head (*f*) of that rule. The point is similar to one which was raised and decided in *Robert Addie & Sons' Collieries Limited v. Inland Revenue*, 1924 S.C. 231, where I endeavoured to state the true issue thus–Are the sums in question part of the trader's working expenses, are they expenditure laid out as part of the process of profit-earning; or, on the other hand, are they capital outlays, are they expenditure necessary for the acquisition of property or of rights of a permanent character the possession of which is a condition of carrying on the trade at all?"

Jones v. Commissioners of Inland Revenue (11), 7 T.C. 310, was a case in which patents and goodwill were sold for £750 payable as to £300 by three instalments of £100 each, as to £450 by a "royalty" and as to the balance by way of additional consideration a

> "further royalty of ten per cent. upon the invoice price of all machines constructed under the said inventions and sold during a period of ten years."

It was held that the "further royalty" did not constitute part of a capital sum but represented a share of the profits of the purchasing company, and formed part of the income of the appellant, and that as such it had been correctly included in the assessments of super tax made upon him. The facts of *Jones'* case (11) and the transaction between the parties were entirely different from the facts and the transaction in the present case, but I cite it for the principles of general application laid down by Rowlatt, J. (at p. 314):

> "I do not think there is any law of nature, or any invariable principle, that because you can say a certain payment is consideration for the transfer of property, therefore it must be looked upon as the price in the character of principal. It seems to me that you must look at every case, and see what the sum is. A man may sell his property for what is an annuity, that is to say, he causes the principal to disappear and an annuity to take its place. If you can see that that is what it is, then the Income Tax Act taxes it. Or a man may sell his property for what looks like an annuity, but you can see quite well from the transaction that it is not really a transmutation of a principal sum into an annuity, but that it is really a principal sum the payment of which is being spread over a time, and is being paid, with interest, and it is all being calculated in a way familiar to accountants and actuaries, although taking the form only of an annuity. That was Scoble's case–when you break up the sum and decide what it really was. On the other hand a man may sell his property nakedly for a share of the profits of a business, and if he does that, I think the share of the profits of the business would be undoubtedly the price paid for his property, but still that would be the share of the profits of the business and would bear the character of income in his hands, because that is the nature of it. It was a case like that which came before MR. Justice Walton in *Chadwick v. Pearl Life Insurance Company*, [1905] 2 K.B. 507. It was not the profits of a business but a man was clearly bargaining to have an income secured to him, and not a capital sum at all, namely, the income which corresponded with the rent which he had before."

In *Commissioners of Inland Revenue v. British Salmson Aero Engines Ltd*. (12), 22 T.C. 29, Finlay, J., said (at p. 36):

> "It is perfectly obvious . . . that it is quite possible that a licence may be granted or, for the matter of that, property may be sold partly in respect of a lump sum and partly in respect of an annuity or annual payment or payment for royalty or anything of that sort; . . ."

In *Commissioners of Inland Revenue v. Mallaby-Deeley* (13), 23 T.C. 153, the question was whether certain annual payments which Mr. Mallaby-Deeley had covenanted to make to finance the publication of a literary work were of a capital, or an income, nature. Sir Wilfrid Greene, M.R. (as he then was), said (at p. 166):

> "The distinction which is to be drawn for the purposes of the Income Tax Acts between payments of an income character and payments of a capital nature is sometimes a very fine and rather artificial one. It may depend upon–in fact it does depend upon–the precise character of the transaction. To take a simple case, if the true bargain is that a capital sum shall be paid, the fact that the method of payment which is adopted in the document is a payment by instalments will not have the effect of giving to those instalments the character of income. Their nature is finally determined by the circumstance that the obligation is to pay a capital sum, and instalments are merely a method of effecting that payment. On the other hand, to take another simple case, where there is no undertaking to pay a capital sum and no capital obligation in existence, and all that exists is an undertaking to pay annual sums, those may, in the absence of other considerations, be annual payments of an income nature for the purposes of the Income Tax Acts. The operation of that distinction in individual cases may present some appearance of unreality. Nevertheless, it is a distinction which is now well-founded, and the first question that arises in this case is this: what circumstances may be regarded for the purpose of the application of that rule? It is not disputed that a covenant to pay a lump sum by instalments is a covenant of a capital nature. It may be

> the purchase price of a business; it may be a pre-existing debt, and that particular method of liquidating it may have been selected . . . It was suggested, on behalf of the Crown, that, provided there was present a mere intention to provide a sum expressed as a capital sum, and the covenant was a covenant to pay annual sums, that mere intention would be sufficient to bring the case within the rule to which I have referred. That is an argument which I must not be taken to be accepting for one moment. It seems to me that the cases to which we have been referred, and indeed the principle of the thing, must depend upon there being a real existing capital sum, not necessarily pre-existing but existing in the sense that it represents some kind of capital obligation. If you had a case where a man merely made up his mind that he would like a covenantee to have a certain sum of money more than he had at present and then effectuated that intention by entering into a covenant to make annual payments, the sum which he thought of, which would in no real sense be a sum at all, would be no more than the motive for entering into the covenant to make the annual payments. On the other hand, if there is a real liability to pay a capital sum, either pre-existing or then assumed, that capital sum has a real existence, and, if the method adopted of paying it is a payment by instalments, the character of those instalments is settled by the nature of the capital sum to which they are related. If there is no pre-existing capital sum, but the covenant is to pay a capital sum by instalments, the same result will follow."

In *Commissioners of Inland Revenue v. Ramsay* (4), Lord Wright, M.R., said (20 T.C. at p. 92):

> "The question involved in the case is the question which has so often to be debated where property has been sold, namely, whether the consideration is a sum of money, though payable in instalments, or whether it is an annuity. It is, of course, quite clear that for a lump sum of money the right to receive periodical payments may be purchased, and in that case if the transaction constitutes the purchase of an annuity and each one of these payments is in the nature of income, in the appropriate hands and in the appropriate manner it is taxable as such, but if that is not the case and the instalments are not annuities in the proper sense of the term, but are merely the method and the manner and the form in which a lump sum is paid, then the position is different, and the sums in question are not to deemed income but capital, and accordingly in the hands of the payer when he comes to make his returns for surtax cannot be deducted under the provisions of s. 27 of the Income Tax Act of 1918."

and (at p. 95):

> ". . . I cannot see why a creditor who has sold property for a particular price should not, in discharge of that price, agree to accept a fluctuating sum, if, as may be the case, and no doubt was the case here, there are sufficient reasons of convenience or other considerations which make it desirable to adopt that method of payment."

and (at p. 97):

> ". . . the conclusion I have arrived at, with great respect to the learned judge, is that this is not the case of an annuity, or a series of annual payments. It is a case in which a capital lump sum has been stipulated as the price of a piece of property, and it is none the less so because the payment of that sum is to be made by instalments, instalments at certain specific periods, no doubt, but not instalments of a fixed price. It is none the less, in my judgment, a capital sum because in the working out of the transaction, and in the discharge of that capital sum, the vendor according to the terms

> of the agreement may have to be content with a lesser amount than the £15,000. The £15,000 is not an otiose figure; it is a figure which permeates the whole of the contract, and upon which the whole contract depends. That being so, I think that the £886 in question was a sum in the nature of capital, and therefore that it was not competent for the respondent to deduct it in returning his total income."

and Romer L.J., said (at p. 98):

> "If a man has some property which he wishes to sell on terms which will result in his receiving for the next twenty years an annual sum of £500, he can do it in either of two methods. He can either sell his property in consideration of a payment by the purchaser to him of an annuity of £500 for the next twenty years, or he can sell his property to the purchaser for £10,000, the £10,000 to be paid by equal instalments of £500 over the next twenty years. If he adopts the former of the two methods, then the sums of £500 received by him each year are exigible to income tax. If he adopts the second method, then the sums of £500 received by him in each year are not liable to income tax, and they do not become liable to income tax by it being said that in substance the transaction is the same as though he had sold for an annuity."

Applying the principles indicated in these cases to the payments in question in the present case, it will be useful first to ascertain, in the words of Lord Cave in *British Insulated and Helsby Cables v. Atherton* (9), whether the expenditure was incurred with a view to bringing into existence an asset or advantage for the enduring benefit of the trade or, as the test was stated by Lord Clyde in *Adam's* case (5).

> "Are the sums in question part of the trader's working expenses, are they expenditure laid out as part of the process of profit earning; or, on the other hand, are they expenditure necessary for the acquisition of property or of rights of a permanent character the possession of which is a condition of carrying on the trade at all?"

What was the consideration for the payments amounting to £174,000? Mr. Hooton, for the respondent, says that that they were part of the purchase price of two sisal estates, of a right of occupancy of the land and of the unexhausted improvements on it: that is that they were a part of the purchase price, payable by instalments, of an interest in land and permanent improvements, vehicles, chattels, etc. Mr. Borneman, for the appellant, argued that these payments were merely royalties "geared to production" and to the current market price of sisal fibre; and that the consideration for them was merely the user of the land to produce sisal fibre, which he called "the right to exploit the sisal potential."

I have come to the conclusion that Mr. Hooton is right as to what the consideration for the payments was and that the £174,000 was paid as part of the purchase price of a ninety-nine years' right of occupancy of two sisal estates and the unexhausted improvements thereon and machinery, vehicles, etc., and not merely for the right to exploit "the sisal potential". I think that this is quite clear when the correspondence and documents, the surrounding circumstances, and the relevant Ordinances are considered. A leasehold interest may, of course, be the subject of a sale, and instalments of its purchase price may be capital payments (*Green v. Favourite Cinemas Ltd*. (14), 15 T.C. 390). It is true that the valuation of each estate was based mainly on its potential production; but that was a method of arriving at its value to a purchaser. In the letter dated April 7, 1950, from the Government of Tanganyika to the Sisal Board, referred to above, the Government wrote:

> "It is proposed to base the valuation of each estate on its potential production."

That did not mean that nothing was to be disposed of but a right of user. In the foreword to the catalogue it was said that it had been decided by Government to dispose of the "former German-owned sisal estates" on a long-term leasehold basis: and it was stated that all these sisal estates were being advertised for sale and that every applicant "for the purchase of a sisal estate" must do certain things. There is no suggestion that all that was being sold was a right of user, a licence to exploit the sisal potential. What were being offered for sale were sisal estates on a long-term leasehold basis. Potential production is mentioned only because the sale price will naturally depend on it, on the value estimated by the annual profit that can be made out of the land (c.f. *Constantinesco v. R.* (15), 11 T.C. 730 at p. 743). Obviously, what a purchaser will pay will depend on what he expects to make out of the estate; but that does not mean that he is buying only a right of user. Then follows a statement that the conditions of sale will include the offer of a right of occupancy (or lease) for ninety-nine years, subject to payment of a premium, a royalty and a rent. The statement goes on

> "The premium and royalty will be related to the value of the unexhausted improvements on the land including leaf, building, machinery and equipment . . ."

and the rent will be based on the unimproved value. It is to be noted (*a*) that both premium *and* royalty are to be related to the value of the unexhausted improvements; (*b*) that they are to be related to the value of the unexhausted improvements "on the land"; and (*c*) that they are both to be related not only to leaf, but also to buildings, machinery and equipment. It is not correct, therefore, as I understood it to be suggested by Mr. Borneman, that premium only is related to unexhausted improvements. "Royalty" is also related to these and is to be part of the purchase price of buildings, machinery and equipment which are clearly capital assets.

In the letter of September 30 referred to above, it is said that the "estates will be disposed of" on long agricultural leases: a yearly rental of two shillings per acre will be charged and payment of a premium and royalty will be required. Royalty is to be charged on a sliding scale based upon the f.o.b. price of line fibre at the scheduled rates: royalties will be payable until, in the case of each estate, "the whole balance" due by way of royalty has been extinguished, or until royalty has been paid on the tonnage liable to royalty, whichever occurs the earlier. In the details of the two estates given below there are columns for "total net capital value", "premium" and "balance due on royalty". The sum of the "premium" and "royalty" make up the "total net capital value" of the "estates" which will be disposed of. "Royalty" here is expressed to be part of the "total net capital value" of the things sold, that is "estates" on "long agricultural leases". The thing sold was not expressed to be a right of user, or a right to exploit the sisal potential, but estates on long agricultural leases or, more precisely, on a ninety-nine years' right of occupancy. The letter of December 20 makes this, if anything, still clearer. This document is headed

> "Offer of a right of occupancy. The Land Ordinance (Cap. 115 of the Laws)".

The letter, which is signed by the land officer, is addressed to Ralli Estates Limited (which company would be entitled to commence operations on the following day) and says that the land officer is directed by His Excellency the Governor to offer Ralli Estates Limited a right of occupancy over the specified land subject to the terms and conditions contained in, and annexed to, the letter. In this letter £491,600 (translating shillings into pounds) is described as "the full purchase monies" of which £449,646 is to be deemed to be in respect of the said land, buildings, immovable machinery, fixtures and effects and

£41,954 is in respect of movables transferable by delivery. Of the full purchase price of £491,600, £317,000 is to be payable as premium and

> "the balance of such purchase monies, amounting to £174,600 is to be paid by monthly instalments and a notice informing the company of the amount of each instalment is to be sent on or before the 15th day of each month".

It will be observed that the expression "royalty" has been dropped and what was previously called "balance due on royalty" is now called "balance of such purchase monies". This may have been, and probably was, done with an eye to the taxation position. Mr. Borneman first suggested that the Government through the land officer was not entitled to alter the nomenclature, because there was, before December 20, a concluded contract on the basis of the letter of September 30. Mr. Borneman pointed to para. 3 of the letter dated October 26 from the Member for Lands and Mines to Ralli Brothers Limited and said

> "This is the offer which we accepted and paid ten per cent. This is a concluded contract. We paid £58,000 odd on November 16, 1950".

I cannot agree that there was a concluded contract on November 16, 1950, by payment of the £58,000 on the basis of the letter dated October 26. The relevant part of that letter reads:

> "In accordance with the conditions of sale as set out in para. 3 of my letter under reference, I shall be grateful to receive your remittance representing ten per cent. of the premium, after which a formal offer of a right of occupancy will be addressed to you as soon as possible . . ."

It is clear that the payment of ten per cent. was only a necessary preliminary to entitle Ralli Estates Limited to receive a formal offer, which they would have been still perfectly at liberty to decline. The formal offer was the letter of December 20 and, in my opinion, there was no concluded contract before December 31, 1950, when Ralli Estates Limited sealed its acceptance of that letter. As found by the learned judge, the acceptance does not seem to have been returned until January 31, 1951. The Government was entitled to set out in the formal offer of a right of occupancy precisely the terms upon which that offer was made, and Ralli Estates Limited were entitled to object to anything to which they took exception at any time before the offer was accepted. They did in fact object to some of the terms and conditions; but they took no exception to the description of what had previously been termed "balance due on royalty" as "balance of such purchase monies", though in correspondence they continued to refer to it as "royalty". But the point is not very material because, upon the authorities referred to above, the court may disregard the nomenclature and is not bound to accept whatever label is put upon the payments by the parties, but should try to ascertain what, according to the substance of the transaction between the parties, these payments were. In my opinion, these payments according to the substance and the form of the transaction were part of the purchase price of a right of occupancy of two sisal estates including land (with the mature and immature sisal thereon), buildings, machinery, effects, chattels and vehicles. The letter of December 20 only stated with more precision what was already the substance of the negotiations between the parties.

A right of occupancy is defined in s. 2 of the Land Tenure Ordinance of Tanganyika as "a title to the use and occupation of land . . .". It may be granted by the Governor for any definite term not exceeding ninety-nine years (s. 7). Section 18 of the same Ordinance provides that, subject to certain provisions irrelevant in the present case,

> "the occupier shall have exclusive rights to the land, the subject of the right of occupancy against all persons other than the Governor".

It appears that a certificate of occupancy is, at least for the purposes of the present case, equivalent to a lease and amounts to much more than a mere revocable licence to occupy would amount to in England. The Governor can only revoke a right of occupancy "for good cause", e.g. for one or more of the reasons set out in s. 10. A right of occupancy is something which devolves upon the death of the grantee. In the case of a right of occupancy granted to a non-native, it devolves as a leasehold forming part of his estate (s. 12). Under the Land Register Ordinance (Cap. 116) "lease" includes a certificate of occupancy (s. 2). Under s. 5 (1) (*b*), any person entitled to a lease for an unexpired term of not less than five years may apply to be registered as owner of the lease; and, under s. 44 (1) (*b*), registration of any person as the owner of an agricultural lease

> "shall vest in that person the possession of the land comprised in the lease for the unexpired residue of the term created by the lease, with all implied or expressed rights, privileges and appurtenances attached to the estate of the lessee, and free from all estates whatsoever including those of His Majesty".

It is plain, I think, that the grant, in Tanganyika, of a right of occupancy confers an estate or interest in land. What Ralli Estates Limited were buying was far more than a mere right of user–a "right to exploit the sisal potential"; and the payments in question in this case were part of the purchase price of a ninety-nine years' interest in land and of growing sisal, buildings and permanent improvements, as well as vehicles, chattels and effects–in short of sisal estates as going concerns. Accordingly, the payments in question were part of the expenditure incurred in bringing into existence an asset for the enduring benefit of the company's trade within Lord Cave's test in the *British Insulated and Helsby Cables* case (9).

Or, applying Lord Clyde's test in *Adam's* case (5), the two payments amounting to £174,600 were part of the

> "expenditure necessary for the acquisition of property or of rights of a permanent character the possession of which is a condition of carrying on the trade at all".

They were not merely

> "part of the trader's working expenses, expenditure laid out as part of the process of profit earning".

According to Lord Clyde's test, this would make them "capital outlays".

Or, applying the test outlined by Rowlatt, J., in *Jones'* case (11), supra: Was this a sale for an annuity, or partly for an annuity? Did the Tanganyika Government, as regards these payments, "cause the principal sum to disappear and an annuity to take its place" or was this

> "not really a transmutation of a principal sum into an annuity, but really a principal sum the payment of which was being spread over a time and was being paid with interest"?

Interest was payable on overdue instalments, though not on the outstanding balance of the £174,600. We do not know how the valuation of the estate was arrived at, except that the total fibre tonnage of 19,397 tons was said by Mr. Carson, a witness called by the appellant whose evidence there is no reason to distrust, to be based on mature and immature sisal on the estates at that time. The £174,600 may or may not have contained an element representing interest. As interest was to be payable on overdue instalments, that seems unlikely. But I do not think that that is material. For instance, no interest was payable in *Ramsay's* case (4), supra, yet the payments were held to be capital payments. The point is: Did the Government of Tanganyika "cause the principal sum to disappear and an annuity to take its place" or was this

£174,600 part of the principal sum, payable for the estates, which was being spread over a time? In my opinion, it was the latter. The obligation was to pay the balance of the purchase price amounting to £174,600 by monthly instalments depending on production and the export price of line fibre; provided that, in certain circumstances (which did not occur), an obligation to pay by instalments a balance of the purchase price calculated according to the export price from time to time of a fixed tonnage of line fibre might have been substituted. In my opinion, the Tanganyika Government did not, as regards these payments, "cause the principal sum to disappear and an annuity to take its place". The only annuity they took was the rent which they could only, under the Ordinance, charge on unimproved value. For the rest, they fixed a principal sum, part of which was permitted to be paid by instalments. There was a capital obligation–an obligation to pay by monthly instalments £174,600 balance of the purchase price or the aggregate of instalments based on a fixed tonnage of 19,397 tons of line fibre. In my opinion, these were capital obligations. It does not matter that the calculation of the instalments was "geared to production" as Mr. Borneman phrased it and that the amount of the instalments might fluctuate or the sum of £174,600 be reduced. In *Ramsay's* case (4) the annual payments were geared to profits, but they were nevertheless held to be instalments of capital.

Mr. Borneman has pressed upon us a dictum of Rowlatt, J., in *Jones'* case (11), (7 T.C. at p. 315):

> "The property was sold for a certain sum, and in addition, the vendor took an annual sum which was dependent, in effect, on the volume of business done; that is to say he took something which rose or fell with the chances of the business. I think when a man does that, he takes an income–that is what it is. It is in the nature of income, and on that ground I decide this case."

The correctness of that statement as laying down a general rule has not, however, been accepted in the Court of Appeal. In *Ramsay's* case (4), supra, Lord Wright, M.R., said (20 T.C. at p. 93):

> ". . . it cannot, I think, be said as a general rule that if the amount of the instalments is one which is to fluctuate during the period in which they are payable according to certain circumstances, that is necessarily inconsistent with these instalments being instalments of capital, and that it necessarily involves that they must be treated as annual payments or annuities. The case of *Jones v. Commissioners of Inland Revenue*, 7 T.C. 310, which was referred to, does contain a proposition to that effect by Rowlatt, J., in his judgment, but he was clearly there dealing with the facts of the case."

His lordship quoted the passage from the judgment of Rowlatt, J., cited above and continued:

> "In my judgment, the learned judge there was laying down that proposition with reference to the circumstances before him and did not intend, and I think could not rightly have intended, to state that as a universal proposition applicable to all cases of this character."

Commissioners of Inland Revenue v. Ledgard (16), 21 T.C. 129; and *Commissioners of Inland Revenue v. Hogarth* (17), 23 T.C. 491, both make it clear that the fact that payments may depend upon, and vary with, the profits of a business is not decisive as to whether they are capital or income payments.

Commissioners of Inland Revenue v. Ledgard (16) was a case in which an agreement between partners provided that the purchase money for the share of a deceased partner should be a sum equal to one-half of the share of profits, of the three years following his death, which would have been payable to such

deceased partner had he continued to be a partner during those three years. It was held that the sum payable in respect of the deceased partner's share in the business was a single capital sum to be paid at the end of three years. In that respect *Ledgard's* case (16) differs substantially from the present case, though it resembles the present case in that there was a vendor and purchaser agreement for an asset and that the payment was not expressed to be subject to deduction of income tax. In *Commissioners of Inland Revenue v. Hogarth* (17) an agreement was made between a retiring partner and the remaining partners (of whom the respondent was one) under which the former agreed to retire and, in settlement of his share in the capital, assets and profits of the business, was to be paid *inter alia*

> "a sum equal to one-fourteenth part of the net profits of the business for the three years ending December 31, 1937, 1938 and 1939 under deduction of income tax".

It was held that this agreement dealt with the profits of the three years distributively and that the first payment made under the agreement was an admissible deduction for purposes of surtax, as claimed by the respondent. But the decision turned not only upon the fact that the payments were to be made annually; but also upon the fact that the agreement was not a vendor and purchaser agreement for an asset and that there was provision (as there was not in *Ledgard's* case (16) for the payments to be subject to income tax. *Ledgard's* case (16) and *Hogarth's* case (17) each turned upon its special facts; but they are useful for the general principles enunciated in them and as illustrating that it is not an essential characteristic of a capital payment that it shall be quantified in advance. In *Ledgard's* case (16) Lawrence, J., quoted with approval a dictum of Scott, L.J., in *Dott v. Brown* (18), [1936] 1 All E.R. 543 at p. 550:

> "Take a very simple case–a sale for a lump sum, which is to be paid ultimately by reference to certain subsequent considerations affecting the amount–a sort of arrangement that the ultimate sum payable may be higher or lower as the value of the property sold may turn out to be more or less–a perfectly natural and not uncommon transaction in the sale of certain types of property, particularly where goodwill is included in the sale. No fixed sum is there defined because the true essence of the transaction is that the consideration shall vary according to future calculations depending on certain facts. To say that, because in that transaction the sum might so vary it was not a capital payment, would be an erroneous conclusion."

In *Hogarth's* case (17) commenting on *Ledgard's* case (16) Lord Normand, L.P., said (23 T.C. at p. 501):

> "Accordingly, there again it was typically a vendor and purchaser agreement for an asset and although the sum was to be measured by the fluctuating profits of three years it was nevertheless the price for that asset. I think that is an important difference when the circumstances of the present case are compared."

A case on which Mr. Borneman strongly relied was *Commissioners of Inland Revenue v. Rustproof Metal Window Co., Ltd*. (7). In that case a company granted to a licensee a licence to use a patent in the manufacture of boxes. The consideration for the licence was the payment of £3,000 and a royalty of 3d. per box. The question was whether the £3,000 was an income or a capital receipt. It was held by the Court of Appeal that it was an income receipt. Mr. Borneman particularly relied upon a passage in the judgment of Lord Greene, M.R. (29 T.C. at p. 268) where, citing from *Nethersole v. Withers* (19), 28 T.C. 501, he said:

> "If the lump sum is arrived at by reference to some anticipated quantum of user it will, we think, normally be income in the hands of the recipient."

The passage continues:

> "If it is not, and if there is nothing else in the case which points to an income character, it must in our opinion, be regarded as capital. The distinction is in some respects analogous to the familiar and perhaps equally fine distinction between payments of a purchase price by instalments and payment of a purchase price by way of an annuity for a period of years."

Both in the *Rustproof Metal Window* case (7) and in the *British Salmson* case (12) therein referred to the sums in question were merely sums payable (either per article manufactured or annually) for a licence to use an invention. In the present case, as has already been said, what was sold was not a mere licence to use, but an enduring asset, sisal estates on a ninety-nine years' right of occupancy, interests in land and permanent improvements. I think that this is very different from a mere licence to use. In *Ogden v. Medway Cinemas Ltd*. (3) a deed granting the goodwill of a cinema business in consideration of an annual payment contained an option to purchase the head-lease of the premises and goodwill for a lump sum. It was held that the substance of the transaction was

> "a revenue payment for the use, during a certain period of certain valuable things and rights".

It is to be noted that this was not an outright sale and purchase of the head-lease and goodwill. The document was construed as being in substance a grant of a right of user. *Nethersole v. Withers* (19) and *Trustees of Earl Haig v. Commissioners of Inland Revenue* (20), 22 T.C. 725, illustrate the distinction between the sale of a mere right of user, for example, a right to exploit a play as a cinematograph film, or a right to publish war diaries, and the sale of similar rights which also include a right to diminish the value of the copyright, e.g. by altering the play or, in the case of the diaries, by the mere publication. A transaction of the latter kind may involve the partial diminution of the value of the asset and is, therefore, a transaction of a capital nature. The transaction in the present case involves a right to diminish the value of part of the asset sold, certainly as regards buildings, machinery and vehicles and, upon this ground also, would appear to be of a capital nature. But I do not rely greatly on these rather special cases, because a capital asset may be sold for an annuity.

Mr. Borneman said, and it is better perhaps to put the argument in his own words:

> "Before you are on the capital road you must be able to say that, standing at the point of time of the contract, there is a lump sum to pay which, at that date, can be calculated with precision. If there is not such a lump sum at the beginning, then the amounts paid in liquidation of the sum are income and not capital."

I agree that there must be a lump sum to pay; but I do not agree that it must be able to be calculated with precision at the time the contract was entered into. I think that, upon the appellant sealing and communicating its acceptance of the letter of December 20, there was a lump sum to pay in the present case, that is £491,600 of which £174,600 was payable by instalments and liable to fluctuation. This was a pre-determined primary price, and the transaction was a capital transaction. The fact that in certain circumstances there might, if the price of sisal declined, have been substituted for £174,600 a lesser amount being the aggregate of instalments based upon a fixed tonnage of line fibre did not, in my opinion, alter the nature of the transaction into an income transaction

any more than did the facts that in *Ramsay's* case (4) the primary sum of £15,000 was liable to increase or diminish if the profits of the practice increased or declined and that in *Ledgard's* case (16) the lump sum payable depended on the profits of the business and could not be ascertained or quantified in advance.

Ramsay's case (4) was a case in which the respondent agreed to purchase a dental practice for a primary price of £15,000 subject to increase or diminution as therein provided. The primary price was to be satisfied by a payment of £5,000 down and by ten annual payments of a sum equal to twenty-five per cent. of the profits of the practice for each year. If the amounts so paid during the ten years were, in the aggregate, more or less than the balance of the primary purchase price, that price was to be treated as correspondingly increased or diminished. It was held that the annual sums paid under the agreement were instalments of capital. In *Ramsay's* case (4) it would not have been possible, if the transaction was carried out by instalments as planned, to state with precision, standing at the point of time when the contract was entered into, what sum would be payable. It appears that that is not an essential criterion of a capital transaction. It was sought by Mr. Borneman to distinguish *Ramsay's* case (4) on the ground that in that case the purchaser became at once liable to pay the £15,000, whereas in the present case the appellant did not become liable at the date the contract was entered into to pay £174,600. But in my opinion the appellant did, when it sealed and communicated its acceptance of the offer of December 20 become liable to pay a purchase price of £491,600, subject only to this that there might in certain circumstances be substituted for £174,600 of that amount, a sum representing an aggregate of instalments calculated as stipulated on the proceeds of 19,397 tons of line fibre. I think that the £491,600 and the £174,600 are not otiose amounts and that they permeate the contract and the contract depends upon them. The fact that the £174,600 might have varied does not matter. The £174,600 was payable and was paid by instalments upon a vendor and purchaser agreement as the balance of the purchase price of a right of occupancy of the Lanconi and Mjesani estates. It was payable and paid for the creation of a capital asset in the hands of the company from which, no doubt, income would be derived.

Another case upon which Mr. Borneman strongly relied was *Mackintosh v. Commissioners of Inland Revenue* (21), 14 T.C. 18. The question was whether quarterly sums payable by surviving partners of the executors of a deceased partner for the right to continue to use the firm's name, marks and goodwill were to be treated as capital or income payments in the hands of the deceased partner's widow. It was held that they were to be treated as income. Rowlatt, J., pointed out that the transaction was not a sale at all but merely a surrender to the continuing partners of the right to use the firm's name, marks and goodwill for five years in consideration of periodical payments, and that this was not paying for something by instalments but merely an arrangement for securing an income for a period of five years. I think that the facts of *Mackintosh's* case (21) are too different from the facts of the present case to afford any assistance. As I have already said, in my opinion, the transaction in the present case was a sale of property (subject to a reversion) for a fixed sum, part of which was payable by instalments which might fluctuate but were not periodical payments for a mere right of user.

It remains to deal with the alternative argument, presented by Mr. Bechgaard, based on ground of appeal 2 (*e*) which reads:

> "In the alternative . . . the learned judge erred in failing to hold that the said payments represented cost to the appellants of stock-in-trade of their business."

As I understood Mr. Bechgaard's argument, it was that the sum of £174,600 was paid in respect of growing sisal and that this was stock-in-trade of the

appellant's business of running a sisal estate or estates and that a payment made for stock-in-trade was an

> "outgoing or expense wholly or exclusively incurred during the year of income in the production of the income"

and was, therefore, deductible. I think that the answer to this submission is that the sums amounting to £174,600 were not paid in respect of growing sisal; but were part of the purchase price of a right of occupancy of the land, buildings and permanent improvements as well as of the growing sisal: they were part of the purchase price of the estates which were a capital asset from which income would be derived. I would respectfully adopt the words of Croom-Johnson, J., in *Commissioners of Inland Revenue v. Pilcher* (22), 31 T C. 314 (cited by Mr. Bechgaard) at p. 325:

> ". . . I cannot see that there is anything in this case which leads me or should lead me to believe that this transaction, which was a purchase of land which happened to have a growing crop upon it, the benefit of which the purchaser was entitled to get, was other than what it is on the face of it expressly, a purchase of a capital asset, with the result that the profits flowing from the capital asset in future will belong to the purchaser, but how that entitles the purchaser to say: 'And now, please, we should like to debit a proportionate part of the capital sum which we paid for this asset as against those profits', is something I regret to say I am unable to follow."

See also *Stow Bardolph Gravel Co., Ltd. v. Poole* (23), 35 T.C. 459. I think that the case of *Mohanlal Hargovind v. Commissioner of Income Tax Central Province and Berar, Nagpur* (24), [1949] 2 All E.R. 652, is distinguishable. In that case the contracts granted no interest in the land or in the trees or plants themselves. I think that ground of appeal 2 (*e*) fails.

So, in my opinion, does ground of appeal 2 (*d*). In my view, the payments in question were not properly deductible in ascertaining total income in accordance with ordinary commercial principles, as alleged in that ground of appeal.

In my opinion, the learned judge in the court below came to a correct conclusion. I think that all the guides and signposts point to these payments amounting to £174,600 being capital, and not income, payments; and that to hold that they were

> "outgoings and expenses wholly and exclusively incurred during the year of income . . . in the production of the income"

would be to lose touch with the realities of the transaction.

I would dismiss the appeal with costs, and would grant a certificate for two counsel.

Briggs V-P: I have had the advantage of reading the judgment of the learned President. I agree with his reasoning and with his conclusions, but I desire to add some remarks on certain aspects of the case.

I have no doubt whatever that the whole of the contract is to be found in land officer's letter to the appellants dated December 20, 1950, and the appellants' acceptance under seal dated December 31, 1950. The previous negotiations cannot, I think, be allowed in any way to modify the construction of the contract, and I see no obscurities in it which they might serve to clarify. If and insofar as the final offer of Government departed in substance or in form from the general tenor of the previous negotiations, I think it quite possible that the changes were deliberately made with a view to ensuring that the sum of £174,600 should not be deductible for purposes of income tax. If this was so, Government was entirely within its rights in making the change.

I think that it is of interest to note how that sum was arrived at. It cannot, I think, be mere accident that the £70,300 for Lanconi is nine times 7,809, to the nearest hundred pounds, and the £104,300 for Mjesani is nine times 11,588, to the nearest hundred pounds, the figures 7,809 and 11,588 being the respective tonnages on which royalty (so-called) was to be payable. In the High Court the Crown wished to call evidence showing how the figure of £174,600 was arrived at, but it was excluded as irrelevant. I think, however, that one may infer that it represented £9 per ton of assessed probable production over a period, which was stated from the bar to have been seven to eight years. The schedule of rates shows that less than £9 would have been paid if the price of sisal did not rise above £85 per ton. It seems fair to suppose that in Government's view the full purchase price would have been burdensome to a purchaser at that level of prices and that some relief should be given. The relief might be anything up to £174,600 minus £19,397, or £155,203–over thirty per cent. of the total price. This large variation might suggest that Government was directly interesting itself in the future of the business; but I do not think that is correct. Government's real concern was presumably to fix a price which would not be so high as to deter suitable buyers, nor so low as to cause loss by sale at an undervalue. The business of sisal-growing is intensely speculative, and it may well be that a variable price was the best way to achieve this object. If the intention of Government had been to reserve an interest in the business as such, there was no reason to fix a ceiling for the so-called royalty: it would have been more natural to limit it only by duration, as in *Jones'* case (11), 7 T.C. 310. There is no ground whatever for suggesting that the contract did not represent the true, or the whole, transaction between the parties, and I think the sum of £174,600 was nothing more or less than a part of the purchase price, as the contract states.

I am not impressed by the argument that the rights obtained under a right of occupancy in Tanganyika are only rights of user, and are essentially different from a freehold or long leasehold title in England. The circumstances of Tanganyika as regards dealings in public land are peculiar, if not unique, and the interest in the land which the appellants acquired was the largest interest which, in all the circumstances and having regard to current practice in Tanganyika, they could acquire, or Government could offer them. The essential difference between a title of this kind and the short leases previously granted appears clearly from the description of the covenants in those short leases, which my lord has quoted, and the conditions governing the appellants' present title. For example, the latter contains no provision for maintenance of buildings. User is to be agricultural, but is not otherwise controlled, save for the special and limited purposes of drainage, etc., and soil-preservation. The obligations in this respect appear to be little, if at all, greater than would attach by law to a freehold. Substantially this was a sale of a "permanent" title to land so equipped, and in conjunction with such movables, as to constitute the whole a valuable profit-making business. It was in the most obvious sense a sale of a capital asset.

It is to be observed that, although in their own accounts for the period of eight months ending August 31, 1951, the appellants charged the "royalty" so far paid against current production, in their balance sheet for the same period they showed a sum of £80,274, the outstanding balance of the sum of £174,600, as a contingent liability. If it was a mere revenue charge, to be incurred only upon and in respect of future production, this would appear to be somewhat unusual accounting. True, they did not take credit for the £174,600 in the 1952 balance sheet as a capital payment, but they wrote up their fixed assets on directors' valuation by about £50,000 and added a note referring to the £174,600, presumably as evidence that the writing-up was justified. That it was justified cannot be doubted.

If, as I think, the payments making up the sum of £174,600 were instalments of a variable purchase price, the only outstanding question is whether Government had agreed to "take an income", as Rowlatt, J., expressed it in *Jones'* case (11), instead of capital payments. That would not, admittedly, be conclusive that, qua the appellants, the payments were revenue payments; but I accept Mr. Borneman's submission that it would be a strong indication to that effect. Apart from *Jones'* case (11), which I would distinguish on the grounds given by the learned President, I think the cases most strongly relied on by the appellants can be distinguished quite shortly. In *Ogden v. Medway Cinemas Ltd*. (3), 18 T.C. 691, the sub-lease was for a relatively short period, only thirteen years, and the payments in question were really a "rent" for use of the goodwill over that period. This was emphasised by the option given to acquire the property in the goodwill and the head-lease for a lump sum. In *Racecourse Betting Control Board v. Wild* (6), 22 T.C. 182, the right acquired by the Control Board was a licence to occupy certain buildings erected for the purpose on race days only, which were said to amount only to about seventeen days a year, and over a period of no more than twenty-one years. No tenancy was created. The Board paid an annual sum which was sufficient to cover the capital cost of the buildings, but that was held to be immaterial. The payments were clearly of a revenue nature and for the use of the buildings over a limited period. *Hogarth's* case (17), 23 T.C. 491, can best be considered by comparing it with *Ledgard's* case (16), 21 T.C. 129. The fine, but, if I may say so with deference, legitimate distinction drawn in those cases need not be described in detail, but I think that Lord Normand's comment, at 23 T.C. 501, that

> "it was typically a vendor and purchaser agreement for an asset and although the sum to be paid was to be measured by the fluctuating profits of three years it was nevertheless the price for that asset",

shows that the present case is analogous to *Ledgard's* case (16) and not to *Hogarth's* case (17). *In Commissioners of Inland Revenue v. British Salmson Aero Engines Ltd*. (12), 22 T.C. 29, the asset acquired was an exclusive licence to manufacture for a period of ten years under patents owned by the French company. Finlay, J., said,

> "I cannot regard the fact that this is an exclusive right as turning a licence into a sale of property".

I have no doubt that in the present case there was a sale of property and not merely the temporary grant of a right of user. *Mallaby-Deeley's* case (13), 23 T.C. 153, turned on the fact that the true nature of the transaction was to be ascertained not from one document, but from two. It does not appear to me to assist the appellants. In *Commissioners of Inland Revenue v. Rustproof Metal Window Co*. (7), 29 T.C. 243, the payment in question was again for the right to manufacture under patents and was held to be of a revenue character, although it was a lump sum and stated by the parties to be a capital sum; but much stress was laid on the fact that the right was only to manufacture a limited number of articles. This was said to be inconsistent with a capital transaction.

The general argument for the appellants was that the sum of £174,600 must, having regard to the whole of the negotiations, be treated as a sum paid for the right to exploit the "sisal potential" of the estates and that, since it was dependent on quantum and value of production, it had all the characteristics of a true revenue royalty. I think the basic fallacy of this is that, if one buys agricultural land (and in that expression I include the acquisition of a right of occupancy for ninety-nine years), one does not separately acquire the land and the right to make a profit by using it. If I may quote Finlay, J., once more (from the *British Salmson* case (12), 22 T.C. at p. 35), "it seems to me to be not the reality of the thing". The reality of this transaction was the sale of an agricultural business for a single purchase price, which might fluctuate within

fixed limits, in accordance with the turnover of the business, and part of which was payable over an uncertain period by instalments. Nothing in that, in my opinion, detracts from the essentially capital nature of the transaction. I agree that the appeal should be dismissed with costs, and that there should be a certificate for two counsel.

Forbes JA: I agree and have nothing to add.

Appeal dismissed.

For the appellants:
RE Borneman QC (of the English Bar) and *K Bechgaard*
K Bechgaard, Nairobi

For the respondent:
JC Hooton (Deputy Legal Secretary, East Africa High Commission) and *HB Livingstone* (Assistant Legal Secretary, East Africa High Commission)
The Legal Secretary, East Africa High Commission

Nyasani s/o Bichana v R
[1958] 1 EA 190 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	21 May 1958
Case Number:	60/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Templeton, J

[1] Criminal law – Evidence – Child – Ability to understand nature of oath – Duty of judge to record that child has sufficient intelligence and understands duty to tell truth – Oaths and Statutory Declarations Ordinance (*Cap.* 20), *s.* 19 *as amended by Ordinance No.* 42 *of* 1954 (*K.*).

[2] Criminal law – Evidence – Child – Need for judge to refer to evidence relied on as corroboration of unsworn evidence of child – Oaths and Statutory Declarations Ordinance (*Cap.* 20), *s.* 19 *as amended by Ordinance No.* 42 *of* 1954 (*K.*).

Editor's Summary

At the trial of the appellant a child aged about six gave unsworn evidence. The trial judge's note merely stated that she promised to tell the truth, and in his judgment convicting the appellant the trial judge did

not refer to the evidence relied on as corroboration of the child's unsworn statement. On appeal against conviction and sentence the court, whilst affirming the conviction and enhancing the sentence on the ground that the evidence against the appellant was overwhelming, referred to the statutory conditions upon which unsworn evidence by a child may be received and relied on.

Held –

(i) a trial judge must before the reception of the unsworn evidence of a child record in his notes that the child "is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth";

(ii) the trial judge must also direct himself explicitly as to the evidence relied on as corroboration of such unsworn evidence;

(iii) omission to comply with both these requirements of s. 19 of the Oaths and Statutory Declarations Ordinance (as amended) may result in the quashing of a conviction when the other evidence is insufficient by itself to sustain the conviction.

Appeal dismissed. Sentence increased from eighteen months' to three years' imprisonment.

No cases referred to in judgment

Judgment

Briggs V-P: read the following judgment of the court: The appellant was convicted by the Supreme Court of Kenya of the offence of attempting to have unlawful carnal knowledge of a girl under sixteen years of age, contrary to s. 138 (2) of the Penal Code, and was sentenced to serve a term of imprisonment of eighteen months. He appealed to this court against conviction and sentence, leave to appeal against sentence being granted. We affirmed the conviction, but, in view of the fact that the appellant was about thirty years of age and the complainant was a child of about six years, we were of the opinion that the sentence was manifestly inadequate. We accordingly set aside the sentence of eighteen months' imprisonment and substituted a sentence of three years' imprisonment.

The conviction was based on overwhelming evidence and we have no doubt it was correct. There are, however, two matters upon which we desire to comment.

In the first place the complainant was, as stated above, a child of about six years of age, and her evidence was not given upon oath. The learned trial judge's note upon the subject when she was called to give evidence was merely as follows:

> "P.W.1.–Nyaboke d/o Mose (Aged about 6 years promises to tell the truth)."

This note does not indicate that there was a compliance with s. 19 of the Oaths and Statutory Declarations Ordinance (Cap. 20) as amended by the Oaths and Statutory Declarations (Amendment) Ordinance, 1954 (Ord. No. 42 of 1954), but would appear to indicate the contrary. Sub-section (1) of that section reads as follows:

> "19(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court, or such person as aforesaid, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person as aforesaid, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with the provisions of s. 229 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section:
>
> "Provided that where evidence admitted by virtue of this section is given on behalf of the prosecution in any proceedings against any person for any offence the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him."

It is clearly the duty of the court under that section to ascertain, first, whether a child tendered as a witness understands the nature of an oath, and, if the finding on this question is in the negative, to satisfy itself that the child

> "is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth."

This is a condition precedent to the proper reception of unsworn evidence from a child, and it should

appear upon the face of the record that there has been a due compliance with the section. In the instant case we did not consider

it necessary to call for a report from the learned judge as to whether or not there had, in fact, been a compliance with the requirements of s. 19, since we were of opinion that there was ample evidence of the commission of the offence apart from the evidence given by the complainant herself. We do, however, emphasize the necessity for strict compliance with the provisions of the section. Non-compliance might well result in the quashing of a conviction in a case where the other evidence before the court was insufficient in itself to sustain the conviction.

The second matter upon which we desire to comment is the fact that in his judgment the learned trial judge has failed to warn himself of the need, under the proviso to the section quoted above, for corroboration of the unsworn evidence of a child of tender years, or to look for the necessary corroboration. Such an omission is a serious defect in a judgment, and may well result in the quashing of a conviction. In the circumstances of the instant case, however, we did not think that the defect warranted our intervention as there was, in fact, ample corroborative evidence sufficient, in itself, to establish the guilt of the appellant.

Appeal dismissed. Sentence increased from eighteen months' to three years' imprisonment.

The appellant did not appear and was not represented.

For the respondent:
DD Charters (Crown Counsel, Kenya)
The Attorney-General, Kenya

Francis Juma s/o Musungu v R
[1958] 1 EA 192 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	19 May 1958
Case Number:	17/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Meyers, J

[1] Criminal law – Trial with assessors – Failure of trial judge to take opinion of each assessor separately – Whether irregularity curable – Criminal Procedure Code s. 318 *and s.* 381 (*K.*)

Editor's Summary

After the trial judge had summed up, the assessors retired and conferred together. On returning to court, the first assessor stated "We all agree that accused is guilty" but the other assessors were not asked to

confirm this statement and did not speak individually.

Held – s. 318 of the Criminal Procedure Code requires each assessor to state his own opinion orally and individually but the irregularity was curable by s. 381 of the Code.

Appeal dismissed.

Case referred to in judgment:

(1) *R. v. Mungu Atosha Bin Sija and Another* (1938), 5 E.A.C.A. 143.

(2) *Baland Singh v. R.* (1954), 21 E.A.C.A. 209.

Judgment

Briggs V-P: read the following judgment to the court: This was an appeal from a conviction by the Supreme Court of Kenya sitting at Mombasa. We dismissed the appeal, but desire to comment on one point.

After the summing-up the assessors retired and conferred for twenty-five minutes. The learned judge then noted,

> "Assessors having returned to court re-enter box and answer their names–all present. *Assessor No*. 1. We all agree that accused is guilty."

The other assessors were not asked to confirm this, and apparently did not speak.

We think this constituted an irregularity. The wording of s. 318 of the Criminal Procedure Code, in providing that the judge

> "shall then require each of the assessors to state his opinion orally, and shall record such opinion",

clearly contemplates and, we think, requires that each assessor shall separately state his own opinion. This view is confirmed by the judgment of this court in *R. v. Mungu Atosha bin Sija and Another* (1) (1938), 5 E.A.C.A. 143, where two members of the court stressed that the judge must obtain the "individual opinion of each assessor". The importance of this provision depends on the difference between the verdict of a jury and the opinion of an assessor, the value of which is in many cases to be judged by the reasons he gives for it. See *Baland Singh v. R.* (2) (1954), 21 E.A.C.A. 209, 211.

If the first assessor uses words such as were used in this case, the proper course will be to ask the other two successively whether what has been said is correct, and whether they wish to add anything to it, and to record separately their answers.

We were, however, of opinion that this irregularity was curable under the provisions of s. 381 of the Code.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:
DD Charters (Crown Counsel, Kenya)
The Attorney-General, Kenya

Kasturilal Laroya v Mityana Staple Cotton Co Ltd and another
[1958] 1 EA 194 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	22 May 1958
Case Number:	57/1957 (Jinja Registry)

Before: Sir Audley McKisack CJ

Sourced by: LawAfrica

[1] Contempt of court – Disobedience to prohibitory order of court – Application for committal – No obstruction of course of justice or prejudice to decree-holder's rights – Whether committal proper remedy – Civil Procedure Ordinance, s. 48 (*U.*) *– Civil Procedure Rules, O.* 19*, r.* 51 *and r.* 82 (*U.*).

Editor's Summary

The applicant, as decree-holder, moved for the committal of two directors of the defendant company and one M. K. Hathi for wilfully disobeying a prohibitory order of the court. The High Court had issued under O. 19, r. 51 an order of attachment in execution against the defendant company, the material part of which read as follows:

> "It is hereby ordered that the interest of the judgment-debtor in the lands comprised in the schedule on the reverse hereof is hereby attached and the judgment-debtor is prohibited from transferring or charging such property in any way and all persons from taking any benefit from such transfer or charge and it is also hereby further ordered that the said judgment-debtor deliver to this court immediately the duplicate Certificate of Title to the above-mentioned lands."

It was alleged that the defendant company disobeyed this order by leasing the premises to Hathi after the date of the attachment. The contempt alleged against Hathi was disobedience to that part of the order prohibiting "all persons from taking any benefit from such transfer or charge". The applicant also contended that since the premises were in the custody of the court once they had been attached, the respondents were guilty of a contempt by reason of their interference with the court's possession of the premises. The respondents admitted the lease but said it was executed before the date of the attachment. It was agreed by counsel on both sides that before any further evidence on this disputed point was adduced, the court should decide whether, assuming that the facts were as alleged by the applicant decree-holder, it could properly deal with the respondents as for a contempt and the court accordingly heard arguments on this question.

Held –

(i) in proceedings of this nature it is necessary to consider whether there has in fact, been such prejudice to the interests of the decree-holder, or such obstruction to the course of justice, as to make committal for contempt the proper remedy;

(ii) if the lease to Hathi was subsequent to the attachment, it was void by virtue of s. 48 of the Civil Procedure Ordinance and therefore it could not be said to prejudice the decree-holder's rights;

(iii) the conduct of the respondents (on the assumed facts) did not amount to obstruction of the course of justice nor to prejudice of the decree-holder's interests, and the mere fact that there had been disobedience to an order of the court did not, in those circumstances, render the respondents liable to be dealt with as for contempt.

Principle stated in *Re Maria Annie Davies* (1888), 21 Q.B.D. 236 at 239 applied.

Motion dismissed.

Case referred to:

(1) *Re Davies* (*Maria Annie*) (1888), 21 Q.B.D. 236.

Judgment

Sir Audley McKisack CJ: The decree holder in this case alleges that a director of the company which was the first defendant, and another director who was the second defendant, and one M. K. Hathi, have been guilty of contempt of court, and he moves for their committal to prison for the contempt. The second defendant has, however, left the country and was not served with the notice of motion.

The contempt alleged against the director of the defendant company is that of wilful disobedience to a prohibitory order issued under O. 19, r. 51. This is an order of attachment in execution, the material part of which is as follows:

> "It is hereby ordered that the interest of the judgment-debtor in the lands comprised in the schedule on the reverse hereof is hereby attached and the judgment-debtor is prohibited from transferring or charging such property in any way and all persons from taking any benefit from such transfer or charge and it is also hereby further ordered that the said judgment-debtor deliver to this court immediately the duplicate Certificate of Title to the above-mentioned lands."

The contempt alleged against M. K. Hathi is disobedience to that part of the order prohibiting "all persons from taking any benefit from such transfer or charge".

The decree holder says that the defendant company, after the date of the attachment, leased the attached premises to M. K. Hathi, and the latter entered into possession of the premises in pursuance of that lease. The respondents to this motion admit the lease but say it was executed before the date of the attachment. Counsel have agreed that, before any further evidence on this disputed point is adduced, I should first decide the question whether, assuming that the facts are as alleged by the decree holder, it would be proper for me to deal with the respondents as for a contempt.

I shall therefore proceed on that assumption, viz., that the lease was subsequent to the attachment. The following facts are also material. No sale of the premises took place under the order of attachment. A bank held an equitable mortgage on these premises, and a petition for the winding-up of the defendant company was filed on the 6th September, 1957. The premises were eventually sold by the liquidator together with other assets of the company. The notice of motion in the proceedings now before me was filed on 29th August, 1957. The respondent, M. K. Hathi, continues as tenant of the premises and has paid rent, first to the receiver appointed by the court, and now, after the sale of the premises, to the present owner.

The decree holder's case is that, by reason of the grant of the lease after the attachment, there has been a wilful disobedience to the order of the court, which is properly punishable as a contempt. Mr. Shah for the decree holder also contends that, since the premises were in the custody of the court once they had been attached, the respondents are guilty of a contempt by reason of their interference with the court's possession of the premises. That wilful disobedience to a court order can, in certain circumstances, be punished by committal to prison is undoubtedly true. And I think it is certainly arguable that there has been disobedience (assuming the lease was subsequent to the attachment) to the order not to transfer or charge the property in any way; and that the respondent M. K. Hathi–although a

stranger to the original action–has disobeyed the order by taking benefit from the defendant company's breach of the order or at any rate, has aided that company in committing that

breach. But that is not an end of the matter. In proceedings of this nature it is also necessary to consider whether there has, in fact, been such prejudice to the interests of the decree holder, or such obstruction to the course of justice, that committal for contempt is the proper remedy.

Section 48 of the Civil Procedure Ordinance provides that any alienation of property or any interest therein after attachment "shall be void as against all claims enforceable under the attachment". Consequently, if the lease to M. K. Hathi was subsequent to the attachment, it is void, and I do not see how it can be said to prejudice the decree holder's rights. A sale under the attachment order would have been a sale of the premises untrammelled by the purported lease. Mr. Shah says that the decree holder has been prejudiced because the sale of the premises, which took place in consequence of the winding-up of the defendant company, would have realised more if it had not been sold subject to this lease (which I presume must have been recognized as valid by the liquidator). But that seems to me a quite irrelevant consideration, since (for one thing) this motion was filed before the liquidation proceedings began.

Had a sale taken place under the attachment order, and had M. K. Hathi continued in possession under the purported lease after the sale, the purchaser could have caused him to be removed from the premises by obtaining an order under O. 19, r. 82. Thus, had the sale proceeded in pursuance of the attachment order, not only would it not have been subject to a valid lease, but also any person occupying the land under the void lease could have been removed. There would thus have been no infringement of the decree holder's interests.

I asked Mr. Shah if he could cite me any instance of a similar disobedience to an attachment order being punished as a contempt, but he was unable to do so. The principle propounded in *Re Maria Annie Davies* (1) (1888), 21 Q.B.D. 236 at p. 239 must be borne in mind–

> "Recourse ought not to be had to process of contempt in aid of a civil remedy where there is any other method of doing justice. The observations of the late Master of the Rolls in the case of *Re Clement* seem much in point: 'It seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. I say that a judge should be most careful to see that the cause cannot be fairly prosecuted to a hearing unless this extreme mode of dealing with persons brought before him on accusations of contempt should be adopted. I have myself had on many occasions to consider this jurisdiction, and I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction'."

In the result, therefore, I find that the conduct of the respondents (on the assumed facts) does not amount to an obstruction of the course of justice or to prejudice to the decree holder's interests, and the mere fact that there has been disobedience to an order of the court does not, in those circumstances, render the respondents liable to be dealt with as for a contempt.

Motion dismissed.

For the applicant:
JM Shah

For the respondents:

REG Russell

For the plaintiff:
Patel & Shah, Kampala

For the defendant:
Russell & Co, Kampala

Prestonjee Rustomjee Digaria v R
[1958] 1 EA 197 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	7 May 1958
Case Number:	34/1958
Before:	Briggs V-P, Forbes JA and Sir Owen Corrie Ag JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Aden–Campbell, C.J

[1] Criminal law – Practice – Accused's request for copy of a witness' statement to the police refused – Whether such refusal fatal – Whether magistrate's failure to record reasons for such refusal a curable irregularity – Criminal Procedure Ordinance (*Cap.* 38), *s.* 115 *and s.* 363 (*A.*).

Editor's Summary

The appellant was convicted by a magistrate on charges of conspiracy and fraudulently preventing an electric meter from duly registering. At the trial counsel for the appellant had asked to be furnished with a copy of a statement made to the police by a witness for the prosecution. The magistrate ruled that it was "not essential in the interests of justice for Mr. Joshi to see the statement" but gave no reasons for doing so. On appeal the Supreme Court of Aden upheld the convictions, whereupon the appellant again appealed on two grounds, namely, (1) that the refusal to supply a copy of the statement was an injustice and a fatal irregularity and (2) that the magistrate had failed to record the reason for his refusal and therefore it was impossible to know whether he had reasonable grounds for his decision and if the grounds were unreasonable and the statement should have been supplied, it was impossible to say that the appellant had not been prejudiced.

Held –

(i) failure to record reasons was clearly an irregularity;

(ii) the question whether it was curable depended upon actual prejudice, not upon merely potential prejudice;

(iii) there were sufficient grounds for the magistrate's decision that it was not "essential in the interests of justice" that the appellant should see the statement;

(iv) the magistrate's failure to record the reasons for his opinion caused no prejudice to the appellant, and although irregular, could be disregarded.

Appeal dismissed.

Judgment

Briggs V-P: read the following judgment of the court: This was a second appeal from the Supreme Court of Aden which upheld convictions by a Magistrate on charges of conspiracy and fraudulently preventing an electric meter from duly registering. We dismissed the appeal and only one point arising on it requires comment.

Section 115 of the Aden Criminal Procedure Ordinance (Cap. 38) provides as follows:

"115. (1) Any statement made by a person to a police officer in the course of an investigation under this Chapter shall be reduced into writing and shall be signed by the person making it.

(2) When any witness is called for the prosecution or for the defence, other than the accused, the court shall on the request of the accused or the prosecutor refer to any statement made by such witness to a police officer in the course of a police investigation under this Chapter, and, subject to the provisions of sub-s. (3) of this section, shall then direct the accused

to be furnished with a copy thereof, and such statement may be used to impeach the credit of such witness in the manner provided by s. 161 of the Evidence Ordinance.

(3) If the court is of opinion that the statement or any part thereof is not relevant to the subject matter of the inquiry or trial or that the disclosure to the accused is not essential in the interests of justice or is inexpedient in the public interest it shall record the reasons for such opinion and shall thereupon withhold the whole or part of such statement from the accused."

At the trial counsel for the present appellant asked the learned magistrate to refer to the statement of a witness named Abdul Rahim. The learned magistrate did so and recorded that he had done so. After one more question to the witness counsel apparently asked that his client might be furnished with a copy of the statement, and thereupon the learned magistrate noted,

"Ruling. It is not essential in the interests of justice for Mr. Joshi to see the statement."

Before us it was objected first that the refusal to furnish a copy was an injustice and a fatal illegality. We could not accept this submission as it stood, but it was linked with another, that the learned magistrate had omitted to record the reasons for his opinion that "disclosure to the accused (was) not essential in the interests of justice", and that his failure in this respect made it impossible to know whether he had reasonable grounds for his opinion: if the grounds were unreasonable and the statement should have been given to the appellant, it was impossible to say that he had not been prejudiced.

The failure to record reasons was clearly an irregularity, but the question whether it was curable under s. 363 of the Ordinance depended on actual prejudice, not merely potential prejudice. The purpose of furnishing such statements to the accused is to enable him to establish by cross-examination that the witness has made inconsistent statements or is otherwise unworthy of credit. If the statement could not assist the accused in this way, the refusal to give it to him could not cause prejudice. If this point had been taken on first appeal one would have expected that the Crown would have produced the statement and the court would have decided the question of prejudice then; but the point is not mentioned in the judgment or the learned judge's notes. Since, however, it was certainly raised in the memorandum of appeal and we were informed from the bar that it was raised in argument, we thought it proper to investigate the matter, and called for the statement, which was produced by the Crown. On comparing the statement with the evidence of the witness it was apparent that there was no sign of inconsistency and nothing in the statement which could in any way have assisted the appellant. This being so, there was sufficient ground for the learned magistrate's opinion that it was not "essential in the interests of justice" that the appellant should see it. His failure to record the reasons for that opinion caused no prejudice to the appellant, and, although irregular, could be disregarded.

Appeal dismissed.

For the appellant:
EP Nowrojee
PK Sanghani, Aden

For the respondent:
F de F Stratton (Crown Counsel, Kenya)
The Attorney-General, Aden

Harbans Singh v R

[1958] 1 EA 199 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	28 April 1958
Case Number:	123/1958
Before:	Sir Ronald Sinclair CJ and MacDuff J
Sourced by:	LawAfrica

[1] Criminal law – Practice – Order for payment of costs to prosecutor by accused – Duty of court to inquire into quantum of claim – Penal Code, s. 32 (*K.*) *– Criminal Procedure Code, s.* 171 (*K.*) *– Costs in Criminal Cases Act,* 1952, *s.* 1.

Editor's Summary

The appellant was convicted and fined Shs. 20/- by a second class magistrate's court of "failing to comply with a stop sign contrary to s. 49 (*b*) of the Traffic Ordinance" and was also ordered to pay Shs. 100/- costs to the prosecution. The appellant appealed against this Order. By s. 32 of the Penal Code a court is empowered subject to s. 171 of the Criminal Procedure Code, to "order any person convicted of an offence to pay the costs of and incidental to the prosecution or any part thereof". Section 171 (which is quoted in extenso in the judgment) in effect limits that power to "such reasonable costs as to such judge or magistrate shall seem fit". However, in considering what costs were to be paid the magistrate did not address his mind to the question as to what expenses had been properly incurred by the prosecution.

Held –

(i) a magistrate is bound to inquire into the quantum of any costs claimed, and to decide whether they have been properly incurred before he makes an award of costs and fixes the amount ordered to be paid;

(ii) as he had not done so in the present case his order could not for that reason alone be allowed to stand;

(iii) it was unnecessary, in the present case, to say whether the facts disclosed were sufficient to justify an award of costs.

R. v. Murray (1945), 21 K.L.R. (Part 2) 26 considered and approved.

Per Curiam – (Referring to s. 1 of the Costs in Criminal Cases Act 1952) "we are of opinion that the section . . . provides a useful criterion of what would fall within the scope of 'reasonable costs' as the term is used in s. 171 of the Criminal Procedure Code."

Appeal allowed.

Case referred to:

(1) *R. v. Murray* (1945), 21 K.L.R. (Part 2) 26.

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court: The appellant was convicted by the magistrate, second class, at Nairobi of

> "failing to comply with a stop sign contrary to s. 49 (*b*) of the Traffic Ordinance (No. 39 of 1953)"

and was fined Shs. 20/-. The magistrate also made an order that the appellant pay Shs. 100/- costs to the prosecution. It is against this order that the appeal was brought. We allowed the appeal and set the order for payment of costs aside. We now give our reasons.

Section 32 of the Penal Code which empowers a court to order payment of costs reads–

> "32. Subject to the limitations imposed by s. 171 of the Criminal Procedure Code a court may order any person convicted of an offence to pay the costs of and incidental to the prosecution or any part thereof."

and s. 171 of the Criminal Procedure Code limits that power in these words–

> "171 (1) It shall be lawful for a judge of the Supreme Court or a magistrate of a subordinate court of the first, second or third class to order any person convicted before him of an offence to pay to the public or private prosecutor, as the case may be, such reasonable costs as to such judge or magistrate may seem fit, in addition to any other penalty imposed;
>
> "Provided that such costs shall not exceed one thousand shillings in the case of Supreme Court or five hundred shillings in the case of a subordinate court."

In the result the costs awarded are restricted, *inter alia*, by s. 171 of the Criminal Procedure Code to "such reasonable costs as to such judge or magistrate shall seem fit."

What costs are to be considered as coming within the term "reasonable costs" in cases such as the present one, where the prosecution is conducted by a police officer? We can find no authority in English legislation, where the system of prosecution is rather different from that pertaining in this Colony. Some guide may be obtained from the provisions of the Costs in Criminal Cases Act, 1952, which empowers a court of assize or quarter sessions, and a magistrates' court, to award out of local funds the cost of the prosecution, or if the accused is acquitted, the costs of the defence. The quantum of such costs is assessed in this manner–

> "The costs payable out of local funds under the preceding sub-section shall be such sums as appear to the court reasonably sufficient to compensate the prosecutor, or as the case may be the accused, for the expenses properly incurred by him in carrying on the prosecution or the defence, and to compensate any witness for the prosecution, or as the case may be for the defence, for the expense, trouble or loss of time properly incurred in or incidental to his attendance and giving evidence."

In considering that wording it may be appreciated that in England the costs of prosecution are in general borne by local funds and that in a number of cases the prosecution is represented by counsel.

However, we are of opinion that the section quoted provides a useful criterion of what would fall within the scope of "reasonable costs" as the term is used in s. 171 of the Criminal Procedure Code. In the first place such costs would include expenses properly incurred in carrying on the prosecution, that is to say court fees expended by local authorities and an advocate's fee in certain cases. In the second place, they would include witnesses' expenses. If this criterion is applied it will become clear that a magistrate is bound to inquire into the quantum of any costs claimed, and to decide whether they have been properly incurred before he makes an award of costs and fixes the amount ordered to be paid. It may be useful at this stage to draw attention to one result of the difference between the two systems; in England provision is made that the amount of costs ordered to be paid shall be ascertained as soon as practicable by the proper officer of the court; in this Colony the magistrate orders payment of such reasonable costs as he thinks fit. But whether the amount is ascertained by the proper officer, or by the magistrate, the practical effect must be the same; either the proper officer, as in England, or the magistrate in this Colony, is bound to make inquiry before he fixes the amount of the costs to be awarded.

It is apparent in the present case that the magistrate did not address his mind to the question as to what expenses had been properly incurred by the prosecution and for that reason alone his order cannot be allowed to stand.

We must also draw the attention of magistrates to the decision in *R. v. Murray* (1) (1945), 21 K.L.R. (Part 2) 26, where it was held that it is only in exceptional circumstances that an accused person is ordered to pay costs to the public prosecutor. In that case the accused had been convicted of malicious damage to property contrary to s. 332 (1) (new s. 334 (1)) of the Penal Code, an offence of a much more serious nature than offences under the Traffic Ordinance. It is our view that different considerations will apply in considering this problem in the case of relatively minor offences from those applicable in the case of major offences, and facts which may justify an award of costs in respect of offences under the Traffic Ordinance may well be of a very different nature from those which would be required to establish the exceptional circumstances envisaged by Murray's case in respect of offences under the Penal Code. Whether the facts disclosed in the present case were sufficient to justify an award of costs we find it unnecessary to say. It would appear, however, that on an application for costs by a public prosecutor the magistrate must first decide whether the facts before him disclose circumstances such as to justify his making an order that the convicted person pay the costs of the prosecution or any part thereof and having decided that they do he is then required to inquire into the quantum of such costs with particular regard as to whether any costs so claimed have been properly incurred.

Appeal allowed.

For the appellant:
AR Kapila
Swaraj Singh, Nairobi

For the respondent:
AP Jack (Deputy Public Prosecutor, Kenya)
The Attorney-General, Kenya

Mohamed s/o Salim v R
[1958] 1 EA 202 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	5 May 1958
Case Number:	21/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika–Mahon, J

[1] Criminal Law – Legal aid – Charge of murder – Accused unrepresented – Desirability of legal aid in preparation and conduct of defence – Prejudice to accused – Poor Prisoners Defence Ordinance (*Cap.* 21), *s.* 3 (*T.*).

Editor's Summary

The appellant had been convicted of murder by the High Court. The magistrate who committed him for trial had noted on the record of the proceedings before him that he had examined the accused as to his means and since he owned ten head of cattle he should not be accorded free legal aid. By s. 3 of the Poor Prisoners Defence Ordinance it is provided that where it appears desirable in the interests of justice that a prisoner should have legal aid, in the preparation and conduct of his defence, and that his means are insufficient to enable him to obtain such aid, the registrar or a judge of the High Court may certify that the prisoner should have legal aid. At the hearing of the appeal it was noticed that the appellant had not been represented and that neither the registrar nor a judge of the High Court had apparently considered whether legal aid should be provided. The court accordingly called for a report, which revealed that the opinion of the committing magistrate had been accepted without inquiry and in consequence the appellant was not assigned an advocate. Further, the question of legal aid was not brought to the attention of the trial judge or the Chief Justice for consideration.

Held –

(i) although there was no substance in the appeal, which the court dismissed, it was clearly desirable in the interests of justice that a person on trial on a capital charge should have the benefit of legal aid, and the registrar or a judge should always give anxious consideration to the circumstances before deciding to refuse a certificate for legal aid on the ground of sufficiency of means.

(ii) the court might feel obliged to order a re-trial if it appeared that a person accused of a capital charge had been prejudiced by the refusal of legal aid, or that the question of providing legal aid had not been properly considered.

Appeal dismissed.

No cases referred to in judgment

Judgment

The following judgment was read by direction of the court: The appellant was convicted by the High Court of Tanganyika of murder, and was sentenced to death. We were of opinion that there was no substance in the appeal to this court, which we accordingly dismissed. There is, however, one aspect of the trial on which we desire to comment, namely that, although the appellant was being tried upon a capital charge, he was not represented at the trial by an advocate.

The relevant authority for the provision of free legal aid to a prisoner in Tanganyika is contained in s. 3 of the Poor Prisoners Defence Ordinance (Cap. 21) which reads as follows:

> "Where it appears that it is desirable in the interests of justice that a prisoner should have legal aid in the preparation and conduct of his defence

> at his trial before the High Court, or before a magistrate exercising extended jurisdiction, and that his means are insufficient to enable him to obtain such aid, the registrar, or a judge of the High Court (hereinafter referred to as the "certifying authority") may certify that the prisoner ought to have such legal aid, and if an information is filed against the prisoner and it is practicable to procure the services of an advocate, he shall be entitled to have an advocate assigned to him."

"Registrar" by definition in s. 2 includes the deputy registrar and a district registrar.

It did not appear from the record before us that either the registrar or a judge of the High Court had considered the question whether the appellant in this case should be provided with free legal aid at his trial, although the committing magistrate had noted the following "certificate" on the record of the committal proceedings:

> "I have examined accused as to his means and I certify that in my opinion, as he owns ten head of cattle he should *not* be accorded free legal aid."

Since the committing magistrate is not a "certifying authority" under the section, we called for a report as to whether the matter had been considered either by the registrar or a judge. The relevant part of the report of the then acting deputy registrar reads as follows:

> "3. That I consider the committing magistrate's certificate recorded in the said proceedings which is as under:
>
> "I have examined accused as to his means and I certify that in my opinion, as he owns ten head of cattle he should not be accorded free legal aid."
>
> "4. That I accepted the opinion of the committing magistrate as to the accused's means.
>
> "5. Accordingly being satisfied that the accused had sufficient means to enable him to obtain legal aid at his own expense I did not assign to him an advocate at the expense of the Government for the preparation and conduct of his defence at his trial before the H.M. High Court of Tanganyika.
>
> "6. That this matter was not brought specifically to the attention of the judge or the Chief Justice by me for consideration."

We would comment upon this, first, that it is by no means clear that the acting deputy registrar in fact exercised (as he should have done) his own independent judgment in the matter upon the facts stated by the committing magistrate, instead of merely accepting the opinion expressed by the magistrate; and secondly, that it seems difficult to justify the refusal of legal aid merely on the ground that the appellant "owns ten head of cattle". We are not aware of the price which such cattle would be likely to realise upon a forced sale, but in any event it would clearly be exceedingly difficult for the appellant to effect such a sale while in custody, and it seems problematical whether, if he did succeed in so doing, the proceeds would suffice, or could be realized in time, to brief counsel for his defence.

It is clearly desirable in the interests of justice that a person on trial on a capital charge should have the benefit of legal aid in the preparation and conduct of his defence. And we are of opinion that in such a case the "certifying authority" i.e. the registrar or a judge should give the matter anxious consideration before deciding to refuse a certificate for legal aid on the ground of sufficiency of means, that a reasonably liberal interpretation ought to be placed on the section, and that in case of doubt the discretion should be exercised in the prisoner's favour. It so happened that the instant case was an exceptionally

clear one, free from difficulty. But it might well happen that this court would feel obliged to order a re-trial if it were of opinion that a person accused of a capital charge had been prejudiced by refusal of legal aid, and the court was not satisfied that the question of the provision of legal aid had been properly considered by the "certifying authority".

We would add that we consider that it is the duty of the trial judge to ascertain that the question of provision of legal aid has been duly considered by the proper authority in any capital case in which the accused appears before him unrepresented.

While in capital cases it is normally to be presumed that the interests of justice require that the accused should be legally represented, there is no such presumption in non-capital cases. In non-capital cases, it is a matter for consideration on the facts of each case whether legal aid is desirable in the interests of justice.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:
GC Thornton (Crown Counsel, Tanganyika)
The Attorney-General, Tanganyika

Ali Kassam Virani Limited v The United Africa Company (Tanganyika) Limited
[1958] 1 EA 204 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	20 May 1958
Case Number:	6/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika–Lowe, J

[1] Sale of goods – Sale of coffee by sample and description – Goods delivered and paid for – Coffee confiscated by police – Refund of price refused – Vendor without title to sell – Whether breach of warranty for quiet possession has occurred – Whether purchaser entitled to refund of price – Sale of Goods Ordinance, s. 14, *s.* 15 *and s.* 26 (*T.*) *– Criminal Procedure Code, s.* 180 (*T.*) *– Indian Evidence Act*, 1872, *s.* 43, *s.* 106 *and s.* 114.

Editor's Summary

The appellants who were dealers in coffee and other produce sold the respondents in November 1954 six tons of “Tanganyika Coffee (Morogoro District)” by sample. The respondents were general merchants and buyers of coffee for export. Delivery was made to the respondents prior to signing of the contract and payment was made shortly after. In January, 1955 the police ordered the appellants to hold this coffee pending proceedings and in February seized the coffee as suspected stolen property. The coffee was never returned to the respondents who claimed the return of the price paid, and when this was refused they sued and obtained judgment for the price. In the meantime the managing director of the appellants was convicted of having received the coffee knowing it to have been stolen. In these proceedings it transpired that the coffee was Belgian and of high quality. When the trial began issues had not been framed and the case proceeded without these. When the respondents closed their case, the appellants called no evidence, but submitted that there was no evidence before the court that the appellants had no title to the coffee,

as the decision in the criminal case which had been admitted in the pleadings was res inter alios acta. The appellants also contended that the suit was for money had and received and it was essential to prove that the consideration had wholly failed. The trial judge then himself framed issues; he held that although there was no evidence that the appellants received the coffee knowing it had been stolen, the coffee was sold by description and since the coffee was not as described, the respondents were entitled to be repaid the price. On appeal it was contended for the appellants that the judge had erred in raising and deciding those issues which concerned a sale by description, as these points were not raised by the pleadings.

Held –

(i) the contract was a sale by description as well as sample.

(ii) since it was the business of the appellants to deal in coffee, it was incredible that they should not know that the coffee was sold much below its proper price, from which the inference followed that they were abnormally anxious to sell quickly because they knew the coffee was either likely to be the subject of police investigation or that their title was defective.

(iii) the facts proved at the trial were sufficient to place on the appellants, by virtue of s. 106 of the Indian Evidence Act, the onus of proving facts peculiarly within their own knowledge, that they had a right to sell the coffee and that the failure of the respondents to obtain quiet possession of the coffee was not due to any cause for which the appellants were responsible.

(iv) the action of the police in confiscating the coffee was not novus actus tertii and the appellants were guilty of a breach of warranty for quiet possession.

Appeal dismissed.

Case referred to in judgment:

(1) *Hollington v. Hewthorn & Co. Ltd*., [1943] 2 All E.R. 35; [1943] 1 K.B. 587.

(2) *Monforts v. Marsden* (1895), 12 R.P.C. 266.

(3) *Niblett v. Confectioners' Materials Co. Ltd*., [1921] 3 K.B. 387.

Judgment

Briggs V-P: read the following judgment of the court: This was an appeal from a judgment and decree of the High Court of Tanganyika, whereby the appellant company was ordered to pay to the respondent company a sum of Shs. 37,694/31 with interest at six per cent. from April 20, 1957, until payment and costs. We dismissed the appeal with costs and now give our reasons.

The plaint is a sadly inartistic document, and one of the most serious difficulties in the case is to determine its true meaning and effect. The events giving rise to the proceedings were as follows. The defendants were dealers in coffee and other produce in Morogoro and elsewhere. By a contract in writing dated November 24, 1954, they sold to the plaintiffs six tons of "Tanganyika Coffee (Morogoro District)", quality as per sample in buyers' possession, at Shs. 115/- per frasila, delivered to buyers' godown at Morogoro. The plaintiffs are importers and exporters and general merchants and are buyers of coffee for export. Delivery was made prior to the signing of the contract and payment a few days after. About the beginning of January the plaintiffs were ordered by the police to hold the coffee pending

further proceedings, and on February 10, 1955, the police seized the coffee as suspected stolen property. It has not been returned to the plaintiffs and there is no evidence to show what has happened to it; but one Ali Kassam Virani, who is the managing director of the defendants, was charged and convicted on April 25, 1955, of having received it, knowing it to have been stolen. The plaintiffs demanded back the purchase price of the coffee and the defendants refused to pay.

Arbitration proceedings took place under a clause in the contract and an award was made in favour of the plaintiffs. Later it was set aside by the High Court, but before that a sum of Shs. 45,000/- to cover the amount of the award had been ordered to be paid into court, and is still in court pending final disposal of this suit. All this was pleaded and admitted. Paragraph 13 and para. 14 of the plaint are as follows:

> "13. That the plaintiff purchased the said six tons of coffee from the defendant and paid for it in good faith and at the time of the purchase was unaware that it was Belgian grown coffee and had in fact been stolen property or had been received by the defendant knowing it to have been stolen and the plaintiff believed it to be special quality Morogoro grown coffee as described by the defendant and certified as Morogoro grown by the Agricultural Department of Tanganyika.
>
> "14. That in view of the findings in the resident magistrate's court of Criminal Case No. 52 of 1955 Regina versus Ali Kassam Virani, the plaintiff avers that at no time did the defendant have any title to or property in the six tons of coffee and that therefore the defendant could not pass any property or title in it to the plaintiff."

The claim is merely for a stated sum of money, with an order for payment out of the sum in court, and for interest and costs.

The defendant admits most of the facts alleged, and raises in para. 1 and para. 2 issues which have been decided against the defendants and are not now material in themselves, but para. 2 must be quoted as throwing some light on the later course of the proceedings. It reads,

> "2. If, which is not admitted, the coffee sold by the defendant was stolen coffee the contract referred to was tainted by fraud and illegality on the part of the plaintiff which by its servants knew that the coffee was not coffee of the quality or origin described in the contract, but was superior coffee, and stolen or illegally obtained, or alternatively that it was being offered for sale in breach of the law relating to the sale of native-grown coffee."

Paragraph 4 is as follows,

> "4. Para. 13 and para. 14 of the plaint are not admitted and the defendant repeats the matters referred to in para. 1 and para. 2 hereof. It is denied that the sum of Shs. 45,000/- is the property of the plaintiff. The said sum is the property of the defendant and is deposited in court to abide the determination of this suit."

A set-off and counterclaim was raised for the sum of Shs. 10,792/19, which related to other transactions, is admitted and merely reduces the amount of the plaintiffs' claim pro tanto.

At the trial the court asked if issues had been agreed, and the following remarks were made.

> "Grimble: I have not had an opportunity of discussing any issues with my learned friends, as they have only just arrived, but I can see only one possible issue, and that is, did the plaintiff practise any fraud in obtaining the contract for the sale of the coffee.
>
> "O'Donovan: My lord, with respect to my learned friend, I think he has put the issue in an unduly simple manner. It is more complicated than that.
>
> "Court: I think possibly I had better leave you two together for a while to frame issues.

> "O'Donovan: Could your lordship leave the question of the issues for the moment?"

Mr. Grimble for the plaintiffs then called his witnesses, without opening. It is apparent from the evidence called, and even more so from that which was not called, that he wholly misunderstood the effect of the pleadings and the difficulties with which he would be faced. When he closed his case Mr. O'Donovan for the defendants called no evidence, and Mr. Grimble's final address confirms what we have just said. He said,

> "The facts are practically undisputed, namely, that the coffee was duly delivered to the plaintiff, who paid for it, and that the police removed it because they thought it had been stolen. The action, the criminal action following it, clinched the matter on that point, and after the conviction of the director of the company we find ourselves in the position of having paid out money for something which we had not got and, I submit, never had, that is, a title to the coffee . . ."

Mr. O'Donovan then submitted that the suit must fail because there was no evidence that the defendants had had no title to the coffee. The decision in the criminal case was res inter alios acta, and the finding therein made that the director knew the coffee had been stolen (and therefore by implication that it had in fact been stolen) was not evidence that the coffee had been stolen at all, and in any event might mean that it had been stolen from the defendants themselves. He referred to s. 26 of the Sale of Goods Ordinance and s. 180 of the Criminal Procedure Code. He submitted that the suit was one for money had and received by the defendants to the use of the plaintiffs, and that it was essential to prove that the consideration had wholly failed. To do this, it must be proved that the defendants had no title to, and could not sell, the coffee. Mr. O'Donovan did not revert to the question of issues.

The learned judge accordingly himself framed the issues as follows:

> "1. Did the plaintiff company practise any fraud in contracting for and obtaining the coffee?
>
> "2. Did the defendant company receive the coffee knowing it to be stolen as alleged by the plaintiff company?
>
> "3. If not, did the defendant company have any title to or property in the six tons of coffee?
>
> "4. Was the coffee sold by description?
>
> "5. If so, was the description a condition precedent in the contract?
>
> "6. If the description was a condition precedent, was coffee of the description delivered pursuant to the contract?
>
> "7. If not, is the plaintiff company entitled to a return of the money paid to the defendant company for the coffee?"

His decision on these issues was,

> "1. I am satisfied that the plaintiff company did not practise any fraud throughout the transaction.
>
> "2. I have no evidence from which I can conclude whether or not the company received the coffee knowing it to have been stolen.
>
> "3. I am unable to decide this issue for the reason already stated.
>
> "4. The contract specifically describes the coffee as being of Morogoro origin and the sale was by description.
>
> "5. The description was a condition precedent to the sale of the coffee.
>
> "6. The coffee delivered was not as described in the contract.
>
> "7. The plaintiff company is entitled to avoid the contract and to receive back the money paid to the

defendant company under the contract."

The grounds of appeal were that the learned judge erred in raising and deciding the fourth, fifth and sixth issues, since they were not raised by

the pleadings, that there had been no admission by the defendants that the coffee did not answer the description in the contract, and that s. 15 of the Sale of Goods Ordinance did not apply to the contract.

Before us Mr. O'Donovan submitted for the appellants that on the first three issues the learned judge was right. He said that the next three should not have been raised at all, and in any event had been wrongly answered. He also contended that the substantial period during which the coffee had been retained by the respondents showed that they had finally accepted it, that there had been no avoidance of the contract, and that if it was avoided the respondents would be obliged to restore the coffee to the appellants. On these arguments we would only comment that we construe the contract as being a sale by description as well as sample, that the retention for a substantial period was explainable and excusable on the ground that the respondents had at first no reason to suppose that the coffee was not Morogoro coffee, that they would not have bought it from the appellants if they had believed that it was Belgian Congo coffee, that the demand for repayment of the purchase price, or the filing of the plaint, would in itself be a sufficient act of avoidance, and that, as regards restoration of the coffee, the obligation of the respondents would be to restore any benefit received by them in virtue of the contract. This would normally be the coffee itself; but we are unable to see that in this case they received any benefit at all, since they enjoyed no more than a temporary possession of the coffee.

We invited Mr. O'Donovan to deal with other aspects of the case, particularly in reference to the second and third issues. Whilst accepting that the fact of the director's conviction would not ordinarily suffice to prove that the coffee was stolen, we thought it was by no means irrelevant for other purposes. The first question appeared to be whether the director's knowledge, whatever it might be, concerning this coffee, should in the circumstances be imputed to the company. Mr. O'Donovan said that in addition to the possibility that the director had received the coffee as agent for the appellants, it having previously been stolen from a third party, there were two other possibilities, first, that the coffee was stolen from the appellants, received by the director, recovered by the appellants and then lawfully sold to the respondents, or, secondly, that after the director wrongfully received it the true owners recovered it and disposed of it to the appellants, who lawfully sold to the respondents. If either of these suppositions were correct, it would have been the duty of the police to restore the coffee to the respondents and, from the fact that they did not do so, we think it is permissible to infer, in the absence of evidence to the contrary, that neither represented the facts as found in the criminal case, whether those findings were correct or not. It was part of the director's duties to obtain coffee for the company to sell in the market, and we think that any knowledge which he might have concerning this coffee, including knowledge as to its quality and as to any defect of title affecting it, must be imputed to the company for the purposes of any later dealings by the company with third persons. It must not be overlooked that the negotiations for the sale of the coffee to the respondents were conducted by the director, a fact which renders either of the suppositions put forward by Mr. O'Donovan at least highly improbable.

Knowledge of quality is material in this case for the following reasons. When negotiating the sale to the respondents the director told them that this was Morogoro coffee of specially good quality. The evidence was that Morogoro coffee was ordinarily not particularly good and an average price for it at that time would have been about £350 per ton, but some coffee of better quality, and indeed some of high quality, was produced in the district, and the price of this would vary with the quality. When the respondents submitted the sample of this coffee to their taster in Mombasa he found the quality to be much better

than usual Morogoro standards and advised purchase at any price up to £515 per ton. The respondents then made an offer equivalent to £360–£370, being no doubt prepared to raise this substantially, and were surprised to find that the offer was promptly accepted. Now coffee is no doubt an intricate subject. The respondents' managing director, Mr. Waller, said that neither he nor the appellants' director was an expert. Even the taster, who gave evidence, disclaimed any real expertise. But it was the appellants' and their director's business to deal in coffee, and it seems quite incredible that they should not know the difference between coffee worth £370 per ton and coffee worth £515. If that be accepted, they knowingly sold this coffee at a very substantial undervalue–for about seventy per cent. of its commercial price. This entitles one to ask why, and the immediate inference appears to be that they were abnormally anxious to sell quickly, an anxiety which would be easily understood if they knew that the coffee had been stolen, or was likely to become the subject of police investigation, or that their title to it was in some other way defective. It is also possible that, for reasons connected with the provenance of the coffee, they thought it desirable to stress too much its high quality, which was at least unusual for Morogoro coffee. The evidence does not suggest any other explanation. It should also be remembered that, if either of Mr. O'Donovan's other two possibilities represented the true facts, there would have been no reason to sell at an undervalue; but, if the director had knowingly acquired stolen coffee for the company, there would have been every reason to do so.

We also invited Mr. O'Donovan to deal with another possible issue, which was not considered by the High Court, namely,

> "Was the appellant company in breach of warranty under s. 14 (*b*) of the Sale of Goods Ordinance in failing to afford the respondent company quiet possession of the goods?"

Mr. O'Donovan's first answer was that the issue did not arise on the pleadings. His reply on the merits was that the seizure was novus actus tertii interveniens, a matter with which his clients were not concerned or connected, and for which they could in no way be regarded as responsible. On the question whether relief under s. 14 (*b*) could properly be given on the pleadings, and on the evidence as it stood, we would first make some remarks about the defence. Whatever its technical effect, we think that in practice its form was such as might not unreasonably mislead the plaintiffs and their advisers. It appeared to rely on the allegations of fraud and illegality by the plaintiffs, either in relation to the fixing of the purchase price, or as being aware that the coffee could not lawfully be sold by the defendants. Paragraph 7 and para. 8 of the plaint were obviously intended to mean that the coffee had been stolen from a third party before it came into the hands of the sellers, that the seller through their director were aware of this, and in consequence the sellers never had a title, or a clean title, which they could pass on to the buyers. Admittedly the paragraphs do not say this in terms, but it was none the less their clear intention. If the defendants intended to assist in clarifying the issues one would have expected, not a mere admission of the paragraphs, but added allegations showing the defendants' title or right to sell. When dealing with para. 13 and para. 14 of the plaint, the defence is equally oblique. The allegation, now clearly made, that the coffee was stolen and the defendants had no title, is formally "not admitted", but apparently only as a makeweight on repeating the allegations of fraud and illegality against the plaintiffs.

We thought, therefore, that there was at least some excuse for Mr. Grimble's mistaken assumptions about the issues, and Mr. O'Donovan's request to the court not to settle issues had the effect (which we assume was unintentional) of preventing Mr. Grimble from discovering the true position. Had he done so, he would in all probability have put in the record of the criminal case, called the witnesses who had been called in that case for the prosecution, and

established the theft beyond reasonable doubt. The cross-examination of Mr. Waller was mainly directed to the issues of fraud and illegality and Mr. Grimble still remained wholly in the dark. In these circumstances it would be quite wrong to apply against his clients the presumption permitted by illustration (*g*) to s. 114 of the Indian Evidence Act. There was no "withholding" of any evidence by them in this case, but merely a failure to appreciate the desirability of calling it.

As regards the plaint, in spite of its unsatisfactory form, for which Mr. Grimble is responsible, it was common ground that it contained sufficient averment to show a cause of action for money paid on a consideration which wholly failed. The question was whether it sufficed to show any other causes of action. We thought it did. As regards a claim for breach of warranty under s. 14 (*b*), the contract is sufficiently pleaded: that it included an implied warranty for quiet possess on is matter of law and need not be pleaded: that the buyers did not obtain quiet possession and that the responsibility for this lay with the appellants is sufficiently averred by the facts pleaded: that this was a breach of warranty is again matter of law. The claim is merely one for payment of money, which may be ordered as damages or otherwise. On the view which we took of the case as a whole it matters not whether the learned judge was right in raising the fourth, fifth and sixth issues. We were disposed to think that the issues did fairly arise on the pleadings and that, since counsel had given the court no indication that they should not be considered, it was right to deal with them when the primary claim was disallowed. It was not necessary, however, for us to decide this point, or the further question whether the answers of the learned judge on these issues were correct, and we did not do so. To summarize our views on the plaint, it is not necessary to state in terms in a plaint on what cause of action one relies, and unless this is done the plaintiff must be taken to rely on each and every cause of action which the facts alleged in the plaint will establish, and which is not excluded by the form of relief prayed. He may, of course, at the trial disclaim any of these causes of action, but he does not do so merely by stressing one to the exclusion of the others. Again, the evidence may establish some of them, but not others, and the court must give effect to this.

Before reverting to the facts, we wish to stress that we did not overlook the provisions of s. 43 of the Indian Evidence Act, or of illustration (*c*) thereto. And we accept the principles laid down in *Hollington v. Hewthorn & Co. Ltd*. (1), [1943] 1 K.B. 587. But the position is somewhat different where the conviction is not tendered in evidence, but proved by admission on the pleadings. It is still not proof that the accused was rightly convicted, but it is not excluded from consideration.

The facts before the court, as we saw them, were these. The appellants knowingly sold the coffee at an unreasonably low price. Soon after this the police seized the coffee under a search warrant. The director was charged with receiving it, knowing it to have been stolen, and was convicted. If the appellants had ever had a clear title to the coffee, it would have been the duty of the police to return it to the respondents, but they did not do so. The maxim omnia praesumuntur rite esse acta should be applied in favour of the police in this connection. We thought these facts raised a strong *prima facie* probability that there was outstanding a claim of right in some person, antecedent to the appellants' title, and rendering it at best defective. At the very least, the facts proved were sufficient to place, by virtue of s. 106 of the Indian Evidence Act, the onus on the appellants to prove two facts, both peculiarly within their own knowledge, that they had a right to sell the coffee (see s. 14 (*a*) of the Sale of Goods Ordinance), and that the failure of the respondents to obtain quiet possession (see s. 14 (*b*)) was not due to any cause for which in law they were responsible. The appellants, however, deliberately chose to call no evidence.

Having regard to the onus of proof and the point of imputed knowledge, we thought the High Court could and should have found that the appellants were aware at the time of sale that in certain events their title would be brought seriously into question, and that there was a possibility of police intervention in aid of an alleged superior title. We accordingly considered that it should have been found that the seizure by the police was not novus actus tertii. These findings would have been sufficient to show a breach of the warranty for quiet possession, the effect of which is to warrant

> "that the vendor shall not, nor shall anybody claiming under a superior title, or under his authority, interfere with the quiet enjoyment of the vendee."

See *Monforts v. Marsden* (2) (1895), 12 R.P.C. 266. The interpretation which Lord Russell C.J. there put on s. 12 (1) of the English Act, which corresponds with s. 14 (*a*) of the Ordinance, was disapproved in *Niblett v. Confectioners' Materials Co. Ltd*. (3), [1921] 3 K.B. 387, but his interpretation of s. 12 (2), which corresponds with s. 14 (*b*) of the Ordinance was not challenged by the majority of the court in the latter case, though Atkin L.J. (as he then was) expressed the view that the warranty against action by third parties extended only to their lawful actions. If that is to be accepted, and we thought with respect that it should be, the claim under s. 14 (*b*) would still not necessarily be barred, even if the claim of superior right was false and the conviction was wrong, for the action of the police was lawful, even if based on incorrect information.

We thought, however, that this was not very material, since, again having regard to onus of proof and imputed knowledge, it was open to the learned judge to find, and he should have found, on balance of probabilities, that the appellants never had the right to sell the coffee, and there was therefore a breach of condition under s. 14 (*a*) of the Ordinance. The words "right to sell" must, as is shown by *Niblett's* case (3), be construed in a reasonably wide sense. As Scrutton L.J. said at p. 398,

> "If a vendor can be stopped by process of law from selling he has not the right to sell."

It seems at least probable that, if the police had intervened earlier, they could have prevented the appellants from selling to the respondents. If the appellants ever had a right to sell, the facts constituting that right were exclusively within their knowledge and their director's, and under s. 106 it was for them to prove those facts. We were therefore of the opinion that on the facts the respondents were entitled to succeed under both paragraphs of s. 14. Under para. (*a*) they would be entitled to return of the purchase money and interest; under para. (*b*), to damages which would be equal to the amount of the purchase money and interest.

Our conclusion was, therefore, that the effect of the judgment was correct, though we differed in certain respects from the learned judge's reasoning. The decree was also correct, and the appeal failed.

Appeal dismissed.

For the appellants:
BO'Donovan, *Fraser Murray* and *AR Kapila*
Fraser Murray, Thornton & Co, Dar-es-Salaam

For the respondents:
A Grimble
Grimble & Co, Dar-es-Salaam

R v Tambukiza s/o Unyonga
[1958] 1 EA 212 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	21 April 1958
Case Number:	76/1958
Before:	Sir Ronald Sinclair CJ and MacDuff J
Sourced by:	LawAfrica

[1] Criminal law – Charge – Whether magistrate must draw up and sign a formal charge – Criminal Procedure Code, s. 89 *and s.* 381 (*K.*).

[2] Criminal law – Practice – Plea – Whether acceptance of equivocal plea constitutes ground for quashing conviction.

Editor's Summary

As a result of a complaint which had been taken by a magistrate, the accused was arrested and brought before the same magistrate, who convicted him on his own plea of the offence of "desertion contrary to s. 67 (1) (*e*) of the Employment Ordinance (Cap. 109 Laws of Kenya)". The accused was sentenced to pay a fine of Shs. 55/-. Without further inquiry the magistrate ordered that out of the fine, if paid, Shs. 45/- should be paid to the complainant. This sum was more than the accused admitted owing to the complainant. On revision it was argued that having regard to the terms of the section and of the complaint the plea taken by the magistrate did not amount to an unequivocal plea of guilty to the offence. The magistrate had also failed to draw up and sign a formal charge pursuant to the complaint, but it was argued that this failure was an irregularity within the terms of s. 381 of the Criminal Procedure Code, and curable unless it occasioned a failure of justice.

Held –

(i) as the plea taken did not amount to an unequivocal plea of guilty to the offence to which the accused was convicted, the conviction must be quashed.

(ii) the whole object of s. 89 of the Criminal Procedure Code and of the subsequent sections dealing with the framing of charges is that before a trial can be held the accused must be arraigned before the court on a formal charge which must comply with the provisions of the Criminal Procedure Code. If there is no charge there is nothing in which there can be an "error, omission or irregularity", to which the provisions of s. 381 can be applied.

(iii) a formal charge is of the essence of criminal procedure and the failure of the magistrate to draw up and sign a formal charge was a defect which rendered the trial a nullity.

Appeal allowed. Conviction quashed. No order for retrial as offence repealed in the meantime.

Case referred to in judgment:

(1) *R. v. Mohindi wa Mainge* (1906), 2 E.A.L.R. 11.

(2) *Koinange Mbiu v. R.* (1951), 24 K.L.R. (Pt. 2) 130.

(3) *R. v. Mugene Mwita* (1935), 1 T.L.R. (R.) 31.

(4) *R. v. Salim Maalim* (1938), 1 T.L.R. (R.) 55.

(5) *R. v. Shabani bin Mwenegoha* (1940), 1 T.L.R. (R.) 69.

(6) *Subrahmania Ayyar v. King-Emperor* (1901), 25 Mad. 61.

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court: The accused was convicted by the magistrate, second class, Voi, of the offence of

> "Desertion contrary to s. 67 (1) (*e*) of the Employment Ordinance (Cap. 109 Laws of Kenya)"

and was sentenced to pay a fine of Shs. 55/-. Out of the fine, if paid, the sum of Shs. 45/- was to be paid to the complainant. At the hearing we quashed conviction and sentence. We now give our reasons.

The section under which the magistrate purported to convict the accused read:–

> "67. (1) Any employee may be fined a sum not exceeding one hundred shillings and in default of payment may be imprisoned for a period not exceeding six months if he is convicted of any of the following acts:–
>
> (*e*) if he is guilty of desertion;"

and desertion was defined in s. 2 of the Ordinance as

> "'desertion' means absence by an employee from his place of employment without lawful cause, for a period exceeding seven consecutive days."

A complaint was taken by the magistrate in the following form:

Form of Complaint.

(Under section 67 of the Employment Ordinance, 1948.)

"I, Frederick Mlati s/o Ndawiro, Sisal Cutter contract of Mwatate Kenya, hereby make complaint against Tumbukiza s/o Unyonga, hereinafter referred to as 'the accused'.

1. That the said accused on the 26th day of June, 1957 was employed by me at Mwatate under a verbal/written contract of service made under the Employment Ordinance 1948.
2. That–I was employing the accused on a verbal contract and on date . . . advanced him a sum of money Shs. 45/- of which Shs. 45/- has not been repaid.
3. That on or about the 26th day of June, 1957 the said accused did, in contravention of the terms of the said contract, without lawful excuse absent himself from his place of employment at Mwatate, and was absent for a period exceeding seven whole consecutive days, thereby committing the offence of desertion.

Duly sworn before me at Voi.

Signed F. Mlati Signed M. M. Lusiola, Magistrate II"

The accused was then arrested and brought before the same magistrate, on October 26, 1957. His case record reads:–

"Offence complained of	As per complaint form attached.
Offence proved	As above.
Plea of accused in his own words	'I admit I left his employment. But as to the amount advanced I know I owe him Shs. 21/- only.'
Finding	Accused guilty on his own plea.
Sentence	Fined Shs. 55/- or i/d 2 months D.C. Out of fine Shs. 45/- to be paid to complainant."

In our view, taking the wording of the section and of the complaint the plea taken by the magistrate did not amount to an unequivocal plea of guilty to the offence of which the accused was convicted; nor was

the magistrate entitled, without further inquiry, to order payment of compensation in an amount not admitted by the accused. Apart from what we must say later in regard to the

failure of the magistrate to draw up and sign a formal charge we considered that for these reasons alone the conviction must be quashed and in view of the fact that this paragraph, constituting the offence of desertion, was repealed with effect from July 23, 1957, we did not order a retrial.

However, this case was set down for hearing in revision mainly on the question as to whether the failure of the magistrate to draw up and sign a formal charge pursuant to the complaint is necessarily fatal to conviction. In this regard s. 89 of the Criminal Procedure Code provides *inter alia*:

> "89. (1) Proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant.
>
> "(2) Any person who believes from a reasonable and probable cause that an offence has been committed by any person may make a complaint thereof to a magistrate having jurisdiction.
>
> "(3) A complaint may be made orally or in writing, but, if made orally, shall be reduced to writing by the magistrate, and, in either case, shall be signed by the complainant and the magistrate.
>
> "(4) The magistrate, upon receiving any such complaint or where an accused person who has been arrested without a warrant is brought before him, shall, subject to the provisions of the next succeeding sub-section, draw up or cause to be drawn up and shall sign a formal charge containing a statement of the offence with which the accused is charged, unless such a charge shall be signed and presented by a police officer."

The magistrate is then required:

> "90. (1) Upon receiving a complaint and having signed the charge in accordance with the provisions of s. 89 of this Code, the magistrate may in his discretion issue either a summons or a warrant to compel the attendance of the accused person before a subordinate court having jurisdiction to inquire into or try the offence alleged to have been committed:
>
> Provided that a warrant shall not be issued in the first instance unless the complaint has been made upon oath either by the complainant or by a witness or witnesses."

Finally the Criminal Procedure Code provides that at the trial:

> "205. (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge."

For the prosecution it was submitted that the failure to frame and sign a formal charge pursuant to a complaint is an irregularity which comes within the terms of s. 381 of the Criminal Procedure Code which provides *inter alia*:

> "381. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account–
>
> (*a*) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code; . . .
>
> unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice . . ."

and that such irregularity has not in fact occasioned a failure of justice. In support of that submission we were referred to two decisions of this court. The first is *R. v. Mohindi wa Mainge* (1) (1906), 2 E.A.L.R. 11, where in dealing with this question in confirmation Hamilton and Barth JJ. said:

> "The Collector has also omitted to frame a charge as should be done in all warrant cases, but as the accused does not appear to have been prejudiced thereby and his guilt is clear, we confirm the sentence."

The headnote reads:

> ". . . Omission to frame charge–Section 254 C.P.C., not a vital defect except where accused prejudiced."

At the time of that decision criminal procedure in this Colony was governed by the provisions of the Indian Code of Criminal Procedure of 1898. Section 254 refers to the form of procedure to be followed in what were known as "warrant cases", a type of procedure completely different from any known in our present criminal procedure. In our view this decision cannot be relied on as any authority in respect of the provisions of the present Criminal Procedure Code. The second decision is that of *Koinange Mbiu v. R.* (2) (1951), 24 K.L.R. (Pt. 2) 130, where this court in its appellate jurisdiction said:

> "The proceedings out of which this appeal arises were instituted by the making of a sworn complaint in writing by an agricultural officer to the magistrate holding the subordinate court of the first class at Kiambu. The complaint was signed by the complainant and the magistrate in accordance with the provisions of s. 89 (3) of the Criminal Procedure Code but there was a failure to draw up and sign a formal charge as required by the succeeding sub-section. It appears that the complaint, which contains full particulars of the offence alleged, was treated as a formal charge and that the appellant was required to plead thereto. The irregularity has not been entered as a ground of appeal upon the petition of appeal, and though an attempt was made to introduce such ground in the course of the hearing it was abandoned upon the objection being taken by Crown Counsel, who referred to the case of *Gray v. R.* (1907), 2 E.A.L.R. 40 in which it was held that it was not open to an appellant to argue on a ground of appeal not specifically set out in the petition of appeal. It can be said, however, that there is no doubt that the appellant was made fully aware of the provisions of the law against which he was alleged to have offended and the particulars of the offence being charged; he is accordingly hardly in a position to suggest with any force that having regard to s. 381 of the Criminal Procedure Code, the irregularity has in fact occasioned a failure of justice."

It is clear that an objection had been raised that the failure to draw up a formal charge constituted an irregularity but it is also clear that the objection was abandoned by the appellant. The remarks of the learned judges thereon were purely obiter dicta and although of some persuasive value are not authoritative. In fact their persuasive value would appear to be small since the question was not argued before them; nor does it appear to have been fully considered by them.

This court is aware of three decisions of the High Court of Tanganyika on the same point. The first, *R. v. Mugene Mwita* (3) (1935), 1 T.L.R. (R.) 31, and the second, *R. v. Salim Maalim* (4) (1938), 1 T.L.R. (R.) 55, were decisions made in respect of the then corresponding section in the Tanganyika Criminal Procedure Code, s. 87, which required only that the complaint or charge be reduced to writing and signed by the complainant and the magistrate. By the Criminal Procedure Amendment Ordinance, 1939, the then s. 87 was repealed and replaced by the present s. 87 which for present purposes is identical in wording with the four sub-sections of s. 89 of the Kenya Criminal Procedure

Code quoted above. Subsequent to the enactment of that amendment the effect of the new s. 87 was considered in revision by a court of three judges in the case of *R. v. Shabani bin Mwenegoha* (5) (1940), 1 T.L.R. (R.) 69. That court considered a number of authorities and in particular the statement of a basic principle in criminal law enunciated by their Lordships of the Privy Council in *Subrahmania Ayyar v. King-Emperor* (6) (1901), 25 Mad. 61, in which, dealing with a multiplicity of charges it was observed:

> "It is likely to cause confusion and to interfere with the definite proof of a distinct offence which it is the object of all criminal procedure to obtain. The policy of such a provision (i.e. the prohibition against a multiplicity of charges) is manifest and the necessity of a system of written accusation specifying a definite criminal offence is of the essence of criminal procedure."

The High Court came to the conclusion that the document in question, a complaint in much the same form as that in the present case, was not a "charge" and then decided that:

> "In our view, therefore, the provisions of s. 335, Criminal Procedure Code, cannot be said to apply to this case because, before any 'errors, omissions or irregularities' could be taken into consideration, it would first have to be established that there was in fact a 'charge' in which any of such could be found."

The s. 335 referred to is identical in wording with s. 381 of the Kenya Criminal Procedure Code.

With respect we agree with the learned judges in Tanganyika. The whole object of s. 89 of the Criminal Procedure Code and of the subsequent sections dealing with the framing of charges is that before a trial can be held the accused must be arraigned before the court on a formal charge which must comply with the provisions of the Criminal Procedure Code. If there is no charge there is nothing in which there can be "error, omission or irregularity" to which the provisions of s. 381 can be applied. In our opinion a formal charge is of the essence of criminal procedure and the failure of the magistrate in the present case to draw up and sign a formal charge to which the accused was required to plead was a defect which rendered the trial a nullity.

Appeal allowed. Conviction quashed. No order for retrial as offence repealed in the meantime.

The accused did not appear and was not represented.

For the Crown:
GP Nazareth (Crown Counsel, Kenya)
The Attorney General, Kenya

Re Plataniotis (*deceased*)–Debtor
[1958] 1 EA 217 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	30 May 1958
Case Number:	46/1958
Before:	Miles J
Sourced by:	LawAfrica

[1] Bankruptcy – Debtor dying insolvent in Tanganyika – Debtor's estate in Tanganyika administered in bankruptcy by order of High Court of Tanganyika – High Court request to Supreme Court of Kenya to exercise bankruptcy jurisdiction over Kenya estate of debtor – Whether Supreme Court of Kenya can assume bankruptcy jurisdiction in circumstances – Tanganyika (*Legislative Council*) *Order in Council,* 1926, *art. XIV – Bankruptcy Ordinance* (*Cap.* 25), *s.* 2, *s.* 20 (1), *s.* 54 (1) *and s.* 117 (3) (*T.*)– *Bankruptcy Ordinance* (*Cap.* 30), *s.* 2, *s.* 20, *s.* 56, *s.* 114 *and s.* 120 (3) (*K.*)

Editor's Summary

On February 25, 1958, the High Court of Tanganyika ordered that the estate of the Michael Nicolaou Plataniotis, deceased, who died insolvent, be administered in bankruptcy and that the official receiver there be the trustee. The deceased had estate both real and personal in Kenya of considerable value, and on April 8, 1958, on the application of the official receiver, the High Court of Tanganyika ordered that a certified copy of the order of February 25, 1958, be forwarded to the Supreme Court of Kenya, with a request to the Supreme Court to exercise its bankruptcy jurisdiction over the estate of the deceased in Kenya, and that the official receiver of Kenya should administer the said estate pursuant to s. 114 of the Bankruptcy Ordinance of Kenya. As the official receiver was uncertain whether the Supreme Court had power to do what it was asked to do, he sought the directions of the court under r. 265 of the Bankruptcy Rules.

Held –

(i) it was the duty of the Supreme Court to assist the High Court of Tanganyika if it could and the only question was the manner in which it should render assistance.

(ii) whilst the court would not make an order vesting the property in Kenya of the debtor in the official receiver of Kenya, there would be an order that the Kenya estate of the debtor be administered in bankruptcy pursuant to s.114 of the Bankruptcy Ordinance.

Re Osborn, Ex parte Trustee, [1931–2] B. & C.R. 189 distinguished.

Order accordingly.

Case referred to:

(1) *Re Osborn, Ex parte Trustee,* [1931–2] B. & C.R. 189.

Judgment

Miles J: On February 25, 1958, an order was made by Her Majesty's High Court of Tanganyika on the petition of Mr. M. A. Carson, legal personal representative of Michael Nicolaou Plataniotis, deceased, who died insolvent, that the estate of the deceased be administered in bankruptcy and that the official receiver be the trustee.

On April 8, 1958, on the application of the official receiver, an order was made by Her Majesty's High Court of Tanganyika that a certified copy of the order of February 25, 1958, be forwarded to the Supreme Court of Kenya and that the said Supreme Court be requested to exercise its bankruptcy jurisdiction over such portion of the estate of the deceased as might be situate in Kenya and that the

official receiver of Kenya do administer the said estate pursuant to s. 114 of the Bankruptcy Ordinance of Kenya.

Since this is apparently the first occasion on which the provisions of s. 114 have been invoked and it did not seem to him altogether clear that this court had power to do what it was asked to do, the official receiver has sought the directions of the court under r. 265 of the Bankruptcy Rules. I am informed that this step has been taken with the concurrence of the legal personal representative of the deceased.

According to the report of the official receiver the deceased died possessed of estate both real and personal in Kenya of considerable value. I wish at the outset to express my indebtedness to Mr. Munro, the acting official receiver, for his argument on this application.

It is necessary first to refer to the relevant sections of the Bankruptcy Ordinance of Tanganyika (Cap. 25). Section 20 (1) provides that upon adjudication the property of a bankrupt shall become divisible among his creditors and vest in a trustee. Section 54 (1) provides that the official receiver shall be the trustee until a trustee is appointed. Sub-s. (2) provides that on the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed. Section 117 (3) provides that upon an order being made for the administration of a deceased debtor's estate, the property of the debtor shall vest in the official receiver, as trustee thereof, and he shall forthwith proceed to realise and distribute it in accordance with the provisions of this Ordinance. Section 2 defines "property" as including money, goods, things in action, land, and every description of property whether movable or immovable, and whether situate in the Territory or elsewhere. The corresponding provisions in the Bankruptcy Ordinance of Kenya are s. 20, s. 56, s. 120 (3) and s. 2, which are in identical terms. Section 114 of the Bankruptcy Ordinance of Kenya is in the following terms–

> "The court of the Colony and all the officers thereof, shall, in all matters of bankruptcy, act in aid of and be auxiliary to every British court elsewhere having jurisdiction in bankruptcy or insolvency, and an order of the court seeking aid, with a request to this court shall be deemed sufficient to enable this court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court which made the request, or this court could exercise in regard to similar matters within their respective jurisdiction, save that to enable the official receiver of the Colony to act as the agent of an officer of a reciprocating court or to enable an officer of this court to seek the aid of an official receiver of a reciprocating court in the manner provided in Part IX of this Ordinance it shall not be necessary for this court or any reciprocating court to make any order or send any request under this section."

The first difficulty which appeared to present itself was the decision *Re Osborn* (1), [1931–2] B. & C.R. 189, under s. 122 of the Bankruptcy Act, 1914, in England. This section corresponds to s. 114 of the Kenya Ordinance. In that case the court at Douglas, in the Isle of Man, invoked the assistance of the English Bankruptcy Court with reference to property of the bankrupt in England. It was held that since the land in England under Manx law did not vest in the trustee in the Isle of Man, ipso facto the High Court could not make a vesting order but might appoint a receiver with liberty to sell. It should be noted that Farwell, J., pointed out that the court had a duty to give such assistance as it could.

The situation which caused the difficulty in *Re Osborn* (1) does not arise here in view of the definition of "property" in s. 2 of the Tanganyika Ordinance, provided that that section and s. 20 and s. 54 are intra vires, and it seems to me that I have to consider this point.

I have been referred to Street "The Doctrine of Ultra Vires," Proposition 182 (at p. 425).

> "Powers of legislation are confined within the local limits of a colonial jurisdiction."

The cases referred to in connection with this proposition are mainly confined to the criminal law and the law of income tax and I do not think that they are of assistance. It is necessary to look at the fons et origo of the Bankruptcy Ordinance of Tanganyika. This is the Tanganyika (Legislative Council) Order in Council, 1926, art. XIV of which provides that

> "It shall be lawful for the Governor with the advice and consent of the council to make laws for the administration of justice, the raising of revenue, and generally for the peace, order and good government of the Territory."

It is the concluding words which are relevant. It could hardly be contended that an Ordinance providing for the administration of the estates of debtors in bankruptcy did not come within the scope of art. XIV. Equally it is plain that the provisions of the Ordinance to the effect that all property shall be divisible among the creditors is necessary for the "order and good government of the Territory." Does the next step, namely that all property wherever situate should be divisible among the creditors follow? In my opinion it is plain beyond argument that it does. If the bankruptcy court had no power over property of a bankrupt outside the local limits of its jurisdiction, a bankrupt would be able to transfer his property outside the country and deal with it at will in front of his creditors. Such a situation would stultify the administration of debtors' estates in bankruptcy. I do not think, therefore, that there can be any question of the relevant provisions of the Tanganyika Bankruptcy Ordinance being ultra vires.

This being so it seems to me that the difficulties in the way of this court coming to the aid of the High Court of Tanganyika disappear. Certainly *Re Osborn* (1) is no longer in the way. It is the duty of this court to assist if it can and the only question is as to the manner in which it should render assistance.

I do not think it is necessary or proper to make an order vesting the property of the deceased in Kenya in the official receiver. There is no provision in the Ordinance for vesting orders save under s. 56 in connection with disclaimed property. The vesting of property in the trustee in bankruptcy is automatic under s. 20 and s. 56 and s. 120 (3). I do not think that the fact that under the Tanganyika Ordinance the property in Kenya has already vested in the Tanganyika Trustee creates any difficulty. The provisions in the two Ordinances are not naturally exclusive. If they were there would be a hiatus in the event of action not being taken by one court.

The order will be that such portion of the estate of Michael Nicolaou Plataniotis, deceased, as may be situate in Kenya, be administered in bankruptcy pursuant to s. 114 of the Bankruptcy Ordinance, Cap. 30.

Order accordingly.

In person:
RH Munro (Ag. Official Receiver)

For the applicant:
The Official Receiver, Kenya

R v Chaka s/o Otenda

[1958] 1 EA 220 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	28 April 1958
Case Number:	129/1958–Case Stated
Before:	Sir Ronald Sinclair CJ and MacDuff J
Sourced by:	LawAfrica

[1] Criminal law – Unlawful possession of official stores – Reasonable account given by accused when asked how stores acquired – Whether accused required also to give explanation to court under Penal Code, s. 319 (*K*).

[2] Criminal law – Trial – Acquittal by magistrate before prosecution evidence completed – Whether prosecution entitled to call all its evidence before charge dismissed.

Editor's Summary

The respondent, who was employed at Makongeni Railway Estate, Nairobi, had been charged with unlawful possession of railway stores,–namely, twelve buttons bearing the insignia "E.A.R. & H."–contrary to s. 319 (2) of the Penal Code. At the trial before a magistrate, the housing supervisor at the estate gave evidence that he saw the respondent wearing a jacket on which were the buttons, that the respondent had no authority to wear such buttons, which were not legally sold outside the railway, and that when asked where he had obtained them, the respondent said where he had bought them. After this witness had given evidence the magistrate indicated to the prosecutor that the respondent had given a reasonable account of how he came by the property and before the close of the case for the prosecution acquitted the respondent. A case was then stated, on the application of the attorney-general, in which the opinion of the Supreme Court was sought whether the magistrate was correct, either in acquitting the respondent before the close of the evidence in support of the charge, or in refusing to allow the prosecution to call its remaining evidence.

Held –

(i) the offence created by s. 319 only arises if an accused, when brought before a court, fails to give account to the satisfaction of the court how he came by the property, and the mere possession of official stores, reasonably suspected of having been stolen or unlawfully obtained, is not itself an offence thereunder. *Christie v. Leachinsky*, [1947] 1 All E.R. 567 followed.

(ii) a person charged under s. 319 must give an account to the court how he came by the property, and it is not sufficient for him to give an account beforehand.

(iii) The magistrate was wrong in dismissing the charge at the stage he did so, and should have allowed the remaining evidence in support of the charge to be given.

Appeal allowed. Case remitted to the magistrate for hearing and determination according to law.

Case referred to:

(1) *Christie v. Leachinsky*, [1947] 1 All E.R. 567.

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court: This was an appeal by the attorney-general by way of case stated against a decision of the resident magistrate, Nairobi dismissing under s. 208 of the Criminal Procedure Code a charge brought against the respondent of being in unlawful possession of E.A.R. & H. stores contrary to s. 319 (2) of the Penal Code.

The particulars of the charge were as follows:

> "Chaka s/o Otenda at about 11.30 a.m. on Wednesday, 20th November, 1957, at Nairobi Railway Station in the Nairobi Extra Provincial District, was in possession of twelve buttons which bore the applied marks thereof as directed by His Excellency the Governor by notice in the *Gazette* namely, G.N. 664/52 dated 13th June, 1952, the insignia of the E.A.R. & H., such buttons being reasonably suspected to have been stolen or unlawfully obtained."

At the trial Mr. Summers, the housing supervisor at Makongeni Railway Estate, gave evidence that on November 20, 1957, he saw the respondent, who was employed on the Estate as a labourer, wearing a jacket on which were buttons which were put in evidence as exhibit 2. The buttons are not described in the case, but for the purpose of this appeal we have assumed that they were buttons marked "E.A.R. & H." as set out in the charge. Mr. Summers went on to say that the respondent had no authority to wear such buttons, that they were not legally sold outside the railway and that, when asked where he had obtained them, the respondent replied that he had purchased them in the Burma market.

At the close of the evidence of this witness the learned trial magistrate indicated to the Crown that the respondent had given a reasonable account of how he came by the property under s. 319 (2) of the Penal Code. The prosecutor then stated that there were witnesses from the Burma market who would give evidence that the respondent had not purchased the buttons from their shops. It is not clear from the case as to what followed, but it seems that the learned magistrate either intimated that there was no point in calling such witnesses or refused to allow the prosecution to call them. For reasons which will appear we did not think it necessary to send the case back for restatement on this point.

The questions of law submitted for the opinion of the court were:

(1) Was the learned magistrate correct in acquitting the accused under the provision of s. 208 C.P.C. before the close of the evidence in support of the charge?

(2) Was the learned magistrate after hearing the evidence of the first witness, correct in refusing to allow the prosecution to call the remainder of the evidence in support of the charge?

After hearing argument, we allowed the appeal, set aside the order of dismissal of the charge under s. 208 of the Criminal Procedure Code and remitted the case to the trial magistrate to be heard and determined according to law. We now give our reasons.

Section 319 of the Penal Code provides so far as is relevant:

> "319. (1) The Governor may by notice in the *Gazette* give directions as to the marks which may be applied in or on any stores under the control of any branch or department of, and being the property of, the Government of the Colony or the East-African Railways and Harbours Administration.
>
> "(2) Any person who is charged with conveying or having in his possession, or keeping in any building or place, whether open or enclosed, any stores so marked, which may be reasonably suspected of having been stolen or unlawfully obtained, and who shall not give an account to the satisfaction of the court how he came by the same, is guilty of a misdemeanour."

The offence created by this section is a curious one for it arises only if the individual, when brought before the court, fails at that stage to give an account to the satisfaction of the court as to how he came by the property. The mere possession of marked Government or Railway stores reasonably suspected of having been stolen or unlawfully obtained is not, of itself, an offence under the section; it is the failure of the person charged to satisfy the court as to how he came by the stores in question that constitutes the offence: see *Christie v. Leachinsky* (1), [1947] 1 All E.R. 567 at p. 569. We think that the person charged must give an account to the court of how he came by the stores and that it is not sufficient if he gives an account outside the court, for instance, to the police. If he gives no account to the court, or gives an account which is false or unreasonable or inconsistent with innocent possession, he is clearly not giving an account to the satisfaction of the court, and the court is entitled to convict.

In the present case the evidence adduced by the prosecution *prima facie* established that the respondent was in possession of marked railway stores reasonably suspected of having been stolen or unlawfully obtained. As Viscount Simon observed in *Christie v. Leachinsky* (1):

> "The suspicion that a thing has been stolen is, of course, quite different from the suspicion that the individual was a party to stealing it or has received it knowing that it was stolen."

The learned magistrate was, therefore, wrong in dismissing the charge at that stage.

As to the prosecutor's wish to adduce evidence to contradict the account previously given by the respondent as to how he came by the property, that evidence was clearly relevant and admissible and the learned magistrate should have allowed it to be given.

That disposes of the two questions of law which were submitted for the opinion of the court. The trial magistrate must now proceed to hear and determine the charge in accordance with the opinion we have given.

Appeal allowed. Case remitted to magistrate for hearing and determination according to law.

For the appellant:
AP Jack, (Deputy Public Prosecutor, Kenya)
The Attorney-General, Kenya

The respondent in person.

The Commissioner of Income Tax v Bapoo
[1958] 1 EA 223 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	10 May 1958
Case Number:	48/1957
Before:	Briggs V-P, Forbes JA and Sir Owen Corrie Ag JA
Sourced by:	LawAfrica

Appeal from: H.M. High Court of Tanganyika–Abernethy, J

[1] Income tax – Profits – Whether a single transaction in East Africa is a business and a taxable transaction – Whether profit realised on breaking up of ship or sale of hulk taxable – East African Income Tax (*Management*) *Act,* 1952, *s.* 2, *s.* 8 (1) (*a*) *and s.* 78 (5) *– U.K. Income Tax Act,* 1952.

[2] Income tax – Liability – Onus of proof – East African Income Tax (*Management*) *Act,* 1952, *s.* 78 (5).

Editor's Summary

The appellant who was made bankrupt in 1931 obtained his discharge in 1941. Whilst a bankrupt he managed for his wife a fruit business at Dar-es-Salaam which in 1937 had amongst its debtors the owner of the wreck of a ship "Tabora" and the owner of the wreck of a ship "Koenig". Both these debts were regarded as bad and with a view to recovering the sums due the appellant's wife agreed to acquire the two wrecks from their owners. When the appellant obtained his discharge he took over his wife's business and also the two wrecks and about that time began dealing in second-hand machinery. After unsuccessfully attempting to sell the wrecks the appellant with a partner began to break up the ships for sale as scrap metal. When some breaking up had been done, which showed a profit to the appellant over the original cost of the wrecks, the partnership was terminated and the appellant later sold the hulks for a considerable sum. The appellant was then assessed liable to tax not only on the profit derived from the breaking-up but also on the profit realised from the final sale of the hulks. From this assessment he appealed to the High Court which confirmed the assessment on the profit arising from the breaking-up but set aside the assessment in respect of the profit realised on the sale of the hulks. The Commissioner of Income Tax appealed from this decision.

Held –

(i) a single transaction may in East Africa be a business and a taxable transaction (*D. S. Trivedi v. The Commissioner of Income Tax* (1956),23 E.A.C.A. 317 followed).

(ii) the taking over the wrecks to liquidate bad debts had little or no bearing upon the question whether the transactions were of a capital or revenue nature, but the circumstances of the transactions established that they were an operation of business in carrying out a scheme of profit making and taxable as such.

Dicta as to whether, having regard to s. 78 (5) of the East African Income Tax (Management) Act, 1952, and *Case No*. 15, 1 E.A.T.C. 124, the onus of proving that a taxpayer is not liable to assessment, as well as the onus of proving that an assessment complained of is excessive, is on the taxpayer.

Appeal allowed.

Case referred to in judgment:

(1) *Case No*. 15, 1 E.A.T.C. 124.

(2) *D. S. Trivedi v. Commissioner of Income Tax* (1956),23 E.A.C.A. 317.

(3) *Californian Copper Syndicate Ltd. v. Harris*, 5 T.C. 159.

(4) *Edwards v. Bairstow*, [1955] 3 All E.R. 48; 36 T.C. 207.

(5) *Vickers, Son & Maxim v. Evans* (1910), 79 L.J.K.B. 954.

May 10. The following judgments were read:

Judgment

Forbes JA: This was an appeal by the Commissioner of Income Tax (hereinafter referred to as the Commissioner) from a judgment of the High Court of Tanganyika which allowed an appeal by the respondent/taxpayer against an assessment to income tax in respect of profits accruing to the respondent from the sale of two wrecked steamships, the "Tabora" and the "Koenig". The respondent's appeal to the High Court also concerned profits on the sale of a third wrecked steamship, the "Slemmestad", and the respondent's share of profits from scrap metal recovered from the "Tabora" and "Koenig" prior to their being sold, but his appeal to the High Court in respect of these items failed, and there was no cross-appeal against this part of the decision of the High Court. After hearing counsel for the respondent we allowed the appeal to this court, with costs in this court and the High Court, and ordered that the original assessment of the Commissioner in respect of the profits realised on the sale of the "Tabora" and "Koenig" be restored. I now give my reasons for the decision.

The following statement of facts is taken from the judgment of the learned judge on the appeal to the High Court:

> "In 1931 the appellant" (i.e. the present respondent) "was adjudicated a bankrupt and he did not obtain his discharge from bankruptcy until the 21st day of January, 1941. But by a general power of attorney the appellant managed to run the business and affairs of his wife, who was the proprietor of a fruit business at Dar-es-Salaam. There is no evidence whatsoever to show that she carried on business as a dealer in scrap metal.
>
> "In 1937 one Yaya Mohammed, who owned the wreck of the ship 'Tabora' was indebted to the appellant's wife in the sum of Shs. 5,000/- and one Lalji Dias Samji, the owner of the wreck of the steamship 'Koenig' owed her Shs. 2,000/-. Both these amounts were trade debts. In order to recover what were considered bad debts, the owners of those two ships offered to sell the two ships to the appellant's wife, setting off against the price to be paid the amounts they already owed her. The 'Tabora' was purchased for Shs. 8,000/-, Yaya Mohammed receiving a promissory note for the balance of Shs. 3,000/-. The 'Koenig' was purchased for Shs. 9,000/-, the seller receiving Shs. 2,000/-, in cash, and promissory notes for Shs. 5,000/-. All those promissory notes were duly paid.
>
> "After obtaining his discharge, the appellant took over what remained of his wife's business and the wrecks 'Tabora' and 'Koenig' were transferred to him. At or about the same time he started to deal in second-hand spares for motor vehicles and other machinery which he obtained from various sources and then re-sold.
>
> "In 1945 and 1946 he attempted to sell the 'Tabora' and the 'Koenig' without success. His attempt to sell the 'Tabora' in 1946 to one Russell Mackay McKnott, ended in litigation, but the suit was settled, the appellant refunded the money paid, and the 'Tabora' remained his property.
>
> "While in Europe in August, 1951, the appellant entered into negotiations to purchase the 'Slemmestad', which he acquired for £2,500. In September or October, 1951, the appellant returned to Tanganyika and entered into an agreement with one Jan Rijsdik trading under the name of the 'Flying Dutchman', whereby briefly the 'Flying Dutchman' agreed to break up the 'Tabora' and 'Koenig', sell the scrap obtained therefrom, and share the profits with the appellant. The 'Flying Dutchman' duly proceeded to

> break up those two wrecks and to sell scrap metal obtained therefrom. The appellant's share of the proceeds of the sale of this scrap amounted to Shs. 35,494/75. It appears, however, that the 'Flying Dutchman' was never able to finish breaking up these ships and the arrangements between the 'Flying Dutchman' and the appellant were terminated, the appellant being left in possession of the hulks of the 'Tabora' and the 'Koenig'. Then, in September, 1952, the appellant sold the hulks of the 'Tabora' and the 'Koenig' and the 'Slemmestad' to a concern known as Mangiorotti S.A.F.A.O., for £27,500."

In addition to the facts stated in the passage quoted, the respondent also said in evidence that, after his discharge from bankruptcy, in 1941, he "tried to sell the wrecks and sent out tenders".

Since the assessment to which the appeal related was in respect of the year of income, 1952, the relevant statute was the East African Income Tax (Management) Act, 1952 (hereinafter referred to as the Act).

On the hearing before the High Court, counsel for the Commissioner asked the court to accept, *inter alia*, the following principles of law:

> First, that there was an onus on the appellant to satisfy the court that each transaction was a capital as opposed to a revenue one.
>
> Secondly, that if the profits arose from a transaction which formed part of a general scheme of profit-making or which bears the badges of trading, it is a revenue transaction and profits therefrom are taxable, unless it involves the realisation of a capital asset.
>
> And thirdly, that the doctrine of isolated transactions, if ever allowed in the United Kingdom is no longer recognized there, and that the doctrine never applied in East Africa.

The learned judge accepted these principles, stating that they had not been challenged by the taxpayer, but that the taxpayer did argue that the purchase of the "Koenig" and the "Tabora" were not transactions which formed part of a general scheme of profit-making, or which bore the badges of trading. Before us, however, Mr. Lean for the respondent stated that the learned judge had misunderstood him to some extent as he had not expressed unqualified acceptance of the principles mentioned.

As to the first proposition, under s. 78 (5) of the Act the onus of proving that an assessment is excessive is on the taxpayer. Mr. Lean sought to draw a distinction between onus in relation to the quantum of tax and onus in relation to the liability to tax, and argued that the question whether a transaction was a capital or a revenue transaction was a question of liability to tax and not of quantum of tax, and that the onus of proving that it was a revenue transaction lay on the Commissioner. I did not regard the distinction as a valid one, and in any case considered that we were bound by the judgment of this court in *Case No.* 15 (1), 1 E.A.T.C. 124 where it was clearly held that the onus is on the taxpayer to establish that a particular transaction is of a capital and not a revenue nature if he seeks thereby to avoid liability for tax. However, in the circumstances of this case, the point was of no particular importance.

No question was raised by Mr. Lean on the second of the three propositions.

As regards the third proposition, the relevant provisions of the Act are s. 8 (1) (*a*) and the definition of "trade" in s. 2. Section 8 (1) (*a*) provides that tax shall be chargeable in respect of

> "gains or profits from any trade, business, profession or vocation, for whatever period of time such trade, business, profession, or vocation, may have been carried on or exercised."

And the definition of "trade" in s. 2 is

> " 'trade' includes every trade, manufacture, adventure or concern in the nature of trade."

This definition is identical with the definition of "trade" contained in the English Income Tax Act, 1952.

Mr. Lean argued that throughout the Act "trade, business, profession or vocation" is referred to as being "carried on"; that the Act thereby clearly contemplates some measure of continuity which could not be satisfied by a mere single transaction; and that therefore the expressions "trade" and "business" in s. 8 of the Act would not include isolated transactions.

However, we indicated that we considered that the decision of this court in *D. S. Trivedi v. Commissioner of Income Tax* (2) (1956), 23 E.A.C.A. 317, was an authority, binding upon us, for the proposition that a single transaction *may* be a business and a taxable transaction under the Act, and Mr. Lean finally accepted this view. In any event we were not dealing with a single isolated transaction in this case. Three different wrecks were purchased and re-sold by the respondent, though it is true that a substantial period of time intervened before the purchase of the third wreck was effected.

Mr. Lean then argued that on the facts the purchase of the "Tabora" and "Koenig" were capital transactions, effected merely to secure something in place of a bad debt; that the fact that the respondent intended to re-sell was of no particular significance; that it could not be said that the transactions formed part of a general scheme of profit-making or that they bore the badges of trading; that there was a clear finding of fact by the learned judge on first appeal that these were capital and not revenue transactions, and that it was not open to this court to disturb a finding of fact unless it could be established that the learned judge was wrong in law or had misdirected himself or that his finding was perverse.

I accepted that we were not entitled to disturb a finding of fact except on the grounds mentioned, but was of opinion that the learned judge had misdirected himself in this case and, in consequence of the misdirection, had reached a conclusion on the facts which could not reasonably be entertained.

The material part of the learned judge's judgment is as follows:

> "The appellant may not be a very reliable witness, but I am quite satisfied that he was telling the truth as to how and why and when he purchased the 'Tabora' and the 'Koenig'
>
>
>
> Throughout the case the respondent has, I think, assumed that a scrap metal business covers the breaking up of ships. From the evidence before the court this does not appear to be so. Breaking up of ships is a special and separate business which can only be carried out by experts. At no time did the appellant himself attempt to break up any of these ships or to obtain any scrap metal therefrom. The only time any scrap metal was obtained from any of the ships was when part of the 'Tabora' and 'Koenig' were broken up by the 'Flying Dutchman' who has not been described as a scrap metal merchant. . . .
>
> "It is quite clear that none of the wrecks produced any revenue and the only way the appellant could make any profit out of them was by breaking them up and selling the scrap obtained therefrom or selling the actual ships for more than he paid for them. But I do not consider that necessarily makes the profits on the re-sale of all these ships income.
>
> "Now the circumstances under which the 'Tabora' and 'Koenig' were purchased differ considerably from those under which the appellant purchased the 'Slemmestad'. The appellant stated in his examination

> in chief that he 'bought the "Slemmestad" because he thought it would be easier to sell all three ships at a better price than just the two'.
>
> "Although I doubt very much if the buying and selling of ships for breaking up comes within the scope of an ordinary scrap metal merchant's business, I must hold that the purchase of the 'Slemmestad' was an adventure in the nature of trade. The appellant bought the 'Slemmestad' with the avowed intention of re-selling it and for no other purpose, and he had the intention of making a profit out of it. The profit he made from the sale of the 'Slemmestad' is therefore taxable.
>
> "But the appellant did not buy the 'Tabora' and the 'Koenig' either as a dealer in scrap metal nor simply for the purpose of re-selling them. He bought these wrecks in order to recover bad trade debts arising out of his wife's fruit business, and only himself took them over later with what was left of that business when he obtained his discharge from bankruptcy. I think there can be little doubt that he hoped when he bought the ships that he might be able to sell them some day to recover this outlay, but in the circumstances I do not think that the hope that he might sell them at a price equal to or exceeding the purchase price and the fact that he received more for the ships than he gave for them makes the profits realised over the sale of those two ships income. In my opinion the purchase of the 'Tabora' and 'Koenig' was not an adventure or concern in the nature of trade and was not done in the course of trading and the profits obtained on the sale of those two ships is (sic) not therefore taxable and the decision of the Commissioner of Income Tax to levy tax on the profits realised on the sale of these two ships must be set aside."

In my opinion the passage

> "the appellant did not buy the 'Tabora' and the 'Koenig' either as a dealer in scrap metal nor simply for the purpose of re-selling them. He bought these wrecks in order to recover bad trade debts . . ."

was a serious misdirection. The learned judge seems to have regarded the fact that the wrecks were taken over as to part in payment of bad debts in some way affected the nature of the transaction. I was entirely unable to accept this view of the matter. The taking over of an asset in discharge of a debt, whether bad or otherwise, amounts to no more than the purchase of the asset, and, in my view, at least in the circumstances of this case, has little or no bearing on the question whether the acquisition of the asset constituted a capital or a revenue transaction. It should be noted that the debts in question in this case were trading debts. Also that in the case of the "Tabora" the respondent paid Shs. 3,000/- over and above the amount of the debt, which was Shs. 5,000/-, and in the case of the "Koenig" he paid Shs. 7,000/- over and above the amount of the debt, which was a mere Shs. 2,000/-. I concluded that the learned judge had to a great extent based his finding as to the nature of the transactions upon a consideration which could not properly be regarded as material. The learned judge also seems to have attached some weight to his conclusion (which I accept) that the respondent was not at the material time a dealer in scrap metal, but this also appears to me not to be material to the question whether or not the purchase of the two wrecks was an adventure in the nature of trade. It was no part of the Commissioner's case that shipbreaking and dealing in scrap metals were the same trade or business, and the fact that they are different was not material to the decision whether the respondent, who admittedly carried on the second, also carried on the first. Apart from these two matters which influenced (in my view wrongly) the decision of the learned judge, it seemed to me that the other circumstances surrounding the purchase and sale of these wrecks were such as to establish conclusively that the transactions were an adventure in the nature of trade, or,

as was said in *Californian Copper Syndicate Ltd. v. Harris* (3), 5 T.C. 159 at p. 166, "an operation of business in carrying out a scheme for profit-making". It was admitted by the respondent that the wrecks were purchased with a view to re-sale and that he "never had any idea of doing anything to the wrecks except selling them". The purchase of the wrecks in 1937 constituted two quite separate transactions. Attempts were made to sell the wrecks in 1941 and again in 1945 and 1946. A third wreck, the "Slemmestad", was bought in 1951. Part of the "Tabora" and "Koenig" were disposed of in 1951 through the medium of a ship-breaking business which the respondent engaged in with the gentleman known as the "Flying Dutchman". Sale of all three wrecks at a profit was finally effected in 1952. Finally, and perhaps most important, a wreck is, as was said of a spinning plant by Viscount Simonds in *Edwards v. Bairstow* (4) 36 T.C. 207 at p. 225,

> "an asset which, unlike stocks and shares, by itself produces no income and, unlike a picture, does not serve to adorn the drawing-room of its owner. It is a commercial asset and nothing else."

It seemed to me that it was an inescapable conclusion on these facts that the purchase of the "Tabora" and "Koenig" were adventures in the nature of trade, and that the learned judge must have reached this conclusion had he not been misled by the application of irrelevant considerations as indicated above.

Besides the cases I have mentioned, a number of other English Tax Cases were referred to by Mr. Lean during argument, but I have not thought it necessary to consider them in detail as they do not affect the basis of my decision.

Briggs V-P: I have had the advantage of reading the judgment just delivered by Forbes, J.A., and agree with it in all respects.

I wish only to add a few remarks as to the decision in Case No. 15 (1), 1 E.A.T.C. 124. It is not beyond possibility that in my judgment in that case, with which the other members of the court agreed, I may have misinterpreted the judgment of Mahon, J., at first instance. But, whether that is so or not, on the interpretation of it which the other members of the court and I adopted, it was clearly essential to our decision that the same question of onus as was raised in this case should be decided, and it clearly was decided.

I quote from p. 130 of the report.

> "It is to be observed that none of these phrases amounts to a direct finding that this was a trading operation. They merely state that the evidence to the contrary is not acceptable. The learned judge proceeds–
>
> > 'I hold, therefore, that the transaction was of a revenue and not capital nature'.
>
> "As the learned judge had stated quite clearly that this issue was one of pure fact, it appears to me that he is saying in effect,
>
> > 'As the evidence does not enable me to find as a fact that it was a capital transaction, the consequence in law is that I must support the assessment, which is on the basis of a revenue transaction'.
>
> "This seems to me to be an exactly correct approach."

This decision binds us, but I desire also to say that no argument put before us made me feel any doubt as to its correctness.

Sir Owen Corrie Ag JA: In the course of his argument in the Supreme Court Mr. Newbold on behalf of the Commissioner of Income Tax, propounded three propositions of law, the first of which was:

> "The onus is on the person assessed to satisfy the court that each transaction is a capital as opposed to a revenue one."

As Mr. Lean on behalf of the respondent taxpayer has addressed us at some length on this proposition, I feel bound to refer to it although, for the reason I shall give, it does not appear to me to be material to the decision of this appeal.

The proposition is based upon s. 78 (5) of the East African Income Tax (Management) Act, 1952, which reads–

> "(5) The onus of proving that the assessment complained of is excessive shall be on the person assessed."

Mr. Lean has argued that this sub-section applies only to the question of the quantum of tax and not to that of liability to tax. There is, in my view, considerable force in this argument. To hold that the sub-section relates to liability as distinct from quantum appears to me to be giving the sub-section the meaning that it would have had if it had read–

> "The onus of proving that he is not liable to assessment or that the assessment complained of is excessive shall be on the person assessed."

That is to say it involves reading words into the sub-section which it does not contain. That is a course which I am not prepared to take. In *Vickers Son & Maxim v. Evans* (5) reported in (1910), 79 L.J.K.B. 955, the Lord Chancellor, Lord Loreburn, said–

> "The appellants contention involves reading words into this clause. The clause does not contain them; and we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself."

The Act to which this observation referred was the Workmen's Compensation Act, 1906. It appears to me to apply with added force to a taxing Ordinance, in a case where the words required to be read into the Ordinance would increase the liability of the taxpayer.

Reference has been made to the judgment of this court in *Tax Appeal* 15 (1), reported in Vol. 1 E.A.T.C. at p. 124. In that case the main question before the learned Acting Chief Justice of Tanganyika was whether a certain transaction was a capital or a revenue transaction. Having reviewed the evidence, he held that the transaction was of a revenue and not capital nature. In his judgment he made no reference to the question of onus of proof and indeed gave no indication that in arriving at his decision that question had ever been present in his mind.

It is true that on hearing an appeal from that judgment this court did refer to the onus of proof. But in view of the wording of the judgment under appeal, that reference must, in my view, be regarded as obiter.

Owing to the fact that for other reasons we have allowed the instant appeal without finding it necessary to call upon Mr. Hooton for the appellant, I have not had the advantage of hearing him on the question of onus: and therefore I should not have made these observations but for the fact that I am fully satisfied a decision of this question is unnecessary to the determination of this appeal: for whatever may have been the extent of the onus upon the respondent, it is obvious that he was fully successful in discharging that onus to the satisfaction of the Supreme Court as regards "the Tabora" and "the Koenig".

I agree that this appeal should be allowed for the reasons stated by the learned Justice of Appeal.

Appeal allowed.

For the appellant:
JC Hooton (Deputy Legal Secretary, East Africa High Commission)

The Legal Secretary, East Africa High Commission

For the respondent:
Ivor Lean
Shapley, Barret, Allin & Co, Nairobi

Brochner v R
[1958] 1 EA 230 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	30 May 1958
Case Number:	200/1958
Before:	Sir Ronald Sinclair CJ and MacDuff J
Sourced by:	LawAfrica

[1] Criminal law – Sentence – Punishment authorized either imprisonment or fine – Whether magistrate had jurisdiction to order endorsement on driving licence as well – Whether magistrate must give reasons for ordering endorsement – Traffic Ordinance, 1953, *s.* 41 (3) (*K.*) *– Criminal Procedure Code, s.* 99 *and s.* 197 (*K.*).

Editor's Summary

The appellant was convicted of exceeding the speed limit in the Nairobi Municipality contrary to s. 41 (3) of the Traffic Ordinance, 1953, in that he drove in Fort Hall Road at 10.10 p.m. at a speed of 55 m.p.h., the maximum permitted speed being 30 m.p.h. The appellant did not appear at the hearing, but entered a plea of guilty in writing and was convicted on his plea following the procedure for minor offences under s. 197 of the Criminal Procedure Code. He was sentenced to pay a fine of Shs. 75/- or imprisonment for 28 days in default, and it was ordered that particulars of the conviction be endorsed on his driving licence. On appeal against the order for endorsement it was argued that s. 197 (2) (*a*) restricts the offences triable under that section to those in respect of which the maximum punishment is no more than six months imprisonment or a fine of one thousand shillings, that the additional punishment of endorsement took the offence outside the scope of the section and that the magistrate had no jurisdiction to try the offence by the procedure set out in s. 197; alternatively that if he had jurisdiction to try the offence under that section, he had no jurisdiction to impose a penalty other than imprisonment or a fine because of sub-s. (4) of s. 197, which provides that the maximum sentence of imprisonment is six months and the maximum fine eight hundred shillings for any conviction under the section. It was also argued that the magistrate gave no reason for ordering endorsement, and that in the absence of any reason, it was impossible for the appellate court to decide whether he exercised his discretion judicially and the case should be remitted.

Held –

(i) s. 197, sub-s. (4) of the Criminal Procedure Code does not debar the court from imposing other

punishments to which the offender may be liable.

(ii) where an accused person elects under s. 99 (1) of the Criminal Procedure Code not to attend court in person or by an advocate but to plead guilty in writing, he has no right to be heard at a later stage in mitigation; there is no reason why he should not bring any mitigating circumstances to the notice of the trial court by letter.

(iii) under s. 73 of the Traffic Ordinance, 1953, the trial magistrate is required to exercise a judicial discretion as to whether the circumstances of the case before him justify endorsement, but he need not necessarily give his reasons, as these may be apparent from the circumstances of the case; it would be otherwise where there is no apparent reason when, of course, he should give his reasons for ordering endorsement.

(iv) the magistrate in this case probably had judicial knowledge of the fact that the offence occurred in a built-up area and of the type of road on which the speeding occurred, and in the absence of any mitigating circumstances it was apparent on the face of the charge that endorsement was justified.

Appeal against endorsement dismissed.

Case referred to in judgment:

(1) *R. v. Samuel Koina Gitebi & Others* (1949), 16 E.A.C.A. 95.

(2) *Purshottam Singh v. R.*, [1958] E.A. 324 (K.).

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court: The appellant was convicted of exceeding the speed limit in the Nairobi Municipality contrary to s. 41 (3) of the Traffic Ordinance, 1953. He was sentenced to pay a fine of Shs. 75/- or imprisonment for 28 days in default of payment, and it was ordered that particulars of the conviction be endorsed on his driving licence. He now appeals against the order that his driving licence be endorsed. S. 74 of the Traffic Ordinance provides that an appeal shall lie against such an order in the same manner as against a conviction.

At the trial the learned magistrate followed the procedure for the trial of minor offences under s. 197 of the Criminal Procedure Code, using the form prescribed under that section. The appellant did not appear at the hearing, but entered a plea of guilty in writing and was convicted on his plea.

The first point taken by Mr. Bechgaard for the appellant was that endorsement of a conviction on a licence is a punishment. It was conceded by Mr. Davies for the Crown that this was so and with that submission we agree.

The next point was that since s. 197 (2) (*a*) restricts the offences triable under the provisions of that section to those in respect of which the maximum punishment is no more than six months imprisonment or a fine of one thousand shillings, the additional punishment of endorsement takes this offence outside the scope of the section and in consequence the magistrate had no jurisdiction to try this offence by the procedure set out in the section. The offences which are triable under the provisions of section 197 are specified in sub-section (2) of that section, para. (*a*) of which reads:

> "Offences punishable with imprisonment for a term not exceeding six months or a fine not exceeding one thousand shillings."

The offence of exceeding the speed limit under s. 41 (3) of the Traffic Ordinance is punishable under s. 42 by a fine not exceeding Shs. 1000/-. But s. 73 of the Traffic Ordinance empowers a court before which a person is convicted of "any offence in connection with the driving of a motor vehicle" to order that particulars of the conviction be endorsed on the offender's driving licence. In *R. v. Samuel Koina Gitebi and Others* (1) (1949), 16 E.A.C.A. 95, however, it was held (we quote from the headnote):

> "(2) That the proper method of approach in considering . . . s. 197 (2) (*a*) of the Criminal Procedure Code is to say that throughout the Code the Legislature, recognizing that offences are generally punishable by imprisonment or fine, accepted as a kind of fair and convenient measure of the seriousness of any offence the maximum period of imprisonment and the maximum amount of the fine which the Legislature had considered adequate to the particular offence, ignoring any further or other punishments which conviction of such offence might involve, . . ."

In determining therefore whether an offence is within the description specified in s. 197 (2) (*a*) of the Criminal Procedure Code reference should be to the maximum penalty by way of imprisonment or fine only provided in respect of that offence and the further punishments of disqualification, suspension or endorsement which may be imposed by virtue of s. 73 of the Traffic Ordinance in respect of that offence

may therefore be ignored.

Mr. Bechgaard's main contention was that although the magistrate had jurisdiction to try the offence under the provisions of s. 197 of the Criminal Procedure Code he had no jurisdiction to impose a penalty other than one of

imprisonment or a fine. This contention he founded on sub-s. (4) of s. 197 of the Criminal Procedure Code which reads:

> "No sentence of imprisonment for a term exceeding six months and no fine of an amount exceeding eight hundred shillings shall be passed or inflicted in the case of any conviction under this section."

In our view that sub-section means no more than it says, namely, that if a sentence of imprisonment is passed it must not exceed six months and if a fine is imposed it must not exceed eight hundred shillings; it does not debar the court from imposing other punishments to which the offender may be liable. That this was the intention of the Legislature becomes even more clear when paras. (*c*), (*d*), (*e*) and (*f*) of sub-s. (2) of s. 197 are considered. A conviction of any of the offences referred to in those paragraphs would usually result in an order for the payment of compensation. It cannot be supposed that the intention of the Legislature by its wording of sub-s. (4) was to deprive a magistrate of jurisdiction to make any such order.

The next point raised by Mr. Bechgaard was that the trial magistrate gave no reasons for ordering endorsement and that, in the absence of any reason, it is impossible for an appellate court to decide whether he exercised his discretion judicially. He submitted that for those reasons this case should be remitted to the trial magistrate for evidence as to the surrounding circumstances to be taken in order that this court could decide whether the trial magistrate had exercised his discretion to order endorsement of the conviction on the appellant's licence on the proper principles.

In the case of offences under the Traffic Ordinance when written pleas of guilty are entered by an accused person there are two sections of two ordinances to be read together. Section 113 of the Traffic Ordinance empowers a police officer to serve a notice, in lieu of a summons in respect of any offence under the Ordinance which is punishable only by a fine or by a fine and imprisonment for a period not exceeding six months. The notice requires the person accused to attend court in answer to the charges stated thereon or to appear by advocate or to enter a written plea of guilty. The trial magistrate obtains his jurisdiction to deal with a charge to which a written plea of guilty has been entered by virtue of the provisions of s. 99 (1) of the Criminal Procedure Code which provides:

> "99. (1) Whenever a magistrate issues a summons in respect of any offence other than fellony, he may if he sees reason to do so, and shall when the offence with which the accused is charged is punishable only by fine or only by fine and/or imprisonment not exceeding three months, dispense with the personal attendance of the accused, provided that he pleads guilty in writing or appears by an advocate."

Sub-section (2) of that section empowers the magistrate at any subsequent stage of the proceedings to direct the personal attendance of the accused and to enforce such attendance in the manner prescribed. Our view is that where an accused elects not to attend court in person or by an advocate but to plead guilty in writing, he has no right to be heard at a later stage in mitigation. On the other hand, as this court observed in *Purshottam Singh v. R.*, (2) [1958] E.A. 324 (K.), there is no reason why the accused should not bring any mitigating circumstances to the notice of the trial court in a letter. When exercising his discretion whether to order endorsement, the magistrate should, of course, take the circumstances of the case into account. In the case to which we have referred where an accused does bring mitigating facts to the notice of the court by means of a letter, then, in the event of any such facts being material and the prosecution not accepting their truth the magistrate may, if he considers it necessary, require the personal attendance of the accused to give him the opportunity of establishing such facts in mitigation.

Endorsement of a conviction for a driving offence should not be automatic. There is a difference between a mandatory endorsement such as that under s. 45 (1) of the Traffic Ordinance, a mandatory endorsement unless there are special reasons why endorsement should not be ordered such as those provided for in respect of careless driving and exceeding the speed limit in built up areas under the Road Traffic Act 1956 and the discretionary endorsement provided for under s. 73 of the Traffic Ordinance. Under s. 73 the trial magistrate is required to exercise a judicial discretion as to whether the circumstances of the case before him justify endorsement.

We do not think however that a magistrate must necessarily give his reasons for ordering endorsement. It may be apparent from the circumstances of the case that endorsement is justified. It would be otherwise when there is no such apparent reason. In such a case we think a magistrate should give his reasons, briefly, for ordering endorsement. These will, in such cases, obviously be required by this court in considering the merits of an appeal against the order of endorsement.

In the present case the charge discloses that the appellant drove in Fort Hall Road, at 10.10 p.m., at a speed of 55 miles per hour, the permitted maximum speed being 30 miles per hour. The magistrate, in his position as a traffic court magistrate, probably had judicial knowledge of the fact that the offence occurred in a built up area and of the type of road on which the speeding occurred. In the absence of any mitigating circumstances therefore this was clearly a case where it was apparent on the face of the charge that endorsement was justified. The appellant failed to advance any mitigating circumstances by appearing in person or by an advocate or by addressing a letter thereon to the court and he cannot be permitted to do so now. We see no reason why this case should be remitted to the trial magistrate as Mr. Bechgaard suggests. The appeal against the endorsement on the appellant’s licence is dismissed.

We can appreciate that there is, and perhaps under the present provisions of the Traffic Ordinance always will be, some difference in the exercise of a discretion to order endorsement by different magistrates, by magistrates sitting in different areas, and in respect of different offences, which may appear to the motoring public to result in an apparent injustice in an individual case. To obtain a greater degree of uniformity the matter could possibly be better dealt with by the Legislature in following the system provided for in the Road Traffic Act, 1956, of making endorsement compulsory in respect of certain traffic offences, placing the onus on the offender to show special reasons why his licence should not be endorsed with the conviction.

Appeal against endorsement dismissed.

For the appellant:
K Bechgaard
K Bechgaard, Nairobi

For the respondent:
DS Davies (Crown Counsel, Kenya)
The Attorney-General, Kenya

Leunzi s/o Ngenje and Two others v R

[1958] 1 EA 234 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	13 May 1958
Case Number:	39/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika–Crawshaw, J

[1] Evidence – Extra-judicial statement by accused before magistrate – Questions put by magistrate to accused later when recording statement – Whether voluntary character of statement destroyed so as to make entire statement inadmissible – Indian Evidence Act, 1872, *s.* 24, *s.* 25 *and s.* 26.

Editor's Summary

The appellants were convicted of murder by the High Court of Tanganyika and sentenced to death. At the appeal the only issue was the question of admissibility of certain extra-judicial statements made by the appellants to a magistrate. The procedure adopted by the magistrate when recording the statements was to issue the proper warning, listen to the statement then made by the appellant without recording it, and then ask the appellant to repeat the statement slowly whilst he recorded it. In the course of actually recording the statements, the magistrate in the case of first and third appellants, questioned them in the later stages of recording their statements in order to elicit any relevant assertion made previously which had been omitted on repetition of the statement. The trial judge considered the questioning improper and such as to throw doubt upon the voluntary nature of that part of their statements given as a result of and subsequent to the asking of the questions. He was, however, satisfied that the earlier parts of the statements were entirely voluntary and accordingly allowed these to be given in evidence and rejected the remainder. The question argued on appeal was whether, if any part of the statement of an accused person was not made voluntarily, the whole statement lost its voluntary character and became inadmissible.

Held –

(i) in the circumstances of these cases, there was no fundamental objection to the admission in evidence of part of a statement and the exclusion of part, if the parts are severable without prejudice to the accused, but each case must depend on its own particular facts.

R. v. Nyungindo s/o Luhende (1948), 15 E.A.C.A. 132 considered and explained.

(ii) in the instant case there was no difficulty in separating the different portions of the statements and the trial judge was correct in admitting the voluntary portions and excluding the rest.

Appeal dismissed.

Case referred to in judgment:

(1) *R. v. Fabiano Kinene s/o Mukye & Others* (1941), 8 E.A.C.A. 96.

(2) *R. v. Nyungindo s/o Luhende* (1948), 15 E.A.C.A. 132.

(3) *Akutendasana d/o Hamidi v. R.* (1956), 23 E.A.C.A. 487.

Judgment

Forbes JA: read the following judgment of the court: The three appellants were convicted by the High Court of Tanganyika of murder, and were sentenced to death. We dismissed the appeals and now give our reasons.

The only question of importance raised on the appeal concerned the admissibility of certain extra-judicial statements made by the appellants to a magistrate. The procedure for taking the statement adopted by the magistrate in the case of each appellant was to issue the proper warning, listen to the statement then made by the appellant without recording it, and then ask the appellant to repeat the statement slowly whilst he recorded it. This practice was characterised as undesirable by the learned trial judge for the reason that

> "the repetition might not be identical with what was first said and lead . . . to questioning."

We respectfully agree, and in fact in this case the procedure resulted in questioning by the magistrate in the case of the first and the third appellants. The questioning took place at a late stage, and was apparently directed to eliciting any relevant assertion made in the first statement which had been omitted from the repetition of the statement. It is settled that the asking of an occasional question by the magistrate during the recording of the statement of an accused person in order to keep the narrative clear will not necessarily affect the voluntary character of the statement and be fatal to its admissibility in evidence at the trial (*R. v. Fabiano Kinene s/o Mukye and Others* (1) (1941), 8 E.A.C.A. 96), but that the asking of leading or incriminating questions may well destroy the voluntary nature of the statement and so render it inadmissible (*R. v. Nyungindo s/o Luhende* (2) (1948), 15 E.A.C.A. 132). In the instant case the learned trial judge considered that the questioning in the case of the first and third appellants was improper and such as to throw doubt upon the voluntary nature of that part of their statements given as a result of and subsequent to the asking of the questions. He was satisfied, however, that the earlier parts of the statements (which, in the case of the first accused, at least, amounted to a confession to the murder charged) were entirely voluntary.

In view of this, and after considering the authorities, the learned judge allowed in as evidence that part of the first and third appellants' statements which was made prior to questioning.

The point at issue was whether, if any part of a statement of an accused person has not been made voluntarily, the whole statement loses its voluntary character and is inadmissible in evidence.

A similar point arose before this court in *Akutendasana d/o Hamidi v. R.* (3) (1956), 23 E.A.C.A. 487. Although the court held that it was unnecessary to decide the point, it made the following observations (at p. 491):

> "The remaining ground of appeal as regards this issue is that there was a failure to comply with the necessary procedure (as set out for guidance in the Handbook For Magistrates) when the district commissioner interrogated the appellant, and that the learned trial judge was accordingly wrong in admitting as voluntary even that part of the statement which preceded the interrogation. This court dealt with the general principle in *R. v. Fabiano Kinene s/o Mukye and Others* (1941), 8 E.A.C.A. 96, at p. 99 in these words: '. . . We would stress the desirability and indeed the necessity of the utmost care being used in taking these confessions to ensure . . . that the accused should not be asked leading questions or cross-examined on what he says. The statement is supposed to be one voluntarily made in his own words by the accused person after he has been charged and cautioned. If there is any suspicion that any element of coercion or persuasion or inducement has been present at its making it may render the confession inadmissible.'
>
> "We re-affirm those observations in toto. But the particular point which arose in the instant case did not arise in *R. v. Fabiano Kinene*, namely as to the consequence of a supplementary and vital question put to the accused after he has voluntarily said all that he had intended to say.

> On account of our views on the points raised under the Indian Evidence Act it is now unnecessary to decide this further ground of appeal. Had the matter been res integra it would, we think, have been forcibly arguable that the earlier part of the statement, which was voluntarily made, should be regarded as unaffected by the subsequent involuntary admissions, and that the learned judge would therefore have been right in admitting the former, apart from the effect of s. 25 and s. 26 of the Indian Evidence Act. But we are at present bound by the decision of this court in *R. v. Nyungindo* (1948), 15 E.A.C.A. 132, where on exactly similar facts it was held 'that the prosecution failed to discharge the onus which lay upon it of proving that the extra-judicial statement was, in its entirety, a voluntary one and that it should therefore have been rejected', since the magistrate's proper warning given before the commencement of the statement was nullified by the later questioning which 'completely destroyed the voluntary nature of the statement', that is to say of the statement as a whole."

In view of the fact that the court expressly stated that it was unnecessary to decide the point, these observations are obiter, though we hasten to add that we also are in entire agreement with the observations made by the court in *R. v. Fabiano Kinene s/o Mukye and Others* (1). In the instant case the learned trial judge considered both *Akutendasana's* case (3) and *Nyungindo's* case (2) and sought to distinguish *Nyungindo's* case (2) from the instant one. He dealt with the matter as follows:

> "In *Nyungindo* the first part of the statement was not incriminating, but then the magistrate by questioning obtained most inculpatory replies. The court observed:
>
> > 'In the present case the magistrate gave the appellant the proper warning before commencing to record the statement but we find that the questioning which occurred later nullified this and completely destroyed the voluntary nature of the statement.
> >
> > 'We consider that the prosecution failed to discharge the onus which lay upon it of proving that the extra-judicial statement in this case was, in its entirety, a voluntary one and that it should therefore have been rejected.'
>
> It is to be noted that the court used the words 'statement in this case.' Although the passages quoted can be read as being general to all cases, it is difficult to believe that the court intended to lay down so restrictive a rule that questioning in all instances, however innocuous it might be, nullifies the whole statement. The question in *Fabiano's* case was not held to do so. It seems to me that the passages quoted were directed particularly to the circumstances of the case then under consideration. In the headnote it is said, '. . . incriminating questions are highly improper', and reference is made to r. 7 of the judge's rules.
>
> "In the *Akutendasana* case the subsequent answers to questions were, as in the *Nyungindo* case, more incriminating than the earlier part of the statement. It was not there necessary for the court to decide whether any part of the statement could properly have been admitted, but it pointed out that the circumstances were similar to the *Nyungindo* case by which it was 'at present' bound. The circumstances of the *Akutendasana* case, by virtue of being similar to the *Nyungindo* case, were dissimilar to the instant case, where, as I have said, the incriminating part of the statement was in the first part which, I think there can be no doubt, was voluntary."

The material facts relating to the taking of the statement in *Nyungindo's* case (2) as set out in the judgment are as follows:

> "an examination of the appellant's extra-judicial statement reveals that, after it had been taken down by the magistrate at Maswa, the latter put several questions to the appellant and that these questions elicited from the appellant replies of a highly incriminating character.
>
>
>
> "We have no doubt that, had the judge's attention been drawn to this matter, he could not have expressed himself in his judgment as being satisfied that the whole of the statement was made voluntarily.
>
> "At the most, the first part of the statement amounted to an admission that the appellant, with others, formed a common intention to entice the deceased to an empty hut either for the purpose of taxing him with having committed misconduct with Kisusi's wife, or, perhaps, for the purpose of giving the deceased a beating. In this part of his statement the appellant said that his role was to keep watch and give warning if anyone approached and he said nothing from which it could be inferred that the probable consequence of the plan was that the deceased would meet his death.
>
> "By his questions to the appellant the magistrate however succeeded in eliciting from him that he knew Kisusi's intention was to kill the deceased."

As there was no evidence, apart from the statement, on which Nyungindo could safely be convicted, it is clear that in the circumstances of that case the earlier part of the statement was of no importance and it made no difference to the result whether that part was admitted or not. The question whether or not the earlier part of the statement should be admitted without the remainder was not, therefore, considered, and we think that the expressions used in the judgment must be read in this context. For instance, when it is said that

> "the magistrate gave the appellant the proper warning before commencing to record the statement but we find that the questioning which occurred later nullified this and completely destroyed the voluntary nature of the statement",

we think that the court must have had in mind the incriminating portion of the statement which came after the questioning. Similarly, where, in the last paragraph of the judgment, it is said

> "We consider that the prosecution failed to discharge the onus which lay upon it of proving that the extra-judicial statement in this case was, in its entirety, a voluntary one"

we consider that the court had in mind the fact that though the earlier and innocuous part of the statement may have been shown to be voluntary, the prosecution had failed to show that the latter and incriminating portion was also voluntary. This view, we think, derives some support from the phrasing of the paragraph already quoted above:

> "We have no doubt that, had the judge's attention been drawn to this matter, he could not have expressed himself in his judgment as being satisfied that the whole of the statement was made voluntarily."

We think therefore that the court's preoccupation in *Nyungindo's* case (2) was with the incriminating part of the statement, and that it did not have to consider and did not consider whether the earlier part of the statement could be admitted notwithstanding the exclusion of the later part, since the matter was of no moment. It is true that the dicta in *Nyungindo's* case (2) could be read in a general sense as a decision that the whole of a statement should be excluded, and that the court in *Akutendasana's* case (3) apparently so read it. For the reasons indicated, however, we do not think that the decision is to be so widely construed, and we therefore agree with the view of the learned trial

judge that *Nyungindo's* case (2) is not to be regarded as authority for the proposition that the earlier part of a statement, though voluntarily made, is necessarily affected by subsequent involuntary admissions and thereby rendered inadmissible in evidence. We are of opinion that we are entitled to consider the matter as res integra.

Apart from the cases mentioned, no cases were cited to us either for or against the proposition. However, in the circumstances of these cases we see no fundamental objection to the admission in evidence of part of a statement and the exclusion of part, if the parts are severable without prejudice to the accused. It is true that as a general principle the whole of a confession or admission should be looked at, since the later part may qualify or explain the former. (Phipson on Evidence (9th Edn.) p. 271). The position, however, both in the instant case and in the *Nyungindo* (2) and *Akutendasana* (3) cases, is that a complete voluntary statement was made, and thereafter further information prejudicial to the accused was extracted by means of improper questions. In such circumstances we can see no reason why the parts should not be severable. It would be fair to regard the part of the statement properly obtained as being in itself a complete statement. It may be that in a particular case the earlier and later parts of the statement are so interconnected that it is difficult to separate the two, or correctly to interpret one part without the other and in such case, no doubt, the whole statement should be excluded. Each case must, however, depend on its own particular facts. In the instant case we saw no difficulty in separating the different portions of the statements, and consider that the learned trial judge was correct in admitting the voluntary portions and excluding the involuntary portions of the statements.

No other point of importance arose on the appeal, and we considered that the convictions, which, apart from the statements referred to, were based on clear and unequivocal confessions made on oath by each of the appellants at the preliminary inquiry, must be affirmed.

Appeal dismissed.

The appellants did not appear and were not represented.

For the respondent:
JG Samuels (Crown Counsel, Tanganyika)
The Attorney-General, Tanganyika

The Kiriri Cotton Company Ltd v Ranchhoddas Keshavji Dewani
[1958] 1 EA 239 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	18 April 1958
Case Number:	85/1957
Before:	Sir Kenneth O'Connor P, Forbes JA and Keatinge J
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda–Lyon, J

[1] Rent restriction – Premium – Recovery – Whether premium paid for lease illegal and recoverable – Rent Restriction Ordinance (*Cap.* 115), *s.* 2 *and s.* 3 (2) (*U.*).

[2] Judgment – Judicial decision as authority – Stare decisis – Decisions given per incuriam.

Editor's Summary

The respondent sued for the recovery of a premium of Shs. 10,000/- paid by him to the appellant company for the grant of a sub-lease of a residential flat for a term of seven years and one day. The respondent claimed that the payment of the premium was illegal, having regard to the provisions of s. 2 and the proviso to s. 3, sub-s. (2) of the Rent Restriction Ordinance, and, on the ground that he was not in pari delicto with the appellant company, that he was entitled to recover. The payment was said to be illegal because though the proviso to s. 3, sub-s. (2) provided that the charging of a premium on the grant of a lease for a term exceeding seven years was not unlawful, this proviso applied to "premises" which, by s. 3 was defined to include business premises, but not a residential flat. The appellant company contended that the payment of the premium was legal, that the respondent was in pari delicto with the appellant company, and pleaded estoppel delay or acquiescence. The trial judge found that the payment was illegal, that there was no estoppel delay or acquiescence, that since the respondent had met difficulty in obtaining housing accommodation, he and the appellant company were not in pari delicto and he held that the respondent was a member of a class for whose benefit rent restriction legislation had been passed and that he could, therefore, recover money illegally paid to his landlord or prospective landlord, and gave judgment accordingly for the respondent. On appeal by the appellants company it was not contended that the judge had erred in his findings, but it was argued that the trial judge should have followed the authority of a decision of the Court of Appeal and that likewise, the Appellate Court, on the principle of stare decisis, was also bound by the same decision.

Held –

(i) whilst the principle of stare decisis is followed by the Court of Appeal, the court is not bound to follow a decision of its own if that decision was given per incuriam. Dictum of Lord Greene, M.R., in *Young v. Bristol Aeroplane Co. Ltd*., [1944] 2 All E.R. 293 at p. 300 applied. *R. v. Norman Godinho* (1950), 17 E.A.C.A. 132 criticized.

(ii) the parties did not intend to enter upon any illegal transaction and payment of the premium was illegal only because the flat did not come within the definition of "premises".

(iii) normally the court will not assist a party to recover money, if the cause of action involves reliance on the commission by that party of an illegal act, unless the transaction is made illegal by statute with the object of protecting a particular class of persons, of whom the party is one. *Browning v. Morris* (1778), 2 Cowp. 790 and *Kearley v. Thomson* (1890), 24 Q.B.D. 742 applied.

(iv) the Rent Restriction Ordinance was passed for the protection of tenants, the respondent was a member of the protected class, and since the respondent was at a disadvantage, the parties were not in pari delicto and the respondent was entitled to recover his premium.

Appeal dismissed.

Case referred to in judgment:

(1) *R. v. Norman Godinho* (1950), 17 E.A.C.A. 132.

(2) *Jamnadas Salabhai v. Haribhai Mangalbhai Patel*, Uganda High Court Civil Appeal No. 20 of 1949 (unreported).

(3) *Joseph Kabui v. R.*, (1954), 21 E.A.C.A. 260.

(4) *Young v. Bristol Aeroplane Co. Ltd.*, [1944] 2 All E.R. 293 (C.A.); [1946] 1 All E.R. 98; [1946] A.C. 163 (H.L.).

(5) *Rcbins v. National Trust Co. Ltd.*, [1927] A.C. 515.

(6) *Trimble v. Hill* (1879), 5 App. Cas. 342.

(7) *Nadarajan Chettiar v. Walauwa Mahatma*, [1950] A.C. 481.

(8) *Morelle Ltd. v. Wakeling*, [1955] 1 All E.R. 708.

(9) *Langton v. Hughes* (1813), 1 M. & S. 593; 105 E.R. 222.

(10) *Browning v. Morris* (1788), 2 Cowp. 790; 98 E.R. 1364.

(11) *Kearley v. Thomson* (1890), 24 Q.B.D. 742.

(12) *Gray v. Southouse*, [1949] 2 All E.R. 1019.

(13) *Williams v. Glasbrook Bros. Ltd.*, [1947] 2 All E.R. 884.

(14) *Commissioner of Stamps for the Straits Settlements v. Oei Tjong Swan*, [1933] A.C. 378.

(15) *Scott v. Brown*, [1892] 2 Q.B. 724.

(16) *Barclay v. Pearson*, [1893] 2 Ch. 154.

(17) *Cutler v. Wandsworth Stadium Ltd.*, [1949] 1 All E.R. 544; [1949] A.C. 398.

(18) *Green v. Portsmouth Stadium Ltd.*, [1953] 2 All E.R. 102.

(19) *Williams v. Hedley* (1807), 8 East 378; 103 E.R. 388.

(20) *Atkinson v. Denby*, 6 H. & N. 778; 158 E.R. 321.

(21) *Pasmore v. Oswaldtwistle Urban District Council*, [1898] A.C. 387.

(22) *Cowley v. Newmarket Local Board*, [1892] A.C. 345.

(23) *Butler* (*or Black*) *v. Fife Coal Co. Ltd.*, [1912] A.C. 149.

April 18. The following judgments were read by direction of the court.

Judgment

Sir Kenneth O'Connor P: This was a claim by a tenant to recover from a landlord a sum of Shs. 10,000/- illegally paid by the tenant to the landlord by way of premium for the grant of a sub-lease of a

residential flat in Kampala. Negotiations leading up to the letting took place in May, 1953. The respondent (plaintiff) deposed that he came to Kampala in March, 1953: he lived with a brother for one and a half months: he took a flat but had to pay key money: he had been searching for some time and got a flat at Kololo; but, after two or three days, had to leave as he had trouble with a co-tenant. Then, after having difficulty, he got in touch with one V.C. Patel (who was apparently the representative of the appellant company). A premium of Shs. 10,000/- for the letting of the flat was agreed to be paid by the respondent. The appellant testified that he raised the Shs. 10,000/- by borrowing from a company (the Kampala Flour Mills) of which his brother was a Director. The respondent's evidence was not challenged at the trial. The learned trial judge stressed the fact that the respondent was having difficulty in obtaining accommodation and had found it necessary to pay key money before. The learned judge found as a fact that during the negotiations for the flat the respondent was at a disadvantage vis-à-vis the appellant.

On September 17, 1953, a sub-lease was executed. This was expressed to be made between the appellant company (therein called the sub-lessor) as registered proprietor of the leasehold land therein mentioned, and the respondent.

This document witnessed that in consideration of the sum of Shs. 10,000/- paid by the respondent by way of premium (the receipt whereof was acknowledged) and of the rent and sub-lessee's covenants therein reserved and contained the appellant thereby sub-leased to the respondent all that part of premises . . . known as flat No. 1 . . . to hold to the respondent for a term of seven years and one day from 31st May, 1953, at a clear monthly rental of Shs. 300/- payable in advance It will be observed that the sub-lease was expressed to be made in consideration of the sum of Shs. 10,000/- paid by the respondent by way of premium, as well as of a monthly rent and sub-lessee's covenants; and that the term of the sub-lease was seven years and one day. Clearly, the sub-lease was drawn by a lawyer and, as the learned trial judge has found, the intention in making the term seven years and one day was to bring the document within the second proviso to s. 3 (2) of the Rent Restriction Ordinance (Cap. 115 of the Laws of Uganda). That sub-section reads as follows:

> "(2) Any person whether the owner of the property or not who in consideration of the letting or sub-letting of a dwelling-house or premises to a person asks for, solicits or receives any sum of money other than rent or any thing of value whether such asking, soliciting or receiving is made before or after the grant of a tenancy shall be guilty of an offence and liable to a fine not exceeding Shs. 10,000/- or imprisonment for a period not exceeding six months or to both such fine and imprisonment.
>
> "Provided that a person acting bona fide as an agent for either party to an intended tenancy agreement shall be entitled to a reasonable commission for his services:
>
> "And provided further that nothing in this section shall be deemed to make unlawful the charging of a purchase price or premium on the sale, grant, assignment or renewal of a long lease of premises where the term or unexpired term is seven years or more."

The second proviso was deleted by the Rent Restriction (Amendment) Ordinance, 1954, which added to s. 3 a new sub-s. (2A). This provided that any person who stipulated for more than six months' rent to be paid in advance would be guilty of an offence. This amending Ordinance also added to s. 3 a new sub-s. (4) reading as follows:

> "(4) Notwithstanding any rule of law or of practice to the contrary, in any prosecution for an offence under this section no person shall be deemed to be an accomplice or to be unworthy of credit, neither shall the uncorroborated evidence of any person be held to be insufficient to support a conviction, merely by reason of the fact that such person, whether before or after the coming into force of the Rent Restriction (Amendment) Ordinance, 1954, paid, gave or offered, or attempted to pay or give, any such fine, premium, rent in advance or other like sum, or pecuniary consideration, as aforesaid to the person charged or to any other person."

When the sub-lease was executed, the law stood as in the Rent Restriction Ordinance unamended by the 1954 Ordinance, that is to say, the second proviso to sub-s. (2) of s. 3 was still in force. But that proviso applied to a lease of "premises". "Premises" is defined in s. 2 of the Rent Restriction Ordinance to include business premises, but does not include a residential flat which was the type of property sub-let in the present case. Accordingly, it was alleged by the respondent that, notwithstanding that the term set out in the sub-lease was more than seven years, the payment of the premium was illegal.

The respondent in para. 6 of his plaint pleaded as follows:

> "By virtue of the provisions of sub-s. (2) of s. 3 of the Rent Restriction Ordinance, the receipt of the said sum of Shs. 10,000/- by the defendant from the plaintiff or on behalf of the plaintiff from the Kampala Flour Mills was illegal, but the plaintiff is entitled to recover the same since he (the Plaintiff) was not in pari delicto with the defendant."

Accordingly, the respondent claimed the said Shs. 10,000/- as money received by the appellant for his use.

The appellant company in its defence pleaded that the plaint disclosed no cause of action and was not maintainable in law: alternatively, that the payment of the premium was legal: it denied that the plaintiff was not in pari delicto with the defendant company and set up estoppel, delay, acquiescence and laches.

The learned trial judge found that the payment of the premium was illegal. This conclusion is accepted by both parties to the appeal. He held that there was no estoppel, delay, acquiescence or laches, and that finding is not appealed against. He also held that the respondent was "oppressed" in that he had encountered difficulty in obtaining housing accommodation, and, therefore, that he and the appellant were not in pari delicto. He further held that the respondent was a member of a class, namely tenants, for whose benefit the Rent Restriction legislation had been passed, and that he could, therefore, recover money illegally paid to his landlord or prospective landlord. In reaching this conclusion, the learned judge, for the reasons he gave, declined to follow the judgment of this court in *R. v. Norman Godinho* (1) (1950), 17 E.A.C.A. 132, which is referred to below. The learned judge accordingly gave judgment for the respondent for the Shs. 10,000/- claimed, with costs. Against this decision the appellant appeals to this court.

The first point for decision is whether this court is bound to follow the decision in the abovementioned appeal, *R. v. Norman Godinho* (1). That was a criminal appeal. Godinho had been convicted on four counts of obtaining key-money contrary to sub-s. (2) of s. 3 of the Uganda Rent Restriction Ordinance, 1949, which was identical with s. 3 (2) of the Rent Restriction Ordinance (Cap. 115) set out above. The first count related to a lease of premises for a term of three years. Godinho was sentenced to imprisonment and large fines, and it was ordered that part of the fines should be paid to the complainants on the various counts. He appealed against his conviction on the first count on a ground not material to this case. His appeal against conviction on that count failed. His convictions on the other three counts were quashed because the term of the relevant lease was equivalent to seven years and Godinho, therefore, came within the second proviso to s. 3 (2) of the Rent Restriction Ordinance, 1949. It was also held that the order for payment of part of the fines as compensation to the complainant on the first count was illegal and that s. 175 (1) of the Uganda Criminal Procedure Code had been wrongly applied by the magistrate. The part of the judgment of this court dealing with this point is material to the present appeal and is at p. 134. It reads:

> "This is a second appeal and we are no way concerned with the question as to whether the sentence imposed on the appellant in respect of count one is too severe. We are, however, concerned with the legality of the magistrate's order. In this respect we feel bound to say that the judgment of the learned judge in the court below is open to criticism. The learned magistrate when imposing a fine of Shs. 10,000/- in addition to imprisonment ordered that from the fine, if paid, the sum of Shs. 7,500/- should be paid to the complainant, Mr. Fafek. The magistrate, although he does not say so, in making this order must have purported to act under s. 175 (1) of the Uganda Criminal Procedure Code which is as follows:

> 'Wherever any court imposes a fine or confirms on appeal, revision or otherwise a sentence of fine . . . the court may when passing judgment, order the whole or any part of the fine recovered to be applied:
>
> (*a*) in defraying the expenses properly incurred in the prosecution;
>
> (*b*) in the payment to any person of compensation for any loss or injury caused by the offence when substantial compensation is in the opinion of the court recoverable by a civil suit.'
>
> "The learned judge in the court below expressed himself as being in doubt whether the sum paid by the complainants were civilly recoverable. Nevertheless, he refrained from setting aside the orders made because he felt that it would be harsh to expose the appellant to the risk of civil proceedings for a very large amount of money in addition to his other punishment. With respect the learned judge had proceeded on a wrong principle. If the learned magistrate was wrong in his opinion that the sums paid were recoverable by civil suit the orders made for compensation were ultra vires. It was the duty of the judge therefore, if he felt in doubt, to inquire into and to decide on the legality of the orders. For our part we are in no doubt–what the learned magistrate has done, doubtless quite unwittingly, is to import into the Uganda Rent Restriction Ordinance something which is not there, namely, a right to the tenant to recover from the landlord any payment made in contravention of s. 3 (2). We do not know the reason, but the Uganda Legislature in its wisdom has included in the Ordinance no provision comparable to s. 8 (2) of the Rent Restriction Act of 1920. This sub-section provides that on summary conviction for an offence against the section the convicting court may order the amount paid by way of illegal premium to be repaid to the person by whom the same was given. Without this statutory right of recovery, the giver of the illegal premium is left in the position of one, who although he himself has committed no substantive offence, has aided and abetted the commission of an offence by another. In these circumstances he could not go to a Civil Court with clean hands and the principle stated by Lord Ellenborough in *Langton v. Hughes*, 1 M. & S. 593-596, would have application. 'What is done in contravention of an Act of Parliament cannot be made the subject matter of an action.' For this reason we are of opinion that the sum paid by Mr. Fafek could not be recovered by him in a civil suit and that the learned magistrate was wrong in holding a contrary view. It follows that his order of compensation to Mr. Fafek must be set aside.
>
> "We have some further observations to make on the matter of sentence in respect of count one. It seems manifest to us that the learned magistrate would not have imposed a maximum fine in addition to imprisonment except to provide a fund out of which compensation could be paid to Mr. Fafek. This is a practice which there is authority for saying has always been discouraged in these territories."

It will be observed that though *Godinho's* case (1) was a criminal case, the learned judges in this part of the case were purporting to decide a civil matter, namely, whether compensation would be recoverable by a civil suit; for upon the question of whether

> "substantial compensation is in the opinion of the court recoverable by a civil suit"

depended the question of whether part of the fine could be ordered to be paid as compensation under s. 195 of the Criminal Procedure Code. With deference, it may be doubted whether the learned judges were correct in saying that

> "if the learned magistrate was wrong in his opinion that the sums paid were recoverable by civil suit the orders made for compensation were ultra vires."

I think that an erroneous opinion genuinely and reasonably held by a magistrate that substantial compensation would be recoverable in a civil suit would found an order for compensation, at least until the order was set aside by an appellate court. But the point is not important in the present case.

As already stated, the learned trial judge in the present case declined to follow *Godinho's* case (1). The relevant passage in his judgment reads as follows:

> "The first point for consideration here is that the decision in the *Godinho* case was given in a criminal appeal. Further, a study of the judgment in that case makes it clear that the Court of Appeal had not the advantage of considering all the authorities and arguments–for example, the question of in pari delicto–which I have had. In my opinion all that was decided in the *Godinho* case was that in that particular criminal appeal that particular complainant ought not to be awarded compensation. All the rest was obiter dicta. Again, the Appeal Court in that case attached importance to the absence in the Uganda Ordinance of a provision expressly giving the right to a tenant to recover 'key-money' from a landlord, whereas such express statutory provision had been made both in England and in Kenya. I find it difficult to follow that reasoning.
>
> "Very many remedies are open to a plaintiff without express statutory provision.
>
> "Moreover the Appeal Court held there that the tenant had committed no substantive offence, but that he had aided and abetted the commission of the offence. In this connection one must remember the new sub-s. (4) of s. 3. Further, the Appeal Court relied upon *Langton v. Hughes*, 1 M. & S. 593–596, a case decided in 1813, the principle of which has been greatly whittled down. I shall refer later to more recent English decisions.
>
> "With respect, then, I hold that this court is not bound by the 'decision' in the *Godinho* case. The decision in that case implies a finding that the tenant and the landlord were in pari delicto. This point was not fully argued before the learned Judges of Appeal. To say that a tenant who is only able to obtain accommodation by the payment of 'key-money' is in pari delicto with a landlord who, merely to benefit himself, takes advantage of those difficulties, does not make sense.
>
> "The landlord and the tenant in those circumstances are not in the same class."

The learned trial judge in support of his view that *Godinho's* case (1) could be disregarded cited an extract from a judgment of Edwards, C.J., in the High Court of Uganda in Civil Appeal No. 20 of 1949, *Jamnadas Salabhai v. Haribhai Mangalbhai Patel* (2). This was decided shortly after *Godinho's* appeal (1) and is particularly interesting, because Edwards, C.J., had been a member of the Court of Appeal which decided the *Godinho* appeal (1). An extract from his judgment reads:

> "To revert, for a moment, to the *Godinho* case, I do not think that the ratio decidendi was that the Court of Appeal were entirely satisfied that a tenant could not recover in a civil action. But they set aside the astronomic fine imposed by the magistrate because it was so obvious that the fine had been imposed for the sole purpose of creating a fund from which compensation could be paid: and this reason for fining has, for the past half century, been universally disapproved by the courts in East Africa.

> The speech of Lord Simonds in the recent case of *Jacobs v. L.C.C.*, [1950] 1 All E.R. 737 at the foot of p. 740 is apposite regarding 'obiter dicta'. Moreover, I think that it would be very unfair to say to a litigant in a civil court 'You cannot now raise that argument here; the matter has already been decided against you by a Court of Criminal Appeal'. The litigant might well retort 'I realise that; but I suggest that that judgment of the Court of Criminal Appeal affects only the convicted man and was delivered by the Court of Criminal Appeal because they were in some doubt and, it being a criminal case, they naturally resolved it in favour of the convicted man. In a civil court, other considerations must surely affect the position'. I realise that H.M. Court of Appeal for Eastern Africa is both a court of civil and criminal appeal whereas in England the Court of Appeal is composed of the Master of the Rolls and Lords Justices while the Court of Criminal Appeal is composed of the Lord Chief Justice and Puisne Judges of the King's Bench Division. Nevertheless, I think that the principle is the same. I wish to sound a note of warning–I must not be taken as deciding in this judgment anything more than the facts of this particular case fairly warrant."

With deference, I find it very difficult to follow the suggestion of Edwards, C.J., that the ratio decidendi of the Court of Appeal in the compensation part of *Godinho's* case (1) was not that that court were entirely satisfied that a tenant could not recover in a civil action. The court said (rightly or wrongly) that the order for compensation made by the magistrate was ultra vires unless the sum was recoverable in a civil suit: they said that it was the duty of the judge in the High Court to decide the legality of the magistrate's order. The court then itself expressed the opinion that the sum paid by the tenant

> "could not be recovered by him in a civil suit and that the learned magistrate was wrong in holding the contrary view,"

and said that it followed that his order of compensation to Mr. Fafek must be set aside. The learned judges had earlier said that they were in no doubt. It is difficult to see how the opinion that the sum paid could not be recovered in a civil suit was not the ratio decidendi of this part of the case, or that the court was otherwise than entirely satisfied that the tenant could not recover in a civil suit.

I doubt whether it is correct that this court when sitting to hear a civil appeal is not bound to follow a previous decision of the court upon a question of the validity of a potential claim in a civil case because it arose in the course of the hearing of a criminal appeal. It must be rare indeed for an opinion on a civil matter to be part of the ratio decidendi in a criminal case; but, owing to the wording of s. 175 (*b*) of the Criminal Procedure Code, the question of whether or not a civil claim could succeed does become relevant where compensation is to be awarded, and in *Godinho's* case (1) that question was decided by this court. This court has both criminal and civil jurisdiction, but it is one court. This was a point of law and no different standard of proof was involved. However, as I have come to the conclusion for another reason that this court is not bound to follow *Godinho's* case (1), that point is not of importance and I need not decide it.

In *Joseph Kabui v. R.* (3) (1954), 21 E.A.C.A. 260, it was held that the principle of stare decisis is followed by this court, unless it is of opinion that to follow its earlier decision which is considered to be erroneous, involves supporting an improper conviction. The principle of stare decisis as applied to its own decisions by the Court of Appeal in England is summarised by Lord Greene, M.R. in *Young v. Bristol Aeroplane Co*. (4), [1944] 2 All E.R. 293 at p. 300 as follows:

> "On a careful examination of the whole matter we have come to the clear conclusion that this court is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarise: (i) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (ii) The court is bound to refuse to follow a decision of its own which, though not expressly over-ruled, cannot in its opinion stand with a decision of the House of Lords. (iii) The court is not bound to refuse to follow a decision of its own if it is satisfied that the decision was given per incuriam."

This was approved by Lord Simon on appeal to the House of Lords, [1946] A.C. 163, 169. Category (ii) above must be amplified when applied to this court. For instance, this court would be bound to refuse to follow a decision of its own, which, though not expressly overruled, cannot, in its opinion, stand with a decision of the Privy Council; or of the House of Lords, *Robins v. National Trust Co. Ltd*., (5), [1927] A.C. 515, 519; or probably with a decision of the Court of Appeal in England on a Colonial statute which is a "a like enactment" to an English Act (*Trimble v. Hill* (6) (1879), 5 App. Cas. 342 (P.C.); *Nadarajan Chettiar v. Walauwa Mahatma* (7), [1950] A.C. 481 (P.C.); but see *Robins v. National Trust Co*. (5) at p. 519). I think also that decisions of any of the old appellate courts now treated as having similar authority to decisions of the Court of Appeal would be on the same footing as regards statutes in pari materia. And, in my opinion, established decisions on the common law or doctrines of equity of the superior courts in England, given before the date of reception of the common law and doctrines of equity into the relevant Colony or Protectorate within the court's jurisdiction are binding on this court as well as on the Supreme Court or High Court of that territory. By "established decisions" I mean decisions which must be taken to have correctly declared the common law or the doctrines of equity at the date of reception because such decisions are either unreversed decisions of an appellate court; or being decisions of a superior court other than an appellate court, stand unreversed and have either been affirmed or approved by an appellate court or have been accepted as correct in principle by other superior courts in England. This enumeration does not exhaust the subject. For instance, I have not mentioned the effect of a colonial codification of the common law, or of a provision in a colonial Ordinance applying the current law of England or current procedure of English courts, as these matters do not arise in this case. I should perhaps mention that in applying English decisions dating from before the date of reception, any proviso in the relevant Order in Council limiting the application of the common law and doctrines of equity to the circumstances of the territory and its inhabitants must, of course, be borne in mind.

In *Morelle Ltd. v. Wakeling* (8), [1955] 1 All E.R. 708 (C.A.) the Court of Appeal considered what classes of decisions should be held to have been given per incuriam. Sir Raymond Evershed, M.R., at p. 718, said:

> "As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgment, consistently with the stare decisis rule which is an essential feature of our law, be, in the language of Lord Greene, M.R., of the rarest occurrence."

I am of opinion that the decision of this court in *Godinho's* case (1) was given in ignorance or forgetfulness of authorities binding on the court. By s. 15 (2) of the Uganda Order in Council, 1902, it was directed *inter alia* that the civil jurisdiction of the High Court should be exercised in conformity with the substance of the common law and the doctrines of equity in force in England on August 11, 1902. As I have already said, I think that established decisions of the superior courts in England which declared the substance of the common law or the doctrines of equity which were decided before that date are binding on the courts of Uganda and on this court.

The learned judges of this court who decided *Godinho's* case (1) seem to have assumed that because Godinho had, in Uganda, no statutory right to recover an illegal premium, he could not recover at all. They treated the rule, enunciated by Lord Ellenborough in *Langton v. Hughes* (9) (1813), 1 M. & S. 593, that what is done in contravention of an Act of Parliament cannot be made the subject matter of an action as the rule which in the absence of such a statutory right must apply to the giver of an illegal premium. But that rule is subject to several exceptions; for instance where the parties are not in pari delicto, or where the contract is made illegal by statute with the object of protecting a particular class of persons to which the plaintiff belongs. In *Browning v. Morris* (10) (1778), 2 Cowp. 790, Lord Mansfield said:

> "But, where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one, from their situation and condition, being liable to be oppressed or imposed upon by the other; there, the parties are not in pari delicto; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract."

In *Kearley v. Thomson* (11) (1890), 24 Q.B.D. 742 (C.A.), Lord Justice Fry, at p. 745, having quoted the general rule, that is:

> "you shall not have a right of action when you go into a court of justice in this unclean manner to recover it back,"

said:

> "To that general rule there are undoubtedly several exceptions or apparent exceptions. One of those is the case of the oppressor and oppressed, in which case usually the oppressed party may recover the money back from the oppressor. In that class of case the delictum is not par, and therefore the maxim does not apply. Again, there are other illegalities which arise when a statute has been intended to protect a class of persons, and the person seeking to recover is a member of the protected class."

Both *Browning v. Morris* (10) and *Kearley v. Thomson* (11) were decided before August 11, 1902, the date of reception into Uganda of the English Common law and the doctrines of equity. Uganda Order in Council, 1902, s. 15. *Kearley v. Thomson* (11) is a decision of the Court of Appeal. *Browning v. Morris* (10) must, in my view, be regarded as an established decision correctly declaring the common law or doctrines of equity at the date of reception. Its principle is enunciated in *Kearley v. Thomson* (11) and it was followed and applied as lately as 1949 by Devlin, J., in *Gray v. Southouse* (12), [1949] 2 All E.R. 1019. In my opinion both *Kearley v. Thomson* (11) and *Browning v. Morris* (10) are authorities binding on this court. In my view, the part of *Godinho's* case (1) referred to was inconsistent with those authorities and was, on that account, demonstrably wrong. It seems clear that *Godinho's* case (1) was decided in ignorance or forgetfulness of those decisions. I, therefore hold that it was decided per incuriam within the explanation of that expression given by the Master of the Rolls in *Morelle v. Wakeling* (8). If I am correct,

this court is not bound to follow the decision in the latter part of *Godinho's* case (1).

Learned counsel for the appellant relied on *Williams v. Glasbrook* (13), [1947] 2 All E.R. 884 as an authority for the proposition that this court is bound by *Godinho's* case (1). *Williams v. Glasbrook* (13), however, is distinguishable. In that case the Court of Appeal was being asked to say that the Court of Appeal had wrongly interpreted a previous decision of the House of Lords of which the first court had been aware. There is nothing of that kind here. This court decided the latter part of *Godinho's* case (1) in ignorance or forgetfulness of inconsistent authorities binding on the court, which is quite a different matter. I may mention, in passing, that the fact that a previous case may not have been fully argued was not accepted in *Morelle's* case (8) as a reason for not following it.

It was argued for the appellant that the interpretation put upon the law by this court in *Godinho's* case (1) had been relied upon by the public for years and should not now be disturbed, whether it was right or wrong. Having regard to the fact that, within a few weeks of the decision in *Godinho's* case (1), the learned Chief Justice of Uganda (Edwards, C.J.) refused to follow *Godinho's* case (1) in a civil suit (*Jamnadas Salabhai v. Haribhai M. Patel* (2)) and indicated that *Godinho's* case (1) was an authority only in criminal cases, I do not think that the relevant part of *Godinho's* case (1) was so firmly established as a guide to practice in civil cases as to make it necessary for us to follow it now that it appears to have been decided wrongly and per incuriam.

In deciding that this court is not bound to follow the decision in the latter part of *Godinho's* case (1), I do not wish to be taken to decide that the court below was not bound to follow it.

Having held that this court is not bound by the latter part of *Godinho's* case (1) I must now, untramelled by that case, consider whether or not the respondent is entitled to recover his premium. The absence in the Uganda Ordinance of a provision comparable to s. 8 (2) of the English Rent Restriction Act, 1920, is not conclusive that the legislature did not intend that there should be a right of recovery at common law or in equity. I do not propose to embark upon what their Lordships of the Privy Council described in *Commissioner of Stamps for the Straits Settlements v. Oei Tjong Swan* (14), [1933] A.C. 378, 389 as the "perilous course" of instituting a textual comparison between the Ordinance and the English Rent Acts and relying on conjectures as to the intention of the draftsman in selecting some and rejecting other provisions of his presumed model. The question must be answered from an examination of the Ordinance as it stood at the date of the giving of the premium and of the common law and doctrines of equity. I do not think that the amendments made by the Rent Restriction (Amendment) Ordinance, 1954, are material. The new sub-s. (4) (upon which the learned trial judge seems to have relied to some extent) came into force after the sub-lease was made and is merely a procedural sub-section designed to make it easier to secure a conviction in a criminal prosecution. It has no bearing on the question whether or not there is a right to recover a premium by civil action.

The learned trial judge found, and I agree, that the transaction between the sub-lessee and sub-lessor was intended to fall within the second proviso to s. 3 (2) of the Rent Restriction Ordinance. I think it is clear that neither party intended to enter upon an illegal transaction: there was no intentional delictum on either side. It was only because the flat did not come within the definition of "premises" that the contract was illegal. What then are the rights of the parties?

The ordinary rule is that the court will not assist any party who comes before it to recover money if it is necessary for the party presenting the cause of action to rely on the commission by him of an illegal act. *Gray v. Southouse* (12);

Scott v. Brown (15), [1892] 2 Q.B. 724, 734. But there is an exception to this rule where the contract is made illegal by statute with the object of protecting a particular class of persons to whom the plaintiff belongs. 8 Halsbury's Laws (3rd Edn.) 951; *Browning v. Morris* (10) and *Kearley v. Thomson* (11).

The Uganda Rent Restriction Ordinance was (as were the Rent Restriction Acts in England, see *Gray v. Southouse* (12) at p. 1020) passed for the protection of tenants, and, clearly, sub-s. (2) of s. 3 was passed for the protection of prospective tenants liable, owing to their condition and the scarcity of housing accommodation, to be imposed upon by landlords. In my opinion, the respondent falls within a protected class. The learned trial judge found this as a fact and I agree. It follows that the respondent and the appellant were not in pari delicto. Then is it, in Lord Mansfield's words, "in furtherance of the statute" (i.e. of the Rent Restriction Ordinance) that an illegal premium given by a prospective tenant for a sub-lease of a flat should be recoverable? The object of s. 3 (2) was clearly to prevent premiums being demanded or taken for the letting of dwelling houses and a maximum fine of Shs. 10,000/- and imprisonment was imposed. It would certainly not be contrary to the policy there disclosed that an illegal premium should be recoverable. In my opinion, it is consistent with, and, I think, "in furtherance of", the policy of the Rent Restriction Ordinance, that illegal premiums should be recoverable. It would restore the parties to the status quo ante, and would make it not worth while for landlords to transgress. *Gray v. Southouse* (12) is an authority for the proposition that it is not contrary to public policy for a tenant to recover an illegal premium even when he knows the transaction is illegal. That case depended to a large extent on the fact that in England Parliament had enacted that the premium should be recoverable. But even without such a provision, I feel that it cannot be contrary to public policy in Uganda for a tenant who is an innocent party and intended no illegality to recover a premium paid in contravention of the Ordinance. In *Gray v. Southouse* (12) a prospective sub-tenant paid a premium to the tenant notwithstanding the prohibition of such payments contained in s. 8 (1) of the Increase of Rent and Mortgage (Restrictions) Act, 1920. The sub-tenant was aware that he was doing something which was prohibited by law. The tenant was unable to grant the tenancy. In an action by the sub-tenant for recovery of the sums paid, on the ground that they had been paid for a consideration which had failed, it was held that although, in general, as a matter of public policy, the court would not assist a party to recover money paid by him in the course of an illegal act, it was not contrary to public policy in this particular class of case for a person who had been paid a premium to recover it: and the sub-tenant was entitled to recover the premium as money paid for a consideration which had wholly failed

A fortiori where the giver of the premium is an innocent party.

In the instant case, the consideration for the transaction did not, as in *Gray v. Southouse* (12), wholly fail. The tenant got his sub-lease and occupied the premises. Nevertheless I think that he is entitled to recover the premium which was taken in contravention of the Ordinance, "after the transaction is finished and completed". *Browning v. Morris* (10); *Barclay v. Pearson* (16), [1893] 2 Ch. 154, 167. I have already held that it is in furtherance of the statute that he should do so. *In Kearley v. Thomson* (11) it was held that part performance prevented recovery of the money illegally paid. But the plaintiff in that case was not a member of a protected class and was claiming to recover only on the ground that the contract had not been wholly executed.

The question whether, where a statutory obligation enforceable by a penalty is placed on A., and B. is damnified by A's breach of it, B has a right of action against him without express provision was considered in *Cutler v. Wandsworth Stadium Ltd.* (17), [1949] A.C. 398. That was a case in which a bookmaker sued the occupier of a licensed dog-racing track, on which a totalisator was

lawfully in operation, for failure to provide him with "space on the track where he could conveniently carry on book-making", in accordance with s. 11 (2) (*b*) of the Betting and Lotteries Act, 1934. The obligation imposed by that section is enforceable only by criminal proceedings for specified penalties. It was held that no action lay. Section 11 (2) of the Act provided that the occupier of a licensed track

> "(*a*) shall not, so long as a totalisator is being lawfully operated on the track, exclude any person from the track by reason only that he proposes to carry on book-making on the track; and (*b*) shall take such steps as are necessary to secure that, so long as a totalisator is being lawfully operated on the track, there is available for book-makers space on the track where they can conveniently carry on book-making . . ."

The defendants excluded a book-maker and did not provide him with space on the track. He sued for a declaration of his rights, an injunction restraining the defendants from excluding him, and a mandatory order to secure for him on the track a space on which he could conveniently carry on book-making, and he asked for damages. Lord Simonds said at p. 407:

> "It is, I think, true that it is often a difficult question whether, where a statutory obligation is placed on A., B. who conceives himself to be damnified by A.'s breach of it has a right of action against him. But on the present case I cannot entertain any doubt. I do not propose to try to formulate any rules by reference to which such a question can infallibly be answered. The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted. But that there are indications which point with more or less force to the one answer or the other is clear from authorities which, even where they do not bind, will have great weight with the House. For instance, if a statutory duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damnified by the breach. For, if it were not so, the statute would be but a pious aspiration. But 'where an Act' (I cite now from the judgment of Lord Tenterden, C.J., in *Doe v. Bridges*, 1 B. & Ad. 847, 859) 'creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner'. This passage was cited with approval by the Earl of Halsbury, L.C., in *Pasmore v. Oswaldtwistle Urban District Council*, [1898] A.C. 387, 394. But this general rule is subject to exceptions. It may be that, though a specific remedy is provided by the Act, yet the person injured has a personal right of action in addition. I cannot state that proposition more happily, or indeed more favourably to the appellant, than in the words of Lord Kinnear in *Black v. Fife Coal Co. Ltd.*, [1912] A.C. 149, 165: 'If the duty be established, I do not think there is any serious question as to the civil liability. There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute. The principle explained by Lord Cairns in *Atkinson v. Newcastle Waterworks Co.* (1877), 2 Ex. D. 441, 448 and by Lord Herschell in *Cowley v. Newmarket Local Board*, [1892] A.C. 345, 352, solves the question. We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons,

there arises at common law a correlative right in those persons who may be injured by its contravention.' "

His Lordship held that the Betting and Lotteries Act had not been passed for the benefit of book-makers, but for the benefit of the public who resorted to the stadium and that, accordingly, there was nothing to take that case out of the general rule that where an Act creates an obligation and enforces its performance in a specified manner, that performance cannot be enforced in any other manner. He, therefore, concluded that no civil action lay. The other noble and learned Lords came to the same conclusion. Lord du Parcq said at p. 410:

> "To a person unversed in the science or art of legislation it may well seem strange that Parliament has not by now made it a rule to state explicitly what its intention is in a matter which is often of no little importance, instead of leaving it to the courts to discover, by a careful examination and analysis of what is expressly said, what that intention may be supposed probably to be. There are no doubt reasons which inhibit the legislature from revealing its intention in plain words. I do not know, and must not speculate, what those reasons may be. I trust, however, that it will not be thought impertinent, in any sense of that word, to suggest respectfully that those who are responsible for framing legislation might consider whether the traditional practice, which obscures, if it does not conceal, the intention which Parliament has, or must be presumed to have, might not safely be abandoned. The questions which this traditional legislative reticence so often brings before the courts are sometimes difficult, but that raised by the present appeal seems to me, assisted as I have been by the convincing judgments of the Court of Appeal, to be comparatively simple."

and at p. 411:

> " 'Whether the general rule is to prevail,'(said Lord Macnaghten) 'or an exception to the general rule is to be admitted, must depend on the scope and language of the Act which creates the obligation and on considerations of policy and convenience.' "
>
> "I do not find in the present case any indication that Parliament sought to manifest an intention that an exception to the general rule should be created. On the contrary, whether the question is approached with, or without, such guidance as principles of construction can afford, I am clearly of opinion, in agreement with the Court of Appeal, that the language of the Act points to the opposite conclusion."

Lord Normand said at p. 413:

> "If there is no penalty and no other special means of enforcement provided by the statute, it may be presumed that those who have an interest to enforce one of the statutory duties have an individual right of action. Otherwise the duty might never be performed. But if there is a penalty clause the right to a civil action must be established by a consideration of the scope and purpose of the statute as a whole."

He also pointed out (at p. 414) that the statute had not the single general object of guarding the livelihood of book-makers.

The Act considered in *Cutler's* case (17) was very different from the Ordinance under consideration in the present case. The Act was not passed with the general object of benefiting book-makers; the Ordinance clearly was passed for the benefit of tenants and prospective tenants.

Green v. Portsmouth Stadium, Ltd. (18), [1953] 2 All E.R. 102 is another

case of a book-maker suing under the Betting and Lotteries Act, 1934, this time to recover arrears of admission overcharged. It was held that as penalties for a breach of s. 13 of that Act were provided and that as the Act contained no provision that an amount paid in excess of that permitted by s. 13 (1) should be recoverable, a civil action would not lie for breach of the section. *Cutler v. Wandsworth Stadium Ltd*. (17) was followed. Denning, L.J. (as he then was) drew attention to the fact that the plaintiff in that case did not allege that he was oppressed or imposed on in any way. The learned lord justice continued:

> "The question of whether a breach of a statute can be made the foundation of an action depends on the interpretation of the statute itself . . .
>
> "It is most significant that the Act does not say that the overcharge shall be recoverable. In modern statutes, such as the Rent Restriction Acts, dealing with such things as premiums, if it is intended that an overcharge shall be recoverable, the Act says so."

It is not altogether easy to reconcile this with Lord du Parcq's remarks in *Cutler's* case (17) that "legislative reticence" on this point is "the traditional practice". Denning, L.J., continued:

> "Section 13 of the Act of 1934 only says that the person responsible shall be guilty of an offence . . . The presumption is that, where the statute provides those consequences for a breach no other remedy is available. It was sought to say, however, that by implication an action would lie to recover the overpayments. The decision of the House of Lords in *Cutler v. Wandsworth Stadium Ltd*., seems to me to make that proposition almost unarguable."

I respectfully agree. The Betting and Lottery Act considered in *Cutler's* case (17) and in *Green's* case (18) was not an Act passed for the protection of bookmakers. Both cases are distinguishable from the present case on that ground. Denning, L.J., however, went on to cite the above-quoted passage from *Browning v. Morris* (10) and continued:

> "In my judgment, those observations of Lord Mansfield apply only to cases where the statute, on its true construction, contemplates the possibility of a civil action. He said that it was 'in furtherance of these statutes' that the action for money had and received could be brought. Just as in an action for damages, so, also, in an action for money had and received, it is a question of the true interpretation of the statute whether an action lies so as to recover the overcharge. I see nothing in the Act of 1934 to authorise such an action. I can conceive of cases where bookmakers might themselves aid and abet a breach of the statute. Some rich bookmakers might willingly pay more than the statutory amount to get a privileged position for themselves as against their poorer brethren. Clearly, such people could not recover the overpayments. Nor can the plaintiff here. The breach of s. 13, standing by itself, does not give rise to a claim for repayment."

This passage was relied upon by learned counsel for the appellant who argued that the respondent was a rich and privileged person because he was able to pay the premium demanded. It will be remembered, however, that he had to borrow the money in order to pay it, and I think that I am bound on this point by the finding of the learned judge that this was a case where the landlord held the rod and the tenant had to bow to it. It has not, so far as I am aware, been suggested in any of the other cases in which Lord Mansfield's observations in *Browning v. Morris* (10) are considered or referred to (e.g. *Kearley v. Thomson* (11) and *Barclay v. Pearson* (16); *Williams v. Hedley* (19) (1807), 8 East 378; 103 E.R. 388; *Atkinson v. Denby* (20), 6 H. & N. 778)

that those words apply only to cases where the statute on its true construction "contemplates the possibility of a civil action", if by that is meant that a civil action to recover sums illegally paid is referred to either expressly or impliedly. So far as I know, in none of the cases in which Lord Mansfield's observations have been applied does the statute give an express right to recover by civil action. If it did, it would be unnecessary to apply those observations. In the statutes available here I have been unable to find that any such right is implied. I have read the summary of the statute 17 Geo. 3 c. 46 in Vol. 31 of the Statutes at Large, p. 408, which is all that is available here. This was the statute considered by Lord Mansfield in *Browning v. Morris* (10). I can find no hint in that statute that a civil action for the return of money illegally paid as a premium for insuring lottery tickets is contemplated by it. Neither does there seem to be any indication in the Gaming Act, 1802 (42 Geo. 3 c. 119), the statute considered in *Barclay v. Pearson* (16), that that statute expressly or impliedly authorised the recovery by civil action of sums paid as entrance fees to an illegal competition. Yet, in *Barclay v. Pearson* (16), the fees were held to be recoverable on the ground (*inter alia*) that the competitors were a class protected by statute. *Green's* case (18) was decided on the same Act as *Cutler's* case (17); but the words of Denning, L.J., quoted above seem to go further than Lord Normand's statement in *Cutler's* case (17):

> "But if there is a penalty clause the right to a civil action must be established by a consideration of the scope and purpose of the statute as a whole";

or Lord Macnaghten's statement in *Pasmore v. Oswaldtwistle U.D.C.* (21), [1898] A.C. 387 cited in *Cutler's* case (17):

> "must depend on the scope and language of the Act . . . and on considerations of policy and convenience";

or Lord Herschell's words in *Cowley v. Newmarket Local Board* (22), [1892] A.C. 345 quoted by Lord Kinnear in *Black v. Fife Coal Co. Ltd.* (23), [1912] A.C. 149, 165 (cited in *Cutler's* case (17))

> "we are to consider the scope and purpose of the statute and in particular for whose benefit it is intended."

Lord Justice Hodson in *Green's* case (18) based his judgment on the fact that the plaintiff in that case had not pleaded any facts tending to show that he was not in pari delicto with the defendants: if the defendant had broken the law he had been as much a party to the breach as they. That does not apply to the present case. The facts pleaded by the respondent and the sub-lease produced establish that he was not in pari delicto with the appellant, and he so pleaded. There was no intentional delictum on either side and the tenant was a member of a protected class. The second ground of the judgment of Hodson, L.J., in *Green's* case (18) is that the Betting and Lotteries Act, 1934, was not passed for the benefit of bookmakers. Per contra the Uganda Rent Restriction Ordinance was passed for the benefit of tenants and prospective tenants. In my opinion *Green's* case (18) is distinguishable.

I have reached the conclusion that, on the facts of this case, the respondent is entitled to recover his premium.

The learned judge found that the respondent had not been guilty of laches and no sufficient reason has been shown for interfering with that finding. He must also have found against the allegations of estoppel and acquiescence and those matters have not been raised on the appeal.

The learned trial judge did not give judgment for the interest claimed and there is no cross-appeal against that decision.

I would dismiss the appeal with costs.

Forbes JA: I agree and have nothing to add.

Sir Kenneth O'Connor P: **Mr. Justice Keatinge** agreed the draft of this judgment before his departure on leave.

Appeal dismissed.

For the appellant:
PJ Wilkinson and *AG Mehta*
Patel & Mehta, Kampala

For the respondent:
AI James
Baerlein & James, Kampala

The Commissioner of Lands v Concrete Works Limited
[1958] 1 EA 254 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	23 May 1958
Case Number:	1/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Sir Owen Corrie Ag JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Rudd, J

[1] Arbitration – Case stated by umpire during reference for opinion of Supreme Court – Whether opinion of court is appealable – Arbitration Ordinance (*Cap.* 22), *s.* 8 (*b*) *and s.* 15 (*K.*) – *Civil Procedure Ordinance* (*Cap.* 5), *s.* 2 (*K.*) – *Civil Procedure* (*Revised*) *Rules*, 1948, *O. XLV., r.* 11 *and r.* 16 (*K.*).

[2] Compulsory purchase – Severance – Meaning of "severance of the land" in Crown Lands Ordinance (*Cap.* 155), *s.* 111 (*A*) (*K*).

Editor's Summary

In July, 1956, the Commissioner of Lands, acting under powers conferred by s. 109 of the Crown Lands Ordinance, entered upon a portion of the respondent's land at Embakasi and resumed possession thereof for the purpose of a railway realignment. The respondent claimed compensation, and when the parties

were unable to agree the amount thereof the claim was referred to arbitration under s. 173 and s. 174 of the Ordinance. The arbitrators being unable to agree, an umpire was appointed. The respondent's claim was for the market value of the land resumed, and compensation for severance, on the ground that the severance had depreciated the remainder of the land. The umpire ruled that a claim for compensation for severance could be entertained, whereupon the appellant requested him to state a case for the opinion of the Supreme Court of Kenya. The umpire, purporting to act under s. 8 and s. 15 of the Arbitration Ordinance, stated a case requesting the opinion of the court on whether resumption of part of the respondent's land without involving any division of the remaining land into detached pieces constituted severance within s. 111 (*A*) of the Crown Lands Ordinance. The Supreme Court, having on November 1, 1957, delivered what was described as a "judgment" on the point and answered the question in the affirmative, an "Order" was drawn up and issued by which, in addition to answering the question, the appellant was ordered to pay the costs of the case and given leave to appeal, after an objection

that no appeal lay. The appellant then sought to appeal, whereupon the respondent's counsel took the preliminary point that the appeal was not competent.

Held –

(i) the umpire having stated a case for the opinion of the Supreme Court during the course of the reference, had clearly sought the opinion of the court in a consultative capacity, and since the umpire still had functions to perform, the opinion given was not a decision equivalent to a judgment or order and was, therefore, not appealable.

(ii) an opinion given by the Supreme Court on a case stated under s. 15 of the Arbitration Ordinance is not appealable; but an opinion given by the Supreme Court on a special case stated under s. 8 (*b*) may be appealable, as it would be an effective determination of the rights of the parties and a "decision" "of a civil court which is not a decree", within s. 2 of the Civil Procedure Ordinance.

(iii) in any event "severance of the land" in s. 111 (*A*) of the Crown Lands Ordinance refers to the entirety of the land, part of which is separated from the remainder by resumption of possession, and it is this separation which may give rise to compensation.

Appeal dismissed.

Case referred to in judgment:

(1) *Re Knight and Tabernacle Permanent Benefit Building Society*, [1892] 2 Q.B. 613.

(2) *Cogstad* (*C.T.*) *& Co. v. Newsum* (*H.*) *Sons & Co. Ltd*., [1912] 2 A.C. 528.

(3) *Re Holland S.S. Co. and Bristol Steam Navigation Co.* (1906), 23 T.L.R. 59.

(4) *Trimble v. Hill* (1879), 5 App. Cas. 342.

(5) *Nadarajan Chettiar v. Walauwa Mahatmee*, [1950] A.C. 481.

(6) *Commissioner of Stamps for the Straits Settlements v. Oei Tjong Swan*, [1933] A.C. 378.

(7) *Walsall Poor Overseers v. London & North Western Railway* (1878), 4 App. Cas. 30.

(8) *Onslow v. Commissioners of Inland Revenue* (1890), 25 Q.B.D. 465.

Judgment

Sir Kenneth O'Connor P: read the following judgment of the court: This is an appeal from what is described in the memorandum of appeal as the "decision" of a judge of the Supreme Court of Kenya dated November 1, 1957. The matter arose in this way:

In or about the month of September, 1955, the respondent purchased a piece of land comprising 102 acres or thereabouts, situate at Embakasi, for the purpose of quarrying part of this land. In or about July, 1956, the Commissioner of Lands, on behalf of the Governor-in-Council, in exercise of the power conferred by s. 109 of the Crown Lands Ordinance (Cap. 155 of the Laws of Kenya), entered upon this piece of land and resumed possession of a portion in one corner of it for the purpose of realigning a railway. The resumed portion comprised about 5.77 acres. Compensation for this resumption was claimed by the respondent and, the parties being unable to agree on the amount of such compensation,

the claim was referred to arbitration pursuant to s. 173 and s. 174 of the Crown Lands Ordinance. Under s. 174 (2) every such arbitration is to be carried on in the manner prescribed by the Arbitration Ordinance and to be subject to that Ordinance. The arbitrators were unable to agree and an umpire was appointed pursuant to s. 174 (2) of the Crown Lands Ordinance.

The respondent claimed not only the market value of the land resumed but also, under s. 111 (*A*) of the Crown Lands Ordinance, compensation for damages or loss by severance, on the ground that severance of the 5.77 acres resumed, from the remainder of the 102 acres originally owned by the respondent, had depreciated the value of the remainder by rendering its operation as a quarry more expensive. On July 3, 1957, the umpire, after hearing counsel for both parties, ruled that this was a case of "severance of the land" within the meaning of s. 111 (A) of the Crown Lands Ordinance, and that a claim for compensation under that section could be entertained. Thereupon, the umpire, who had not yet made any final award, was requested by counsel for the appellant to state a case for the opinion of the court. The umpire accordingly stated a case, purporting to act under s. 8 (*b*) and s. 15 of the Arbitration Ordinance (Cap. 22 of the Laws of Kenya) "for the opinion of Her Majesty's Supreme Court of Kenya at Nairobi". The question of law stated for the opinion of the Supreme Court was

> "whether this case, involving resumption of part only of a piece of land, but not involving any division of the remaining part of that land into detached pieces, constitutes 'severance of the land' within the meaning of s. 111 (A) of the Crown Lands Ordinance".

On November 1, 1957, a judge of the Supreme Court of Kenya delivered what was described as a "judgment" upon the point answering the question submitted in the special case in the affirmative. Upon this, a document described as an "Order" was drawn up and issued on December 19, 1957, of which the operative part reads–

> "It is ordered that–
>
> (1) The question asked in para. 10 of the special case be answered in the affirmative;
>
> (2) The Commissioner of Lands do pay the taxed costs of the case; and
>
> (3) The Commissioner of Lands do have leave to appeal to Her Majesty's Court of Appeal for Eastern Africa."

Regarding para. (3), the point was taken before the learned judge that no appeal lay from his decision. He did not purport to decide this point, but gave leave to appeal subject to that point being argued before this court.

Against this "Order" the appellant seeks to appeal to this court.

At the outset Mr. Salter, for the respondent, took the preliminary point that the appeal was not competent. He argued that the ruling of the learned judge was not a judgment or an order, but an opinion; and that no appeal lay from the opinion of the Supreme Court on a case stated for the opinion of that court under s. 8 (*b*) or s. 15 of the Arbitration Ordinance. Mr. Salter contended that the functions of the Supreme Court under those two sections were purely consultative: that the point was merely referred "for the opinion of the court" and that the resulting opinion of the court was not a judgment; neither was it an order appealable under s. 75 of the Civil Procedure Ordinance. He cited the similar provisions of s. 7 and s. 19 of the Arbitration Act, 1889, and relied on the cases *Re Knight and Tabernacle Permanent Benefit Building Society* (1), [1892] 2 Q.B. 613 (C.A.), and *Cogstad* (*C.T.*) *& Co. v. Newsum* (*H.*) *Sons & Co., Ltd*. (2), [1921] 2 A.C. 528 (H.L.), for the proposition that no appeal lies from the decision of the High Court upon a special case stated by an arbitrator with regard to a question of law arising in the course of the reference under s. 19 of the Arbitration Act, 1889. He also referred to r. 11 and r. 16 of O. XLV of the Kenya Civil Procedure (Revised) Rules, 1948. He said that this was not an award stated in the form of a special case under r. 11 of that Order. The arbitrator had expressly stated that he had not made a final award: he

was not functus officio: the opinion of the court was consultative merely and no appeal from it lay. He also referred to *Re Holland S.S. Co. and Bristol Steam Navigation Co*. (3) (1906), 23 T.L.R. 59 (C.A.).

Mr. Newbold for the appellant said that he had been taken by surprise by the preliminary point. He argued that the English authorities relied on by Mr. Salter were not applicable for two reasons: in the first place, because they applied to cases stated under s. 19 of the Arbitration Act, 1889, which corresponded to s. 15 of the Arbitration Ordinance, whereas the umpire had stated his case under s. 8 (*b*) as well as s. 15 and the wording of s. 8 (*b*) of the Ordinance was very different from the wording of s. 7 (*b*) of the Arbitration Act; and, in the second place, because an appeal lay under the express provisions of s. 75 of the Civil Procedure Ordinance and the definition of "order" contained in s. 2 of that Ordinance.

We decided to defer consideration of the preliminary point as to the competence of the appeal and to hear the appeal on its merits without prejudice to our decision upon that point. At the conclusion of the hearing of the appeal, we announced that we would decide the preliminary point as to whether the appeal lay and give written reasons; but that even if we decided that it lay, it would fall to be dismissed on its merits, so that, in either case, the appeal failed.

We proceed now to consider whether or not an appeal to this court lies from the answer (to use a neutral word) of the Supreme Court of Kenya to a question of law referred to it for opinion under s. 8 (*b*) and s. 15 of the Arbitration Ordinance.

Section 8 (*b*) reads as follows:–

> "8. The arbitrators or umpire acting under a submission shall, unless a different intention is expressed therein . . .
>
> (*b*) have power to state a special case for the opinion of the court on any question of law involved . . ."

Section 15 reads as follows:–

> "15. An arbitrator or umpire may at any stage of the proceedings under a reference and shall, if so directed by the court, state in the form of a special case for the opinion of the court any question of law arising in the course of the reference."

It will be noted that in both sections the words are for the "opinion" of the court. No power is conferred by the Arbitration Ordinance on the court to "determine" or "decide" the question referred–cf. in this respect s. 367 and s. 371 of the Criminal Procedure Code of Kenya and s. 62 of the Stamp Ordinance (Cap. 259 of the Laws of Kenya).

Section 66 of the Civil Procedure Ordinance, so far as material, provides that an appeal shall lie from the decrees and from the orders of the Supreme Court to the Court of Appeal for Eastern Africa. This section appears in a part of the Ordinance headed "Appeals from Original Decrees", and presumably it also refers to appeals from original orders.

Section 75 of the Civil Procedure Ordinance, so far as material, provides that an appeal shall lie as of right from the orders specified (none of which is relevant) and shall lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted.

Under s. 2 of the Civil Procedure Ordinance "order" is defined as follows:

> "order" means the formal expression of any decision of a civil court which is not a decree, and shall include a rule nisi."

The document in this case dated November 1, 1957, which is described as an “Order” is not a decree and is not a rule nisi. It is the formal expression

of something. Is it the formal expression of the "decision of a civil court" within the definition of "order" in s. 2?

Section 15 of the Arbitration Ordinance is couched in almost identical language with that used in s. 19 of the Arbitration Act, 1889. There is no difference material to this case. Unless, therefore, there is some cogent reason to the contrary, the construction put upon s. 19 of the Act by the Court of Appeal in England should be taken by us as authoritative as to the construction of s. 15 of the Ordinance. *Trimble v. Hill* (4) (1879), 5 App. Cas. 342, 344 (P.C.); *Nadarajan Chettiar v. Walauwa Mahatmee* (5), [1950] A.C. 481 (P.C.).

In *Re Knight and Tabernacle Permanent Benefit Building Society* (1) it was held by the Court of Appeal that no appeal lay from the decision of the High Court in England upon a special case stated by an arbitrator with regard to a question of law arising during the course of the reference under s. 19 of the Arbitration Act, 1889. Lord Esher, M.R., said at p. 617:

> "In the case of *Ex parte Council of Kent*, [1891] 1 Q.B. 725, where a statute provided that a case might be stated for the decision of the court, it was held that, though that language might *prima facie* import that there was to be the equivalent of a judgment or order, yet, when the context was looked at, it appeared that the jurisdiction was only consultative, and that there was nothing which amounted to a judgment or order. The enactment now in question provides that 'any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the court or a judge, state in the form of a special case for the opinion of the court any question of law arising in the course of the reference'. The words are not 'for the "determination" or "decision" of the court'; so that there is not the *prima facie* difficulty which existed in the case where the statute spoke of the 'decision of the court'. It appears to me that what the statute in terms provides for is an 'opinion' of the court to be given to the arbitrator or umpire; and that there is not to be any determination or decision which amounts to a judgment or order. Under those circumstances, I think that there is no appeal. I base my decision on the words of the statute; but when I consider the result of holding otherwise, I am fortified in the conclusion at which I have arrived. It seems to me that it would be most inexpedient that, where an opinion is given by the court under this statute in the course of a reference for the guidance of arbitrators, there should be an appeal which might be carried up to the House of Lords."

Bowen, L.J. (as he then was) said at p. 618:

> "I am of the same opinion. The arbitrator is a person whom the parties have chosen as judge both of law and fact with regard to the matter submitted to him. The Arbitration Act, 1889, in order to assist arbitrators, has given power to an arbitrator to take the opinion of the court in two ways. He may state his award in the form of a special case. When that is done, the arbitrator has exhausted his powers; he has made his award in such a shape that the opinion of the court will determine the rights of the parties, and turn the award into one groove or the other. Therefore the opinion of the court is, in that case, an effective determination of the rights of the parties. I do not doubt that in such a case there might be an appeal from the decision of the Divisional Court upon a special case. But there is another way in which an arbitrator may, during the arbitration, take the opinion of the court. Under s. 19, he may voluntarily take, or by order of the court or a judge he may be compelled to take, by means of a special case, the opinion of the court for his guidance, and as a step for arriving at his own ultimate award in the matter. That is an interlocutory proceeding in the reference, and I do not think that it can have

> been intended that, whenever a case is stated under this section for the opinion of the court, such opinion when taken is to be treated as an absolute determination of the rights of the parties with the result that there may be an appeal from it which may be carried to the House of Lords. If that were so, the opinion of the court might be carried to the House of Lords, though it ultimately decided nothing. It might turn out that, after the point of law had been carried to the House of Lords, it did not really arise. That is one reason, but not the only reason, for the conclusion that the jurisdiction of the court under this section is consultative only. The section contemplates a proceeding by the arbitrator for the purpose of guiding himself as to the course he should pursue in the reference. He does not divest himself of his complete authority over the subject-matter of the arbitration. He still remains the final judge of law and fact. No doubt a fair and honest arbitrator would, in the absence of special circumstances, be bound in honesty and morality, after taking the opinion of the court, to act upon such opinion. If he did not, it would at any rate be a matter calling for explanation on his part. But the arbitrator is still clothed with the final duty of determining the case. The opinion of the court does not finally determine the case; it only binds the arbitrator in honesty or morals to act upon the law as the court states it. There could be no appeal from his decision because he did not do so, although it might be a ground for impeaching his award on the ground of misconduct if he did not. It appears to me that this consultative jurisdiction of the court does not result in a decision which is equivalent to a judgment or order."

It will be observed that Bowen, L.J., distinguished the case of an arbitrator who states a special case under s. 19 of the Arbitration Act from the case of an arbitrator who states his award in the form of a special case under s. 7 (*b*) of the same Act. That section, so far as material, reads:

> "7. The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power–
>
> (*b*) to state an award as to the whole or part thereof in the form of a special case for the opinion of the court."

Knight's case (1) decides that from an opinion of the High Court on an award under s. 7 (*b*) stated in the form of a special case an appeal may lie, because that opinion is an effective determination of the matter; but that an appeal does not lie from an opinion of the court given in the consultative jurisdiction on a case stated under s. 19 of the Act. Section 8 (*b*) of the Kenya Arbitration Ordinance differs from s. 7 (*b*) of the Arbitration Act, in that no express power is given to state an award in the form of a special case. The power is to state a special case for the opinion of the court on any question of law involved, a power which appears to overlap the power given by s. 15 of the Ordinance. We do not know, and should not conjecture (*Commissioner of Stamps for the Straits Settlements v. Oei Tjong Swan* (6), [1933] A.C. 378, 389 (P.C.)) why the draftsman of the Kenya Ordinance rejected some of the provisions of s. 7 while adopting the remainder. Possibly it was intended that the matter should be covered by Rules of Procedure. Order XLV, r. 11, of the Kenya Civil Procedure (Revised) Rules does provide for the stating of an award in the form of a special case upon a reference by order of the court. But that rule has no application in the present appeal. Whatever was the intention of the legislature in enacting s. 8 (*b*) in its present form, the effect seems to be to make it possible for an arbitrator or umpire stating a special case, during the course of the reference and not as an award, to purport to act under s. 8 (*b*) as well as under s. 15. That is what the umpire has done here. He has not stated an award in the form of a special case. He has said

that he has made no final award. He has clearly only asked the court to act in its consultative capacity. Its opinion is not, in any sense, to be an effective determination of the rights of the parties. The umpire still has functions to perform. In our view, the applicability of the English authorities on s. 19 is not affected by the difference in wording between s. 7 (*b*) of the Act and s. 8 (*b*) of the Ordinance.

In *Re Holland S.S. Co. and Bristol Steam Navigation Co*. (3), the case of *Re Knight and Tabernacle Permanent Benefit Building Society* (1) was approved and applied. It was held that as the arbitrator had not stated the case so that, whichever way the question was answered, the rights of the parties would have been finally determined, but had reserved the matter for himself in the event of the question being answered in one particular way, the case was not an award in the form of a special case within s. 7 of the Arbitration Act, 1889, but was a special case stated under s. 19, and the jurisdiction of the High Court was consultative only and was not subject to appeal. In *Cogstad* (*C.T.*) *& Co. v. Newsum* (*H.*) *Sons & Co., Ltd.* (2), *the Holland S.S. Co*. case (3) was approved by the House of Lords.

The distinction between the judicial and the merely consultative jurisdiction of the court of Queen's Bench was considered in *Walsall Poor Overseers v. London & North Western Railway* (7) (1878), 4 App. Cas. 30 (H.L.), where it was held that the jurisdiction of the court of Queen's Bench to discharge a rule asking for certiorari to quash an order of the court of Quarter Sessions on a rating matter was not purely consultative but judicial, and that, accordingly, decisions of the court of Queen's Bench upon such matters were open to appeal. The jurisdiction of the court of Queen's Bench was to remove the order of the inferior court and put an end to it by quashing it. It was held that that could not be called a consultative jurisdiction. That was contrasted with the ancient power which the quarter sessions had, if they were in a difficulty, of applying to the going Judge of Assize and asking his advice and assistance in making an order. That was a consultative jurisdiction and that seems, to some extent, to resemble in principle the statement of a case for the opinion of the court under s. 15 of the Arbitration Ordinance.

As has already been said, the English authorities on the construction of s. 19 of the Ordinance should be followed by this court unless there is some reason such as a local statutory provision which makes them inapplicable.

It has been argued for the appellant that the definition of "Order" which is in force in Kenya is such a provision: that this places upon the word "order" a wider interpretation than that word bore in England in 1891 when *Knight's* case (1) was decided. As already mentioned, under s. 2 of the Civil Procedure Ordinance "order" means the formal expression of any decision of a civil court which is not a decree and includes a rule nisi. Under s. 19 and s. 100 of the Judicature Act, 1873, an appeal lay to the Court of Appeal from any judgment or order of the High Court and "order" was defined to include a rule. In *Onslow v. Commissioners of Inland Revenue* (8) (1890), 25 Q.B.D. 465 (C.A.) Lord Esher, M.R., having stated what was meant by "final judgment", said:

> "A 'judgment', therefore, is a decision obtained in an action, and every other decision is an order."

If this be the interpretation of an "order" in England, it does not appear to differ substantially, in any respect material to this case, from the definition in s. 2 of the Civil Procedure Ordinance. We think that the English authorities on the construction of s. 19 of the Arbitration Act, 1889, are fully applicable.

The question is: Is the opinion of the Supreme Court given in response to a case stated by an arbitrator or umpire under s. 15 of the Arbitration Ordinance a "decision"? It will be recalled that in *Knight's* case (1) quoted

above, in speaking of the similar words of s. 19 of the Arbitration Ordinance. 1889, Lord Esher said, at p. 617:

> "The words are not 'for the "determination" or "decision" of the court' . . . It appears to me that what the statute in terms provides for is an 'opinion' of the court to be given to the arbitrator or umpire; and that there is not to be any determination or decision which amounts to a judgment or order."

Bowen, L.J., said, at p. 619:

> "It appears to me that this consultative jurisdiction of the court does not result in a decision which is equivalent to a judgment or order."

We think that those words are applicable in Kenya, and that the opinion of the Supreme Court on a case stated under s. 15 (whether or not combined with s. 8 (*b*)) of the Arbitration Ordinance, is not appealable to this court. On the other hand, we think (without deciding the point) that there would be nothing to prevent an arbitrator from stating a final award in the form of a special case under s. 8 (*b*) and that an opinion of the Supreme Court on such a case would be appealable, as it would be an effective determination of the rights of the parties and would be a "decision" of a civil court which is not a decree.

We may mention, in passing, another instance where the answer of the Supreme Court upon a case stated would be a "decision". This is to be found in s. 62 (1) of the Stamp Ordinance where it is expressly provided that the Supreme Court

> "shall decide the questions raised thereby, and shall deliver its judgment thereon containing the grounds on which such decision is founded"

and sub-s. (2) directs that the commissioners shall dispose of the case conformably to such judgment. This is very different from the wording of s. 15 or of s. 8 (*b*) of the Arbitration Ordinance and the jurisdiction thereby conferred is very different from the consultative jurisdiction exercisable under those sections with regard to cases stated during the reference and not as final awards.

We hold that we have no jurisdiction to decide the appeal on its merits. But, in case we are wrong upon this, and inasmuch as the matter was fully argued before us, it may be well that we should state our reasons for thinking that if an appeal had lain, it would have failed.

Section 111 (A) of the Crown Lands Ordinance of Kenya, so far as material, reads as follows:

> "111 (A). Where damage or loss has been occasioned to any land consequent upon the entry upon, or the resumption of, land under any of the provisions of s. 106, s. 107, s. 108, s. 109 and s. 110 of this Ordinance or of s. 23 to s. 28 inclusive of the Crown Lands Ordinance, 1902, and any part of such damage or loss is proved to have been occasioned by the severance of the land or by injury or destruction of trees, bushes or shrubs planted thereon, or by reason of the fact that the land so resumed has, before the date of notice of such resumption, been cleared or otherwise developed for the purpose of cultivation, a reasonable sum by way of compensation shall be paid in respect of any damage or loss incurred as aforesaid notwithstanding that compensation is not otherwise payable under the provisions of any of the aforesaid sections:"

Mr. Newbold pointed out that the word "land" occurs four times in this part section. He submitted that:

(1) "land" where first mentioned means land left after the resumption–remaining land;

(2) "land" secondly mentioned means the land resumed;

(3) "land" thirdly mentioned means the land left after the resumption–the remaining land; and

(4) "land" fourthly mentioned means the land resumed.

He said that his case depended upon the correctness of the third of these propositions. He contended that "land" here must refer to the land left after resumption, because this was indicated by the words "injury or destruction of trees . . . planted thereon". He argued that "thereon" must, in the case of a resumption, refer to the land left, because injury to trees on the land resumed could not be a subject for compensation to the landowner.

Mr. Newbold went on to argue that if "land" in the phrase "severance of the land" meant the land left after resumption, "severance of the land" could, in plain English, only mean the cutting up of the land left into two or more portions, and if the land left was not so cut up, compensation was not payable for severance. This would have remarkable results. For instance, if the land resumed was a strip taken along a boundary of a rectangular plot, so as to leave the remainder in one piece, compensation for severance would not be payable notwithstanding that the remainder might by the resumption be separated from its water supply; but if the strip was taken five yards in from the boundary, so as to bisect the plot, compensation would be payable.

With respect to Mr. Newbold, who put his case with his customary clarity and forcefulness, we do not think that either of his contentions is correct.

In our opinion, Mr. Newbold's interpretation of "land" where thirdly mentioned in s. 111 (*A*) as the land left after the resumption, ignores the fact that the damage or loss which may have to be compensated under the section is damage consequent upon "entry" as well as damage consequent upon resumption. There might be damage by entry to trees on any part of the entirety of the land, so that "thereon" need not, and indeed cannot, be construed as referring exclusively to land left after a resumption.

In our opinion, "land" where first mentioned in s. 111 (*A*) means the land to which damage or loss has been occasioned which may be the whole of the land, or any part of it; "land" where secondly mentioned means the land entered upon or resumed as the case may be; "land" where thirdly mentioned refers to the whole of the land (so that the severance may be of any part of the whole, and the trees damaged by entry may be growing on the whole or any part of the whole), and "land" where fourthly mentioned means the land resumed. The "damage or loss occasioned by the severance of the land" means the damage or loss occasioned by separating the piece resumed from the piece or pieces left. This causes a severance in the sense of a cutting up of the entirety of the land: it also causes a severance of each piece of land, in that each piece is cut off or separated from the other.

It follows that even if, as Mr. Newbold contended, "land" where thirdly mentioned meant the land left after the resumption, we should still not be able to agree that the phrase "severance of the land" could only, in English, mean that the land left must be divided into two or more pieces. Mr. Newbold contended that no other meaning could be given to the phrase "severance of the land" without writing into the section some such words as "from the land resumed", and that the court was not entitled to write in such words. The primary meaning of "sever" is "to put apart, to set asunder, to separate"; and the ordinary synonym for "severance" is "separation". "Severance of the land", even if "land" here meant the land left after the resumption, is at least as apt a phrase to denote the separation or cutting off of the land left from the land resumed, as it is to denote the division or cutting up into two or more

parts of the land left. And, in our view, it would not be necessary, in order to convey the first of these meanings, to write into the section the words “from the land resumed”. Ordinary English usage would imply this. In Tennyson’s phrase “Her lips are sever’d as to speak” it is not necessary to include “from one another” in order to convey the meaning. Similarly if a contract of insurance provided for compensation to be payable for “severance of a hand” it would not be necessary to add the words “from the arm” in order to convey the meaning of loss by cutting off the hand, and it would be altogether too narrow a construction to say that the compensation was not payable unless the hand itself was divided into two or more parts. (We are aware that the ordinary phrase in insurance policies is “loss by severance”). But, as already stated, we think that “land” in the phrase “the severance of the land” refers to the entirety of the land, part of which is separated from the remainder by the resumption. It is this separation which may give rise to compensation. This is also in accord with the ordinary legal meaning of compensation for severance in land acquisition cases, that is compensation to the owner of a holding for the compulsory separation of a portion of it from the remainder, where the remainder is injuriously affected by the separation n.

Mr. Newbold cited various authorities in support of the primary rule of construction of statutes that the court must give effect to the ordinary and grammatical meaning of the words used, without regard to consequences. In our opinion, to construe the section as we have construed it does give effect to the ordinary and grammatical meaning of the words used. But if there is ambiguity, in that severance may mean “cutting up” as well as “cutting off”, then we are entitled to prefer the construction which will avoid manifest injustice and sometimes absurdity.

As we have held that the appeal was not competent, it must be dismissed with costs.

Appeal dismissed.

For the appellant:
CD Newbold QC and *HB Livingstone* (Legal Secretary and Assistant Legal Secretary, East Africa High Commission)
The Legal Secretary, East Africa High Commission

For the respondent:
CW Salter QC and *DF Shaylor*
Buckley, Hollister & Co, Nairobi

Venn v Venn
[1958] 1 EA 264 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	12 April 1957
Case Number:	3/1957
Before:	Rudd J
Sourced by:	LawAfrica

[1] Evidence – Admissibility – Affidavit sworn before commissioner for oaths in England – Whether affidavit admissible in Kenya – Indian Evidence Act, 1872, *s.* 82.

Editor's Summary

This case is reported only on the question whether an affidavit sworn before a commissioner for oaths in England is admissible in Kenya. An affidavit of service upon the woman named was sworn before a commissioner for oaths in England. The registrar granted under r. 29 of the Matrimonial Causes Rules (Cap. 145) a certificate that the pleadings and proceedings were in order subject to the petitioner's advocate satisfying the trial judge that such an affidavit was admissible. It was argued for the petitioner that as an affidavit of service sworn before an English commissioner for oaths is admissible in England it is also admissible in Kenya by virtue of s. 82 of the Indian Evidence Act, 1872.

Held – "an English commissioner for oaths can take an affidavit anywhere in Her Majesty's Dominions or indeed elsewhere and it will be admissible in evidence in England and in my opinion having regard to s. 82 it will also be admissible in Kenya."

No cases referred to in judgment

Judgment

Rudd J: In granting his certificate that the proceedings were in order in this case the registrar raises the point that the affidavit or service upon the woman named was sworn before a commissioner for oaths in England and he granted the certificate subject to the petitioner's advocate satisfying the judge that such an affidavit was admissible in Kenya.

I have no doubt that the affidavit is admissible in this court. I think that s. 82 of the Indian Evidence Act clearly applies. It reads as follows:

> "Whenever any document is produced before any court purporting to be a document which by the law in force for the time being in England or Ireland would be admissible in proof of any particulars in any court of justice in England or Ireland without proof of the seal or stamp or signature authenticating it or of the judicial or official character claimed by the person by whom it purports to be signed, the court shall presume that such seal, stamp or signature is genuine and that the person signing it held at the time when he signed it the judicial or official character which he claimed and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland."

An English commissioner for oaths can take an affidavit anywhere in Her Majesty's Dominions or indeed elsewhere and it will be admissible in evidence in England and in my opinion having regard to s. 82 it will also be admissible in Kenya.

In this case the affidavit was sworn in England and there can be no doubt but that it would be admissible there and it is also admissible here.

For the petitioner:
RDC Wilcock
Archer & Wilcock, Nairobi

For the respondent:
JPG Harris

Robson, Harris & Co, Nairobi

Samusoni Ssango v Lukiko
[1958] 1 EA 265 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	14 April 1958
Case Number:	263/1957
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Criminal law – Practice – Native court calling witness of its own motion – Whether calling of witness irregular – Court not bound by law and practice of England – Buganda Courts Ordinance (*Cap.* 77)*, s.* 20 *and s.* 27 (*U.*)*.*

Editor's Summary

The Principal Court of Buganda convicted the appellant of rape. He unsuccessfully appealed to the judicial adviser, Buganda. Being entitled under s. 26 (3) of the Buganda Courts Ordinance to appeal from the judicial adviser to the High Court on a point of law the appellant further appealed, on the ground that the Principal Court ought not to have called a witness of its own volition at the trial, after the defence case had closed. This point had been considered by the Judicial Adviser, who held that the Buganda Courts had not any strict rules as to the admissibility of rebutting evidence, and in consequence although the procedure was, in the judicial adviser's view, objectionable, the proceedings were not thereby vitiated. On this second appeal it was contended for the appellant that the objection was not merely technical and that substantial injustice had been done to the appellant, since the witness should have been called as a witness for the prosecution before the close of the prosecution case, or not at all.

Held –

(i) since s. 27 of the Buganda Courts Ordinance requires every authority exercising powers of appeal or revision, to decide all matters according to substantial justice without undue regard to technicalities, the question before the High Court was whether any real injustice to the appellant had been done by the Principal Court calling of its own motion a witness at the end of the hearing, in order "to enlighten the court."

(ii) the strict rules under which an accused is tried in courts which follow the law and practice of England cannot always be appropriate where that law and practice do not apply, especially when there are no lawyers, and no one conducts the prosecution, except the complainant; since the witness was not called on the application of the prosecution and there was no prosecutor acting as

such, the court was justified in this particular case in exercising its discretion to call the witness.

Appeal dismissed.

No cases referred to in judgment

Judgment

Sir Audley McKisack CJ: This is an appeal from the decision of the judicial adviser, Buganda, dismissing an appeal from a conviction for rape in the Principal Court of Buganda.

An appeal from the judicial adviser to the High Court lies on a point of law only (s. 26 (3) of the Buganda Courts Ordinance, Cap. 77).

At the trial in the Principal Court, after the accused and his witnesses had given evidence, the court called another witness who had been mentioned during cross-examination of a defence witness by the complainant. This witness had testified that the appellant was in his (the witness's) house at a certain time, and not (as alleged by the complainant) on a path on which complainant was walking. In cross-examination the complainant asked this witness

> "Don't you remember that when you were accompanying me we met Emmanuel of Nabinene, and while standing with him the accused passed us, and you saw him?".

The witness replied

> "I know that we were stopped on the way and wished (sic) Emmanuel, but the accused did not pass us, we left him at my house, and when I went back I found him at my house."

It was this person referred to as Emmanuel who was the witness called by the court after the close of the defence. He had not been mentioned in the evidence of any of the witnesses before the cross-examination which I have quoted.

At the close of the evidence for the defence it is noted in the record of the Principal Court that "the case is adjourned pending the witness Emmanuel's evidence." Subsequently the court resumed the hearing in the presence of the accused, and took the evidence of Emmanuel. This witness confirmed what the complainant had suggested in the cross-examination already quoted, viz., that he did see the accused on the path at the material time and place. In their judgment the Principal Court said that they placed reliance on the evidence of Emmanuel, accepting it as true and independent evidence, and they referred to him as

> "the other witness Emmanuel Busulwa who was summoned to enlighten the court"

(p. 14 of the record). Later in the judgment it is stated that "the court takes Emmanuel's evidence as absolutely true", and goes on to note that, although the appellant was invited by the court to cross-examine Emmanuel (as confirmed by the note at the foot of p. 10), the appellant declined to do so.

On appeal to the judicial adviser the appellant raised, among other objections, the point that the Principal Court ought not to have called a witness after the defence had closed. The learned judicial adviser, in dismissing the appeal, dealt with this point as follows–

> "The appellant objects strongly to the evidence given by Emmanuel Busulwa on which the Principal Court put the greatest weight. It was wrong of the Principal Court to call this witness after the defence had closed and it is clear from its judgment that the Principal Court was somewhat embarrassed by its own procedure for it recounts the evidence of this witness in two places, both after its resume of the prosecution case and again after recounting the defence evidence. However the Buganda courts have not as yet any strict rules as to the admissibility of rebutting evidence after the close of the defence and, though I consider the procedure in this case was objectionable, I am not of the opinion that the admission of this witness vitiated the proceedings."

Mr. Haque for the appellant contends that the judicial adviser erred in law, in that he ought to have allowed the appeal on the ground of wrong admission of Emmanuel's evidence. Mr. Haque argues that this is not a case of mere technicality, but that substantial injustice has been done to the appellant. The witness Emmanuel should have been called as a prosecution witness before the close of the prosecution case, or not at all.

Had this trial taken place in a court bound by the provisions of the Criminal Procedure Code I have little doubt that an appellate court would allow the appeal. But the Principal Court is not subject to the provisions of that Code. Procedure in the Principal Court (and other Buganda courts) is governed by s. 20 of Cap. 77, which is as follows–

> "20. Subject to any matter which may be prescribed under sub-s. (1) of s. 5 of this Ordinance or by rules under s. 28 of this Ordinance or by

> any native law or custom, the practice and procedure of courts shall be regulated in accordance with directions issued by the Omulamuzi on the advice of the resident."

So far as the question of calling a witness after the close of the case for the defence is concerned s. 5 of Cap. 77 (mentioned at the beginning of s. 20) is not relevant; no relevant rules have been made under s. 28 of Cap. 77; and no relevant directions by the Omulamuzi have been brought to my notice. Whether there is any native law or custom which would be relevant, I do not know, and none is mentioned either in the judgment of the Principal Court or in that of the judicial adviser.

Section 27 of Cap. 77 requires that

> "every authority exercising powers of appeal or revision under this Ordinance shall decide all matters according to substantial justice without undue regard to technicalities."

I therefore have to decide whether there was any real injustice to the appellant by reason of the Principal Court having, of its own motion, called a witness at the end of the hearing in order (to use the court's own words) "to enlighten the court". Here was a case in which, at a late stage of the trial, it became apparent that there existed a person who might be able to clear up a material point one way or the other. It was not a case of the prosecution asking for a witness to be called to fill a gap in the prosecution case. There was no application by the prosecution for this purpose, and in fact there was no advocate, police officer or anybody else conducting the prosecution on behalf of the complainant. It has been explained to me that, in the Buganda courts, in a case in which a member of the Buganda police does not conduct the prosecution, it is left to the complainant to say what witnesses he or she wants to be called, and for the court to decide, in its discretion, what other witnesses it may require in order that the true facts may be revealed. In such circumstances is it right that the court, knowing that there exists a witness who may be able to decide a material point one way or the other, should say

> "we will not hear this witness, because we have not heard of his existence until after the accused gave evidence, and we will therefore decide the case in ignorance of any facts which that witness may be able to prove to us"?

I cannot agree that this would have been a right attitude on the part of the Principal Court in the circumstances of the instant case. The strict rules which are properly imposed upon the trial of an accused person under the English system cannot always be appropriate in a court where English law does not apply, where there are no lawyers, and where there is nobody to conduct the prosecution except the complainant. I am not, of course, to be taken as saying that it would always be proper for the court to call a witness after both parties had concluded their case. There may well be many cases in which it would be quite wrong. But the present case is, in my view, an instance–perhaps a rare one–where the discretion of the court in calling a witness after the parties had completed their evidence was justifiable. In this respect I differ from the learned judicial adviser, who considered that the Principal Court erred in calling the witness (though holding that the error was not fatal to the conviction).

The appeal is dismissed.

Appeal dismissed.

For the appellant:
Z Haque
Haque & Gopal, Kampala

For the respondent:
AWK Mukasa (Crown Counsel, Uganda)
The Attorney-General, Uganda

Radhakrishen M Khemaney v Mrs Lachaba Murlidhar
[1958] 1 EA 268 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	23 May 1958
Case Number:	78/1957
Before:	Briggs V-P, Forbes JA and Sir Owen Corrie Ag JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Mayers, J

[1] Damages – Fatal accident – Principles on which damages should be assessed – Fatal Accidents Ordinance (*K.*).

Editor's Summary

The respondent sued the appellant for damages, alleging that the death of the respondent's husband was due to the appellant's negligence. The trial judge found for the respondent and awarded general damages of Shs. 132,500/-, from which award the appellant and the respondent both appealed, on the ground that the judge had applied wrong principles in assessing damages.

Held –

(i) in considering an award of damages under the Fatal Accidents Ordinance, the court should ascertain the age, expectation of working life, wages and expectations of the deceased, and what proportion of his net income the deceased would have made available for his dependants, from which the annual value of the dependency could be calculated; this annual sum should then be capitalized by multiplying it by a sum representing so many years purchase, having regard to the expectation of earning life of the deceased and the expectation of life and dependency of the widow and children; then the capital sum arrived at should be discounted to allow for the prospect of remarriage of the widow, or the acceleration of the receipt by the widow of what her husband left her by his death, with a deduction for the value of the deceased's estate, of which his dependants get the benefit.

(ii) the resulting sum, which must depend upon a number of estimates and imponderables, is the lump sum the court should apportion among the dependants.

(iii) in this case, since the evidence before the trial judge as to the value of the deceased's estate was unsatisfactory, and the trial judge had erred in his approach to the assessment of damages, the award would be set aside and the case remitted for re-trial on the issue of damages.

Case referred to in judgment:

(1) *Peggy Frances Hayes and others v. Chunibhai J. Patel and another*, Kenya Supreme Court Civil Case No. 173 of 1956 (reported on appeal sub. nom. *Chunibhai J. Patel and another v. P. F. Hayes and others*, [1957] E.A. 748 (C.A.)

Case remitted for re-trial on issue of damages.

May 23 The following judgments were read:

Judgment

Sir Owen Corrie Ag JA: This appeal and cross-appeal arise out of a judgment delivered on July 30, 1957, by Mr Justice Mayers in the Supreme Court of Kenya sitting at Mombasa, in an action in which the present respondent and cross-appellant was the plaintiff and the present appellant was the defendant. The action was brought by the respondent, the widow of Murlidhar Doulatram Mahbubani, on behalf of herself and the other dependants of her deceased husband against the appellant under the Fatal Accidents Ordinance, alleging

that the death of the respondent's husband was due to the appellant's negligence. The Supreme Court awarded the respondent the sum of £6,625, that is to say Shs: 132,500/- in respect of general damages. It is against this award that both parties are now appealing.

The appellant bases his appeal on the following grounds:

> That the learned judge in calculating damages adopted an incorrect principle of law:
>
> That he erred in holding that the respondent's deceased husband would in all probability have continued to make an allowance to his mother, father and grandfather for a further fifteen years from the date of his death:
>
> That he erred in law in not appreciating that the allowance alleged to be made by the deceased to the respondent and her children was on the evidence a lavish allowance and could only be maintained by the deceased grossly over-spending his income and that in all probability the allowance would soon have to be reduced to an amount not exceeding £1,200 per annum being the value of the deceased's share in the Dar-es-Salaam partnership which share vested in the respondent and her children and
>
> Finally, that the learned judge erred in holding that little attention need be paid to earnings prior to 1956 and failed to appreciate that the allowance actually made by the deceased to the respondent and her children had been paid for a relatively short period of time before the deceased's death.

By her cross-appeal the respondent maintains that the learned judge's estimate of the damages was wholly erroneous and ought to be increased: that he followed wrong principles in reducing the damages to £6,625 and that the damages awarded are wholly, substantially and grossly inadequate.

I have no doubt as to the principles which are to be applied to this appeal.

In Civil Case No. 173 of 1956, delivered on March 26, 1957, in the Supreme Court of Kenya in an action brought by *Peggy Frances Hayes and others* against *Chunibhai J. Patel and another* (1), the principles applied by the learned chief justice, as he then was, were as follows:

> "The court should find the age and expectation of working life of the deceased, and consider the wages and expectations of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase. The multiplier will bear a relation to the expectation of earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for the possibility or probability of the re-marriage of the widow and, in certain cases, of the acceleration of the receipt by the widow of what her husband left her as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum the court should apportion among the various dependants."

Upon an appeal against this judgment this court held ([1957] E.A. 748 (C.A.)):

> "That the method of assessment of damages adopted by the learned chief justice was correct."

In the instant appeal the court was relieved of the necessity of considering one of the imponderables referred to by the learned chief justice in that it is not suggested that the respondent may re-marry. On the other hand the court had to take into account an imponderable which was not present in the *Hayes*

case (1), namely, that the deceased had been living at an extravagant rate and it well might be that he would have been compelled in the future to reduce the allowance made by him to his wife and family.

On the evidence before him the learned judge found that

> "the basic figure expended by the deceased exclusively upon his dependants was in the order of £2,150."

In regard to this finding this court has to take into account the appellant's argument that the learned judge erred in not taking sufficient account of the allowance made by the deceased to his relatives before the year 1956.

I do not think there is any substance in this objection.

It is clear from the evidence that the deceased's income was rapidly rising: in 1951 he was drawing Shs. 9,000/- a year as salary, in April, 1955, he was transferred to Mombasa at a salary of Shs. 48,000/- a year and was given a free flat, the rent of which was estimated by the respondent at Shs. 300/- a month: and in 1956 his salary was increased to Shs. 60,000/- a year. Moreover, during the whole period, the deceased was also receiving an income in respect of his one-sixteenth interest in a business in Dar-es-Salaam, which the learned judge estimated at approximately £1,200 per annum.

It follows that, in my view, the learned judge was entitled on the evidence before him to assess the amount allowed by the deceased to his relatives at £2,150. He proceeded to capitalize this sum at fifteen years' purchase, to which no objection has been taken by either side, thus arriving at a "basic capital of £32,250."

I have next to consider the finding that the deceased would have been compelled to reduce his allowance to his relatives in order to live within his income.

With regard to this, the learned judge observes:

> "In addition to the foregoing factors, it is necessary to consider in the instant case another factor which, so far as I am aware, has never had to be considered previously. That factor is that the evidence revealed that the deceased had for some considerable time been living so substantially in excess of his income that unless either his income had been increased by at least 50 per cent. or he had effected considerable retrenchments in the amount that he was expending for the benefits of his dependants or for his own purposes, there would inevitably have come a time when he would have been hopelessly insolvent."

The learned judge, however, did not at that stage proceed to estimate the reduction that would have to be made in the deceased's allowance to his dependants and it was not until after he had dealt with all the other factors in the case that he said:

> "I therefore assess the appropriate deduction to be made from the capital sum as already determined consequent upon the probable effects of the deceased's extravagance upon his future ability to provide for his dependants at 50 per cent."

I am clear that in adopting this procedure the learned judge misdirected himself: and that the time when he should have taken into account the future effect of the deceased's extravagance was immediately after he had calculated the actual allowance to the dependants at £2,150.

On behalf of the appellant Mr. Cleasby has argued the 50 per cent. reduction, found by the learned judge, if taken into account at this stage, would give the dependants an income of only £1,075, which is less than the £1,200 a year at which the learned judge estimated the income from the interest of the deceased's

share in the Dar-es-Salaam partnership, and this, under the terms of the partnership, vests in the dependants. Accordingly Mr. Cleasby argued that they were not entitled to a future income of more than £1,200.

On the other hand Mr. O'Donovan has argued that the evidence before him did not justify the learned judge in holding that a reduction in the allowance to the deceased's dependants was inevitable.

The latter argument I cannot accept. I am satisfied that on the evidence the learned judge was entitled to hold that the deceased would have been compelled to make a reduction in his scale of living and that this would affect his allowance to his dependants.

At the same time, in view of the evidence that the deceased's income had been rising rapidly, I am not satisfied that the learned judge's assessment of the deduction appropriate to the deceased's extravagance was entirely justifiable, nor am I satisfied that if the learned judge had dealt with the question of the deceased's extravagance at the point at which I have held he should have done, he would have made so great a reduction as 50 per cent. I am therefore of opinion that this matter should go back for further consideration.

The learned judge has made a deduction of £1,000 in respect of the benefit the dependants will obtain through receiving a lump sum instead of annual payments which would be subject to income tax. No objection has been made by either party to this figure.

Finally, there must be a deduction from the "basic capital" of the value of the deceased's estate. The learned judge has deducted a sum equivalent to fifteen years' purchase of the £1,200 a year, which he estimated as the income deceased was receiving from the Dar-es-Salaam partnership. Clearly this is incorrect.

It is open to the greatest doubt whether the deceased's dependants would continue to receive £1,200 a year from the partnership for any period at all. The evidence was that the capital value of the deceased's share, or the amount in his capital account, in the partnership was approximately equivalent to the amount of his debt to the firm of B. Choitram. This share in the partnership was the only substantial asset possessed by the deceased, and it is a not unreasonable conclusion that it would have to be realised in order to discharge the debt. If this were done it is difficult to see how any interest in the partnership could survive to the dependants. The evidence before the learned judge was not satisfactory, partly because the partnership deed was not produced, and partly because the administration of the deceased's estate was not complete-But the witness Doulatram Bharoomar, a partner in the firm of B. Choitram by which the deceased was employed, and brother of his widow, did say in evidence that he did not expect that the deceased's estate, would be in credit. I am of opinion that the learned judge erred in treating the share of the partnership separately from the remainder of the deceased's estate, and consider that he should have endeavoured to ascertain the value of the estate as a whole which would pass to the deceased's dependants after discharge of the deceased's liabilities. Certainly he was not justified in assuming that the dependants would continue indefinitely to receive £1,200 a year from the Dar-es-Salaam partnership. This matter also in my opinion must go back to the Supreme Court for further consideration.

I am accordingly of the opinion that the judgment should be set aside, and, in all the circumstances, I think the case should be remitted for re-trial. As I have already mentioned the evidence before the learned judge on the first trial as to the value of the deceased's estate was unsatisfactory. It may be that the estate has now been fully administered, in which case its value would be an ascertained fact of which evidence could be led on the re-trial.

Finally, I would mention an objection by the appellant that the learned judge erred in holding that the respondent’s deceased husband would in all

probability have continued to make an allowance to his mother, father and grandfather for a further fifteen years from the date of his death.

I see no substance in this objection. There was no evidence before the court as to the actual amount of the allowances made by the deceased to his parents and grandfather; and under s. 4(1) of the Ordinance the amount recovered, after deducting the costs not recovered from the defendant, is to be divided amongst the dependants "in such shares as the court, by its judgment, shall find and direct."

I would therefore order that the judgment and decree of the Supreme Court, so far as it relates to the assessment of the total sum of general damages, be set aside; and that that issue be re-tried. The dismissal of the claim for special damages should stand, and also the order for apportionment of general damages in the sense that, that whatever sum is awarded on the re-trial, should be divided in the same proportions and between the same person as previously ordered. As regards costs, the order for costs of the original trial should stand. Both the appeal and the cross-appeal were partly successful and partly unsuccessful, so I would make no order as to costs in this court. The costs of the re-trial will, of course, be in the discretion of the judge.

Briggs V-P: I agree and have nothing to add. An order will be made in the terms proposed.

Forbes JA: I also agree.

Case remitted for re-trial on the issue of damages.

For the appellant:
RP Cleasby
Atkinson, Cleasby & Co, Mombasa

For the respondent:
B O'Donovan and *JK Winayak*
Johar & Winayak, Nairobi

Smith and others v R
[1958] 1 EA 273 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	14 May 1958
Case Number:	13/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Templeton, J

[1] Criminal Law – Practice – Trial with jury – Juryman speaking to a member of public after jury

enclosed – Whether trial a nullity – Criminal Procedure Code, s. 291 *and s.* 311 (*K.*)

Editor's Summary

After the trial judge had completed his summing-up and the jury had been enclosed, the deputy registrar, in whose charge they were, obtained leave from the trial judge to take them in his custody to lunch at an hotel. While they were passing through the hotel, one of the jurors, unknown to the deputy registrar, held a short conversation with a friend who had greeted him. The appellants having been convicted, appealed, and it was contended on their behalf that (*a*) the trial judge was not entitled to give any direction with regard to the jury's refreshment without first hearing counsel and ruling on any objection which might be made and (*b*) that even if the trial judge's order was correctly made, it was still an essential condition of the order that the jury should be under effective control of the deputy registrar, and be preserved by him from any possibility of communication with third parties, and in this case that control had proved ineffective or insufficient or insufficient. It was sought to establish by an affidavit of the juror that the nature of the conversation was harmless, in that it was wholly unrelated to the case, but the court refused to receive the affidavit.

Held –

(i) if, at any time after the conclusion of the summing-up, a juryman in any way ceases to be "enclosed" in the sense that he is not under the effective control of the officer in whose charge he is, and is thereby enabled to converse with a member of the public, and does so, the verdict cannot stand and the court will not even enquire whether anything directly prejudicial to the accused took place or not.

Obiter – "We are far from saying that a single remark innocently addressed to a juror under control of the court's officer, though in breach of the provisions of s. 311 would necessarily invalidate the verdict. Nor do we think that innocent remarks addressed by a juror to, say, a waiter in the officer's presence and hearing would, having regard to the terms of s. 291 be incurably irregular";

(ii) the provisions of s. 291 (2), though the terms are apparently wide, should in practice be applied with considerable caution, and they do not permit the court's control to be rendered ineffective.

Per Curiam – "The practical solutions in East Africa would appear to be (*a*) to have some refreshment brought into the jury room or another room in the courthouse, (*b*) to require jurors themselves to bring sandwiches or similar refreshment, or (*c*) to adjourn the final part of the summing-up to a convenient hour, as indicated in *R. v. Neal*".

Appeal allowed. Convictions and sentences quashed. Retrial ordered.

Case referred to in judgment:

(1) *R. v. Neal*, [1949] 2 All E.R. 438; [1949] 2 K.B. 590.

(2) *R. v. O'Connell & Others*, 1 Cox C.C. 365.

(3) *R. v. Willmont* (1914), 30 T.L.R. 499.

(4) *R. v. Ketteridge*, [1915] 1 K.B. 467.

(5) *R. v. Twiss*, [1918] 2 K.B. 853.

(6) *Pascal Clement Braganza v. R.*, [1957] 1 E.A. 152 (C.A.).

Judgment

Briggs V-P: read the following judgment of the court: The appellants were convicted of conspiracy to defraud by the Supreme Court of Kenya sitting with a jury. We allowed their appeal, and quashed the convictions and sentences, but ordered a retrial. We now give our reasons.

After the learned judge had completed his summing-up and the jury had been enclosed, their deliberations took some time, and the deputy registrar, in whose charge they were, obtained leave from the judge to take them in his custody to have luncheon in an hotel. While they were passing through a bar on the way to the dining room, one of the jurors was greeted by a member of the public, detached himself from the party and held a short conversation with that person. He then rejoined the other jurors. The deputy registrar was unaware that he had left their company or spoken to anyone. After luncheon the jury returned, deliberated further and later gave a verdict of guilty. No objection was then taken, since the appellants and their counsel were not aware of these facts until the following day. It was submitted on appeal to us that the verdict was a nullity.

Mr. Caplan for the appellants took first the point that the learned judge was not entitled to give any direction with regard to the jury's refreshment without first hearing counsel and ruling on any objection which might be made. He submitted also that leave to go outside the precincts of the court could not in any event be given. We were not greatly impressed by either of these points, but in the event it was not necessary to give any decision on them.

The relevant statutory provisions are in sections 291 and 311 of the Criminal Procedure Code, which are as follows–

> "291. (1) It shall not be necessary in any case to keep the jury together during any adjournment prior to the close of the judge's summing-up; but it shall be lawful for the court, if it shall appear to it to be advisable in the interests of justice in any trial, to require the jury to be kept together during any adjournment.
>
> "(2) When the jury have retired to consider their verdict, the court may give such directions as it may think fit with respect to their accommodation, custody and refreshment."
>
> "311. After the summing-up, the jury shall consider their verdict, and for that purpose may retire.
>
> "Except with the leave of the court, no person other than a juror shall speak to or hold any communication with any member of the jury while the jury are considering their verdict."

Mr. Caplan cited first *R. v. Neal* (1), [1949] 2 K.B. 590, which is helpful generally as showing the serious consequences of any irregularity concerning a jury after its enclosure; but the court expressly declined to consider the particular situation which arose here, saying, at p. 595,

> "It is unnecessary to consider what might be the position if the court permitted them to go to some place for refreshment under the charge of the bailiff. It may be that in such a case the position would be no different from that which obtained in murder cases until the recent legislation which

> permits a jury to separate for the night, because it is well known that when the court rose for the day, the jury were taken in the custody of the bailiff or bailiffs to an hotel where they stayed for the night and were brought back in the same custody to the court the next day. This might still happen if the court, in its discretion, refused to allow them to separate."

In view of this it seems unnecessary to give to s. 291 the very restricted meaning for which Mr. Caplan contended. The cases of *R. v. O'Connell & Others* (2), 1 Cox C.C. 365, and *R. v. Willmont* (3) (1914), 30 T.L.R. 499, also cited by Mr. Caplan, do not appear to affect this aspect of the case.

Mr. Caplan, however, raised a further point, which appeared to us to be fundamental, that even if the learned judge's order was correctly made, it was still an essential condition of the order that the jury should be under effective control of the deputy registrar, and be preserved by him from any possibility of communication with third parties; and in this case the control undoubtedly proved ineffective or insufficient. We are far from saying that a single remark innocently addressed to a juror under control of the court's officer, though in breach of the provisions of s. 311, would necessarily invalidate the verdict. Nor do we think that innocent remarks addressed by a juror to, say, a waiter in the officer's presence and hearing would, having regard to the terms of s. 291, be incurably irregular. But in this case the matter went further. There was a conversation, albeit a short one, of which the court's officer was wholly unaware, and which was in no way necessitated by circumstances. It seemed to us that Mr. Caplan was right in submitting that the required control had broken down. The juror had, after enclosure, been out of the custody of the deputy registrar and separated from his fellow jurors for an appreciable time. It was sought to establish by an affidavit of the juror that the nature of the conversation was harmless, in that it was wholly unrelated to the case. For reasons which will appear we refused to receive the affidavit.

We refer first to *Willmont's* case (3). On the trial of a prisoner at assizes, some time after the jury had retired to consider their verdict, the clerk of assize went to their room and asked if they had agreed or were likely to agree. The jury then put some questions to him, and he answered them and a discussion took place. Later he visited the jury again, and a further discussion took place. Eventually the jury found the prisoner guilty. Lord Reading, C.J., said that–

> "The appellant wished to call three jurymen, who were prepared to make a deposition to the court, but they had come to the conclusion that such evidence was inadmissible; though it was right to say that the point had not been argued before them. They had, however, received a report from the clerk of assize, who, as they would have expected, had told them frankly exactly what took place. It appeared that when the jury had been out for some time considering their verdict, the clerk of assize went to their room and asked if they had agreed, or were likely to agree. The jury then put some question to him, and he unfortunately, with the best possible intentions, answered them; and a discussion took place. Later he visited the jury again, and a further discussion took place; and eventually the jury found the appellant guilty. In the judgment of the court this was a wholly irregular proceeding on the part of the clerk of assize. He should not have entered into any discussion with the jury, and should not have done anything beyond asking them if they were agreed or likely to agree, or whether they wanted any further direction or assistance from the judge. Outside such questions as that, no interference of any sort with the jury should be made.
>
> "The trial of a criminal charge must be in public, and not in secret; the prisoner was entitled to have the benefit of his counsel throughout

> and to hear any direction or advice given by the judge to the jury. The discussions which had taken place were of a character which they could not disregard; they constituted a serious interference with the jury. The discussions which had taken place were of a character which they could not disregard; they constituted a serious interference with the jury. It was impossible to say with any certainty that, but for the discussions and the advice given by the clerk of assize, the jury would have come to a unanimous conclusion. The conviction would, therefore, be quashed."

In *R. v. Ketteridge* (4), [1915] 1 K.B. 467, where after the charge a juror had become separated from the rest, and from the control of the bailiff, and had been in a position to converse with other persons, Lush, J., said–

> "Mr. Burrows, who appeared for the prosecution, contended that although the juror did what was irregular in separating from his colleagues and exposed himself to the risk of having a punishment imposed for his contempt of court, the court should not, in the absence of evidence that he had communicated with any other person or that the appellant had been prejudiced, treat the trial as abortive, jurors now being allowed to separate during the trial of a prisoner on a charge of felony such as this. He cited *R. v. Kinnear,* 2 B. & Ald. 462, and *R. v. O'Neill,* 3 Craw. & Dix, 146.
>
> "In the first of these cases the offence charged was a misdemeanour and the judge had not summed up, and therefore that decision does not assist us in the present case. In *R. v. O'Neill,* which was an Irish case, and the decision was merely that of a court of first instance, there are dicta which appear to show that the fact that the prisoner had been prejudiced by the juror conversing with other persons was material, but the case of *R. v. Fowler,* (1821), 4 B. & Ald. 273, which was cited, does not appear to us to justify that conclusion. In our opinion it is not necessary or relevant to consider whether the irregularity has in fact prejudiced the prisoner. We refused to consider an explanatory statement which we were told had been made by the juror which would clearly not be admissible in evidence. If a juror, after the judge has summed-up, in any criminal trial separates himself from his colleagues and, not being under the control of the court, converses or is in a position to converse with other persons, it is an irregularity which, in the opinion of the court, renders the whole proceedings abortive, and the only course open to the court is to discharge the jury and commence the proceedings afresh."

These authorities seemed to us to be conclusive that if, any time after the conclusion of the summing-up, a juryman in any way ceases to be "enclosed", in the sense that he is not under the effective control of the officer in whose charge he is, and is thereby enabled to converse with a member of the public, and does so, the verdict cannot stand, and the court will not even enquire whether anything directly prejudicial to the accused took place nor not.

It is necessary to add that quite different rules would apply at any stage before the conclusion of the summing-up. See *R. v. Twiss* (5), [1918] 2 K.B. 853, 859, and *R. v. Neal* (1), [1949] 2 K.B. at p. 594.

It seems desirable to say that the provisions of s. 291 (2), though its terms are apparently wide, should in practice be applied with considerable caution. They do not permit the court's control to be rendered ineffective. The practical difficulties of maintaining such control outside the precincts of the court should be remembered. We do not suggest any dereliction of duty on the part of the Deputy Registrar in this matter, as we appreciate the practical difficulty of a single individual maintaining effective control over a number of jurors while passing through crowded public rooms of an hotel. In England, where jurors were enclosed for the night in an hotel, they were normally conveyed to and fro in special vehicles, accommodated in special accommodation, and

kept under police guard. The practical solutions in East Africa would appear to be (*a*) to have some refreshment brought into the jury room or another room in the court-house, (*b*) to require jurors themselves to bring sandwiches or similar refreshment, or (*c*) to adjourn the final part of the summing-up to a convenient hour, as indicated in *R. v. Neal* (1).

We were urged by counsel for the appellants not to order a retrial. In doing so, we had in mind the judgment of this court in *Pascal Clement Braganza v. R.* (6), [1957] E.A. 152 (C.A.) and considered that our order was in accordance with the principles there laid down. It would be undesirable to give in detail our reasons for this view.

Appeal allowed. Convictions and sentences quashed. Retrial ordered.

For the first appellant:
J O'Brien Kelly
J O'Brien Kelly, Nairobi

For the 2nd and 3rd appellants:
L Caplan QC (of the English Bar), *J O'Brien Kelly, DN Nene, MK Bhandari*
DN Nene, Nairobi
Stephen & Roche, Nairobi

For the respondent:
JP Webber (Crown Counsel, Kenya)

Parbhubhai Morarji v Jagabhai Morarji
[1958] 1 EA 277 (CAN)

Division:	HM Court of Appeal at Nairobi
Date of judgment:	9 June 1958
Case Number:	25/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Edmonds, J

[1] Practice – Irregularities not affecting jurisdiction – Order of court not drawn up or extracted – Reference to referee – Whether proceedings pursuant to order and before referee a nullity – Civil Procedure Ordinance (*cap.* 5), *s.* 90 (*K.*) *– Civil Procedure* (*Revised*) *Rules,* 1948, *O.XXVII r.* 11 *and r.* 12 (*K.*).

[2] Appeal – Grounds of appeal – Objections to evidence and procedure not taken at trial – Whether

objections taken too late.

Editor's Summary

The appellant and respondent, who were brothers, were the registered owners of a plot of land at Nakuru, on which there was a dwelling house. The respondent, who began the proceedings, alleged that the plot was bought and the house built, with money provided by himself and the appellant in equal shares, that the house had been let and the rents collected by the appellant, who refused to account to the respondent, or make any payment to the respondent in respect thereof. The respondent claimed a declaration that the premises should thenceforth be owned by the parties as tenants in common in equal shares, an account of the rents collected and payment of his half share. In his defence the appellant admitted the parties were registered as joint owners, but alleged that this was done on the respondent's assurance that he would pay the appellant half the purchase price and cost of building the house, which he said he had never had. He denied that the respondent was entitled to any portion of the rents and counterclaimed for a declaration that he was sole owner. At the trial, after issues had been settled, the respondent gave evidence

that he and his brother had kept their finances, or most of them, in common, since 1947, and that he had contributed his half share through the common funds. He produced a statement purporting to show his financial dealings with his brother since 1947, and certain documents and vouchers. After his evidence, the trial judge, at the request of the advocates for the parties, ordered that an account be taken by one, Patel, of all the transactions between the parties and that Patel be directed to examine the accounts and report his findings and opinion to the court. No formal order was ever drawn up or extracted, but Patel later reported that neither of the parties had kept proper accounts, but that with the aid of oral evidence, supplemented by memoranda in the diaries of the parties, he had prepared certain accounts, which were filed in court, with a report containing Patel's comments and his opinion to the effect that the respondent had incurred expenses for or rendered services to the appellant "to enable the joint family to accumulate the savings for the purchase of assets". When the hearing was resumed, the appellant's advocate objected to certain items in the report and accounts and to the reference to a "joint family". He did not object to Patel's jurisdiction to report, nor to the absence of any formal order giving directions to Patel. The trial judge, on the material before him, answered the issues, finding, *inter alia*, that the respondent had contributed at least Shs. 25,698/38 to the cost of the plot and the building, and made a declaration as sought by the respondent. On appeal it was argued for the appellant that since no formal order giving directions had been drawn up or issued or given to Patel, the proceedings before him were a nullity, that Patel had failed to transmit to the court the proceedings before him as required by O.XXVII, r. 12 of the Civil Procedure (Revised) Rules, 1948, that Patel had misconceived his duties and had acted as an arbitrator, instead of as a referee, that his report and accounts were erroneous and against the weight of the evidence and that the trial judge had erred in accepting these.

Held –

(i) the omission to extract the order was a serious irregularity, but since the appellant's advocate took no objection on this ground at the trial, and the foundation of the referee's jurisdiction was the court's "direction" that the should examine the accounts, rather than the formal order embodying the direction, the irregularity was not one going to jurisdiction and had been taken too late.

(ii) the terms of the court's order were perfectly clear and a sufficient compliance with O.XXVII r. 12 and this objection was taken too late.

(iii) it was also too late to object that the proceedings before the referee had not been transmitted to the court as they should have been. *Keeble v. Shelton* (1948), 15 E.A.C.A. 14 followed.

(iv) since the appellant's advocate had neither criticised, the conduct of the referee nor attacked the referee's report at the trial as being against the weight of the evidence, nor called evidence to contradict the report, it was too late to do so on appeal.

(v) the referee, in his use of the phrase "joint family" did not intend it to indicate the existence of an undivided Hindu joint family, but the existence of a joint fund.

Appeal dismissed.

Case referred to in judgment:

(1) *Ex parte Van Sandau* (1846), 15 L.J. Bcy. 13.

(2) *R. v. Worksop Local Board of Health* (1865), 34 L.J. M.C. 220.

(3) *Barker v. Palmer* (1881), 8 Q.B.D. 9.

(4) *Gifford v. Bury Town Council* (1888), 20 Q.B.D. 368.

(5) *Keeble v. Shelton* (1948), 15 E.A.C.A. 14.

June 9. The following judgments were read by direction of the court:

Judgment

Forbes JA: This is an appeal from a judgment and decree of the Supreme Court of Kenya sitting at Nakuru.

The parties are brothers, and the suit concerned a plot of land at Nakuru held by them as joint tenants, and the dwelling-house erected on the plot. The respondent, the original plaintiff, alleged in his plaint that the plot was purchased and the dwelling-house built with moneys provided by himself and the defendant/appellant in equal shares; that the house had been let to various tenants since its completion; that the defendant/appellant had been collecting the whole of the rents payable by such tenants; and that the defendant/appellant refused to account to the plaintiff/respondent for his share of such rents or to make any payment to the plaintiff/respondent in respect of such rents. The plaintiff/respondent claimed a declaration that the suit premises be henceforth owned by the parties as tenants in common in equal shares; an account of rents and profits come to the hands of the defendant/appellant in respect of the suit premises and of what was due to the plaintiff/respondent in respect of such rents and profits; payment of what was found due to the plaintiff/respondent upon taking such accounts; and a declaration that the plaintiff/respondent was entitled to one half of the said rents.

In his defence, the defendant/appellant admitted that the plot was in the joint names of the two parties, but alleged that he

> "allowed the plaintiff's name to be included in the respective documents as a joint tenant with the defendant on the specific verbal agreement that the plaintiff, as the defendant's brother, would pay the defendant half the purchase price of the said plot during the completion of the building to be erected thereon jointly by and out of the common funds in equal shares of the plaintiff and the defendant."

The defence continued with a denial that the costs of the plot or the price of the building had been provided by the parties in equal shares, the defendant/appellant asserting that he alone paid the entire cost of the building as well as of the land. Collection of the rents by the defendant/appellant was admitted, but it was denied that the plaintiff/respondent had any right in law or equity to a share of the rents. The defendant/appellant counterclaimed for a declaration that he was the sole owner of the plot and building and for the removal of the plaintiff/respondent's name from the title.

In a reply to the defence and counterclaim, the plaintiff/respondent in effect joined issue thereon, repeating his allegation that the purchase price of the plot and the cost of erection of the building had been provided by the two parties equally.

When the trial commenced on November 6, 1957, the plaintiff/respondent was represented by Mr. Mann and the defendant/appellant by Mr. Shevde. Certain issues were settled, and the plaintiff/respondent was then called as a witness. He was examined in chief, and in effect stated that he and his brother, the defendant/appellant, had kept their finances, or most of them, in common since 1947, and that he himself, through the medium of the common funds, had contributed a half share of the cost of the plot and building. He produced a statement (exhibit 1) which purported to show his financial dealings with the defendant/appellant from 1947. He also produced a certified copy of the title deed of the plot, a bundle of vouchers, and his Post Office savings book, which were put in evidence. He was then cross-examined by Mr. Shevde for the defendant/appellant, and certain further documents were produced and put in evidence in the course of cross-examination. The following note then appears on the record:

> "Mann–Friend and I suggest that an account of all the financial transactions between the parties from the time the plaintiff left India to date, apart from the questions of the rent of the building, be referred to Mr. N. M. Patel of Dalgety & Co., Nakuru, and that he be directed, if willing to undertake task, to examine the accounts and report his findings and opinion to the court before 30.11.57. Hearing to stand adjourned to a date between December 2 and 13.
>
> "Order accordingly. Costs of referee to be costs in the cause. Documents already taken as exhibits to be made available to referee.
>
> E. J. Edmonds J.
>
> "8.11.57. Shevde–Confirm that Mr. N. M. Patel will accept the appointment as referee.
>
> E. J. E."

No formal order embodying this direction was ever extracted. Nevertheless, Mr. N. M. Patel undertook an inquiry into the financial transactions between the parties, heard evidence, and produced a report which in due course was filed in court. The first two paragraphs of this report state:

> "Although nothing in writing has been given by this honourable court, I have set down for writing this report on the verbal instructions of the advocates of the parties.
>
> "In view of this I submit herewith the report of my opinion on all possible points submitted to me by the parties."

It is clear from the report that "accounts" of the financial transactions between the parties, in the ordinary sense of the word, were non-existent, Mr. Patel in the third paragraph of his report says:

> "The outset it would be pertinent to record that none of the parties has during the material time kept proper books of accounts as to come to a definite conclusion therefrom. It was, therefore, this oral evidence and explanations supplemented by bits and pieces of entries and memoranda in their rough diaries, that have helped me in coming to the conclusions written in this report."

On this "oral evidence supplemented by bits and pieces of entries" and also, it is clear, on the court's exhibits which were made available to him, as ordered, Mr. Patel prepared two statements of accounts of the receipts and payments of the respective parties between 1947 and 1955, which are attached to his report. In the body of the report he comments on various individual items of alleged payments or receipts, in respect of which the evidence was scanty. And he reaches the general conclusion that:

> "It is my opinion that the plaintiff has incurred certain expenses on behalf of the defendant or rendered services to enable the joint family to accumulate the savings for the purchase of assets."

As I have already stated, this report was filed in court, but the proceedings on which the report was based were not so filed.

The case came on for continued hearing before the learned trial judge on December 13, 1957. At the continued hearing Mr. Shevde objected to certain specific items in Mr. Patel's report and accounts, and also objected to the apparent finding in the paragraph quoted above that there was a "joint family". He did not object to Mr. Patel's jurisdiction to make the report, to the absence of a formal order embodying the court's directions to Mr. Patel, or to the absence of the "proceedings" on which the report was based. Neither did he apply to cross-examine the plaintiff/respondent further, or to call the defendant/appellant or other witnesses to testify on behalf of the defence. It is true that he is recorded as saying

"My client will be supported by his father and mother as to the denial of a joint family,"

but it is apparent that he made no move to call any evidence.

Upon the material before him, consisting as it did of the evidence given by the plaintiff/respondent and the report prepared by Mr. Patel, the learned judge proceeded to answer the issues which had been settled. He found, *inter alia*, that the plaintiff/respondent had contributed at least Shs. 25,698/38 towards the cost of the plot and building, and that the plaintiff/respondent was entitled to one half of the rents and profits arising from the plot and building. He accordingly made a declaration that the property be thenceforth owned by the parties as tenants in common in equal shares, and ordered an account to be taken of rents and profits received by the defendant/appellant and payment to the plaintiff/respondent of half of such rents and profits.

Against this decision the defendant/appellant has appealed, the grounds of appeal being as follows:

"1. The order referring accounts to Mr. N. M. Patel not having been drawn up, issued out of court, or served upon the said Mr. N. M. Patel, in compliance with the provisions of s. 90 of the Civil Procedure Ordinance, the said Mr. N. M. Patel was not duly appointed or constituted referee to examine accounts nor was he duly empowered or authorized to examine accounts in the case or report thereon and the learned judge erred in taking into account, accepting or in any way acting upon the report transmitted to the court by the said Mr. N. M. Patel.

"2. The court failed, contra O. 27 r. 12 of the Civil Procedure Rules, 1927, (sic) to furnish the said Mr. N. M. Patel (if he was duly appointed or authorized or empowered to examine the accounts or to enter upon any inquiry regarding thereto) with any part of the proceedings or any instructions and failed to specify to the said Mr. N. M. Patel distinctly or at all the matters set out in the said Rules and the learned judge accordingly erred in accepting or acting upon the report transmitted by him (Mr. N. M. Patel) to the court.

"3. The said Mr. N. M. Patel (if duly appointed, authorized or empowered as aforesaid) failed to transmit to the court the proceedings held on the inquiry and the learned judge had not before him the materials which should have been before him, to enable him to consider whether or not or to what extent he should accept or treat as evidence the said report and such proceedings (if any) as were transmitted to the court.

"4. The said Mr. N. M. Patel (if duly appointed, authorized or empowered as aforesaid) misconceived his duties as referee and did not realise that the real or essential part of his duties was to obtain and place before the court the materials which it was to take into account and to act as an assistant to the court, and not to act as if he was an arbitrator or otherwise appointed to judge any issues in the case and the learned judge failed to appreciate that the said Mr. N. M. Patel had acted more as an arbitrator than as a referee.

"5. The report and accounts transmitted to the court by the said Mr. N. M. Patel are erroneous and against the weight of or unsupported by evidence and did not afford any or any adequate basis for the learned judge's judgment founded thereon.

"6. The said Mr. N. M. Patel proceeded on the basis as if there was a 'joint family' when there was no pleading or evidence before him to that effect and accordingly the learned judge erred in accepting the report, opinions and accounts transmitted to the court by the said Mr. Patel."

As regards the first ground of appeal, Mr. Nazareth for the appellant argued

that the omission to have the court order appointing Mr. Patel as a referee drawn up, issued out of court, or served on Mr. Patel was a matter going to jurisdiction, and that the proceedings before Mr. Patel were accordingly a nullity and could not be taken into account by the learned trial judge.

The omission to extract the order is at least a serious irregularity. This court has repeatedly emphasized the necessity of having orders and decrees extracted. It is clear, however, that the appellant's advocate acquiesced in the procedure adopted, and did not take any objection to the absence of a formal order of appointment even when the matter came before the learned trial judge for continuation of the hearing, notwithstanding the terms of the opening paragraph of Mr. Patel's report. Had the objection been taken at any point up to that stage, the defect could have been remedied, possibly on terms as to costs. It is only now, when the decision has gone against him, that the appellant's advocate seeks to take advantage of the defect in procedure. In view of this, I should be of opinion that it is now too late to raise the matter unless, as argued by Mr. Nazareth, it is one which goes to jurisdiction.

Although not specifically mentioned in the record, it was conceded that the appointment of Mr. Patel as referee must have been made in pursuance of O.XXVII r. 11 of the Civil Procedure (Revised) Rules, 1948. This rule reads as follows:

> "11. In any suit in which an examination of accounts is necessary the court may refer the accounts to such person as it thinks fit, directing him to make such examination."

Mr. Nazareth relied on s. 90 of the Civil Procedure Ordinance which provides:

> "90. All orders or notices served on or given to any person under the provisions of this Ordinance shall be in writing."

He argued that this provision was mandatory; that while there was no specific provision requiring a referee to be served with the order of his appointment, this must of necessity be done; that the order was a document which ought to have been under the seal of the court, and that in the absence of the order Mr. Patel was not empowered to act; and he cited *Ex parte Van Sandau* (1) (1846), 15 L.J. Bcy. 13; *R. v. Worksop Local Board of Health* (2) (1864), 34 L.J. M.C. 220; *Barker v. Palmer* (3) (1881), 8 Q.B.D. 9; and *Gifford v. Bury Town Council* (4) (1888), 20 Q.B.D. 368.

In each of those cases it was held that a failure to comply strictly with an express statutory provision, e.g. that the appointment of an arbitrator under the Public Health Act, 1875, should be under the common seal of the local authority (*Gifford v. Bury Town Council* (4)), was fatal to the validity of the appointment or instrument in question.

I accept that the provisions of s. 90 of the Civil Procedure Ordinance are mandatory. But in my view the instant case is distinguishable from those cited by Mr. Nazareth on the ground that here there is no express statutory provision requiring service on the referee of the order appointing him to examine accounts. It is perfectly true that such an order ought to have been extracted and served. But, in my opinion, the foundation of the referee's jurisdiction under O.XXVII r.11 is the court's "direction" that he shall make an examination of the accounts, and not the formal order embodying such direction. It follows that in my opinion the omission to extract the order does not go to jurisdiction, but is no more than an irregularity. As I have already indicated, I think it is too late to take objection to it at this stage. In my opinion, the first ground of appeal should fail.

The second ground of appeal alleges non-compliance with O. XXVII r. 12 of the Civil Procedure (Revised) Rules, 1948. That rule reads as follows:

> "12. (1) The court shall furnish a referee appointed under the foregoing rule with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the referee is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.
>
> "(2) The proceedings and report (if any) of the referee shall be evidence in the suit, but where the court has reason to be dissatisfied with them it may direct such further inquiry as it shall think fit."

In my opinion there is no substance in this ground. No formal order of the court embodying the instructions of the court was sent to the referee, it is true, and I have already dealt with this aspect of the matter. But the terms of the court's order, as set out in the passage from the record quoted earlier, are perfectly clear, though perhaps sparing in detail. The referee is to take

> "an account of all the financial transactions between the parties from the time the plaintiff left India to date, apart from the questions of the rent of the building."

He is to "examine the accounts and report his findings and opinion to the court." And the "documents already taken as exhibits" are to be made available to the referee. This appears to me to be a sufficient compliance with r. 12. It is true the "proceedings" are not specifically mentioned, but it is clear that the rule requires that the proceedings of the referee be transmitted to the court in any event. In any case, no objection was taken at the time, or at the continued hearing, to the terms of reference, and I am of opinion that it is too late for the objection to be taken now. I consider this ground of appeal should also fail.

As to the third ground of appeal, it is perfectly true that the proceedings before Mr. Patel were not transmitted to the court as they should have been under O.XXVII r. 12. Once again, no objection was taken before the appeal to the absence of the proceedings. Nevertheless, I might have been inclined to take a serious view of the omission were it not that I regard myself as bound by authority. In *Keeble v. Shelton* (5) (1948), 15 E.A.C.A. 14 a similar point was taken and rejected by this court. The learned chief justice of Tanganyika (as he then was) dealt with the matter as follows in the judgment of the court:

> "The appellant's advocate has urged in this court that the report should not have been accepted in the court below as the whole proceedings were not produced with the report. Neither in the note of objections, not at the hearing on the report and objections was that objection raised and I do not see that this court can possibly entertain it. I find no substance in the second part of this appeal."

Mr. Nazareth argued that it appeared from the passage quoted that a part only of the proceedings had not been produced in that case, while in the instant case the whole of the proceedings was lacking. I do not think the distinction is a valid one. The point is that the objection should have been taken in the court below, and it is too late to raise it for the first time on appeal. In my opinion this ground should also fail. If the order had been to transmit the proceedings without any report thereon, the position would be different.

As to the fourth ground of appeal, I cannot agree that Mr. Patel acted as if he had been appointed an arbitrator, though I do agree that it might have been better if he had been appointed to act as arbitrator. As he, himself, indicated in his report, there were no proper accounts between the parties which he could examine. He did, however, have before him the account–exhibit 1–prepared by the plaintiff/respondent upon which to base his inquiry. And he has clearly refrained from making findings, but has merely offered his opinion upon the accounts. In the circumstances of the case, the appointment of a referee may have been ill-advised, but I do not think that Mr. Patel tried

to act otherwise than as a referee. In any case, this again is an objection which ought to have been taken in the court below. I consider this ground also must fail.

The fifth ground of appeal is linked with the third ground in that, in the absence of the proceedings before the referee, it is impossible now to assess the value of the evidence before him. As I have already said, it is too late now to object to the failure to transmit the proceedings to the court. Under O.XXVII r. 12 both the proceedings before the referee and the referee's report as to his opinion are evidence. It was open to the appellant's advocate in the court below to criticise the report and submit evidence to contradict it. While objecting to certain items mentioned in the report on the ground that they were not relevant, he did not attack the report as being against the weight of evidence or unsupported by evidence, nor did he call evidence to contradict it. The learned judge therefore had before him the evidence of the plaintiff/respondent and the referee's report (which itself is evidence in the suit) on which to found his judgment. In the circumstances I consider that it is too late now to take objection to the report on the ground that it was against the weight of evidence, and I think that criticism of the report must be restricted to matters apparent on the face of the report and accounts, *Keeble v. Shelton* (5). I am not prepared to say that the learned judge's conclusions on the evidence before him were erroneous. I think this ground of appeal should also fail.

The sixth and last ground of appeal in my opinion is without substance. I do not think that the referee when using the phrase "joint family" intended to use it in a technical sense as indicating the existence of an undivided Hindu joint family, but that he merely intended to indicate the existence of a joint fund between the brothers. The learned trial judge reached the same conclusion. His comment is as follows:

> "It seems clear that the defendant had no thought to challenge the existence of a joint fund until he saw the findings of the referee. There is, of course, no question of there being a joint family."

Accordingly, I consider this ground of appeal also must fail.

In the result, I am of opinion that the appeal should be dismissed with costs. I do not, however, wish it to be inferred from this that the procedure followed has my approval or that strict compliance with the Rules of Procedure is unnecessary. The conduct of the proceedings left much to be desired, but the defendant/appellant or his advocate did not object to the irregularities. The points taken on the appeal are all points which should have been taken in the court below. Had they been taken then, the defects could easily have been remedied. If not then remedied, an appeal based upon them might have succeeded; but I am of opinion that it is too late to raise the objections now for the first time.

Sir Kenneth O'Connor P: I agree. The appeal will be dismissed with costs.

Briggs V-P: I also agree.

Appeal dismissed.

For the appellant:
JM Nazareth QC and *WD Shevde*
Shevde & KM Patel, Nakuru

For the respondent:
GH Mann
Creswell, Mann & Dodd, Nakuru

The Administrator-General, Zanzibar v Mtumwa Binti Bakari Wasu

[1958] 1 EA 285 (SCZ)

Division:	His Highness The Sultans Court for Zanzibar at Zanzibar
Date of judgment:	2 April 1958
Case Number:	12/1958 (O S)
Before:	Law Ag CJ
Sourced by:	LawAfrica

[1] Mohamedan law – Succession – Deceased leaving widow and no other heir – Rights of Beit-el-Mal – Whether net residue of estate after deduction of widow's Koranic share escheats to Beit-el-Mal – Succession Decree (*Cap.* 13), *s.* 327 (*Z.*) *– Administrator General's Decree* (*Cap.* 12), *s.* 12 (3) (*Z.*).

Editor's Summary

The Administrator-General took out a summons to obtain an order as to the disposal of the residue of the estate of the deceased, who was a Moslem of the Sunni sect. The deceased left a widow surviving him and no other heir, and after payment of certain legacies and costs of administration, including the Koranic share of one-quarter of the estate, to which the widow was entitled, together with a sum of Shs. 750/-, which was a discretionary payment under s. 327 of the Succession Decree and s. 12 (3) of the Administrator-General's Decree, there remained a residue of Shs. 4,441/45 available for distribution. Under strict Mohamedan law, the widow in the circumstances was entitled to her one-quarter share only, and the remainder escheated to the Beit-el-Mal (Public Treasury), but since the estate was small and the application of Mohamedan law was liable to cause hardship, the court considered whether, having regard to relaxations of the strict law in other countries, the court had power to make an order to alleviate the hardship to the widow, more especially since the application of the rule in this case would force a sale of the house in which the widow had always lived.

Held –

(i) the modern trend of Indian judicial decision, supported by the opinions of authors of works affecting many schools of Mohamedan law, is that where there are no surviving blood relations, the widow is entitled to benefit from the doctrine of "radd" or return, in the absence of the Beit-el-Mal.

(ii) since, however, the Beit-el-Mal has statutory recognition in Zanzibar, under s. 327 of the Succession Decree, a mandatory duty is placed on executors and administrators to pay the residue to the treasurer of the Zanzibar Protectorate, and this is in accordance with past practice in the Protectorate.

(iii) since there is no statutory duty placed on the treasurer of the Protectorate to ensure that the Beit-el-Mal rights are strictly enforced, the court recommended that the treasurer should accept the available cash and allow the widow to remain in her home during her life, either by giving her a

lease at a nominal rental, or by waiver of the claim; but the only order the court was entitled to make was that the net residue be paid by the Administrator-General to the treasurer of the Protectorate, for the benefit of the Beit-el-Mal.

Order accordingly.

Case referred to in judgment:

(1) *Saumu Binti Uledi v. Khamis bin Songoro* (1944), 7 Z.L.R. 126.

(2) *Mussumaut Soobhanee v. Behtun* (1811), 1 Sel. Rep. S.D.A. 346.

(3) *Mahomed Arshad Chowdhry v. Sajida Banoo* (1878), 3 Cal. 702.

Judgment

Law Ag CJ: This is a summons taken out by the Administrator-General to decide the following main question:

> "How the residue of deceased's estate after payment of testamentary expenses and legacies should be disposed of?"

The deceased Khamis bin Shomar died on September 16, 1956, and was a Moslem of the Sunni sect. The gross value of his estate was Shs. 10,210/-, and after payment of certain legacies and administration charges, including the widow's Koranic share of one-quarter of the estate, increased by the discretionary Shs. 750/-, payable under s. 327 of the Succession Decree and s. 12 (3) of the Administrator-General's Decree, there remains a residue of Shs. 4,441/45 available for distribution. The deceased left his wife (the defendant) surviving him and no other heir, and the strict rule of Mohamedan law in these cases is that the widow takes her one-quarter share and the remainder escheats to the Beit-el-Mal or Public Treasury. The general rule was stated as follows by Sir John Gray, C.J., in *Saumu binti Uledi v. Khamis bin Songoro* (1) (1944), 7 Z.L.R. 126, in which case Ibathi law was under consideration:

> "Under the doctrine of return (*radd*) the residue is divided among such of the blood relations of the deceased as are entitled to be shares in accordance with their respective Koranic shares. It is to be noted that the return only applies to such sharers as are blood relations. Hence neither a husband or wife can take by return. This rule is common to all Mohamedan schools and appears to be based on the declaration that 'the possessors of relationship have the better claim in the ordinances of Allah to inheritance than other believers. (Koran, XXXIII 6)'."

The strict rule of law as set out above has, however, been the subject of relaxation in other countries in comparatively recent times. In Tayabji's Principles of Muhamedan Law (2nd Edn.), where the learned author is dealing with the Sunni law of inheritance, the following appears in para. 637 at p. 902:

> "There is a dictum in an old case that where the widow is the sole heir, the residual three-quarters of the estate also reverts to the widow–it being ruled by 'fatwas' that there is in modern times no 'beit-ul-mal', or public treasury, regularly established."

The case to which reference is made is *Mussumaut Soobhanee v. Behtum alias Shah Azamali* (2) (1811), 1 Sel. Rep. S.D.A. 346, referred to with approval in *Mahomed Arshad Chowdhry v. Sajida Banoo* (3) (1878), 3 Cal. 702. In this latter case Kemp, J., quoted the following extract from the earlier judgment which was that of the Privy Council:

> "As a general rule, a widow takes no share in the return; but some authorities seem to hold that if there are no heirs by blood alive, the widow would take the whole estate to the exclusion of the fisc."

The parties in the *Mohamed Arshad* case (3) were of the Sunni sect. In his judgment, Kemp, J., goes on to say:

> ". . . there can be no doubt that the more ancient authorities did hold that the widow and the husband were not entitled to the 'rudd' or return, under the Mahomedan law; but more modern authorities have held the other way, and have ruled that in the absence of the 'bait-ul-mal', the widow and husband are entitled to the return."

The learned judge proceeded to hold that the widow was entitled to the return.

Mulla, in his Principles of Mahomedan Law (14th Edn.), at p. 72, says:

> "Neither the husband nor the wife is entitled to the return so long as there is any other heir, whether he be a

sharer or a Distant Kinsman.

> But if there be no other heir, the residue will go to the husband or wife, as the case may be, by *Return*."

This extract is taken from the chapter on the Hanafi law of inheritance. In dealing with the relative Shia law, the learned author says (p. 117):

> ". . . the older view was that the wife will take her one-quarter share, and the surplus will escheat to the Crown; in other words, that the surplus never reverts to a wife. But in *Abdul Hamid Khan v. Peare Mirza* (1935 10 Luck. 550) the Oudh Court followed the opinion of Mr. Ameer Ali (Mohamedan Law, Vol. II (5th Edn.) at p. 1254) and held that the rule now in force is that the widow is entitled to take by return."

It will thus be seen that the modern trend of Indian judicial decision and the opinions of learned Indian authors, in matters affecting many different schools of Mohamedan law, is to the effect that where there are no surviving blood relations, the widow is entitled to benefit from the doctrine of "radd" or return. There is, however, one great difference between the position in India and in Zanzibar, which is made clear in the judgment of Kemp, J., in *Arshad's* case (3), and that is that the widow only takes the return "in the absence of the beit-ul-mal". There is in fact no beit-ul-mal in India, but in Zanzibar it enjoys statutory recognition. It is therefore necessary to consider s. 327 of Succession Decree, the relevant portions of which read as follows:

> "327. (1) In any case in which the Bet-el-Mal is entitled to the whole or any portion of an estate it shall be lawful for the court in its discretion to order–
>
> (*a*) a sum not exceeding one hundred rupees to be distributed in such proportions as it may think fit among persons who were dependent on the deceased;
>
> (*b*) a sum not exceeding five hundred rupees to be paid to the husband or wife or wives surviving the deceased.
>
> "(2) All monies payable to the Bet-el-Mal are to be paid by the persons administering the estate to the treasurer of the Zanzibar Protectorate who shall carry the same to a separate account."

It will be seen from sub-s. (1) above that the Beit-el-Mal has a legal existence in Zanzibar, and that the court's power to dispose of residues of estates, to which the Beit-el-Mal is entitled, is strictly limited; and from sub-s. (2) that a mandatory duty is placed on executors and administrators to pay such residues to the treasurer of the Zanzibar Protectorate. Mr. Walshe informs me that the practice in the past has been to adhere strictly to the requirements of this section. The husband or widow is paid his or her Koranic share, together with the discretionary increase of five hundred rupees, and the residue is then paid to the treasurer. In many cases, as in the one under consideration, the principal asset in the residue is the house in which the surviving spouse is living and has always lived. To enable the Beit-el-Mal to be paid its entitlement, the house has to be sold. This causes considerable hardship to a usually aged person who is left homeless. I can only say that the practice, harsh and oppressive as it undoubtedly is, strictly conforms with the law.

The Treasury in England, in dealing with escheated estates, can and does use discretion in favour of needy dependants to the extent in some cases of waiving the whole of its entitlement. Mohamedan law as applied in India has evolved favourably so far as the surviving spouse is concerned, but only because the Beit-el-Mal is not recognised there as a lawful institution. If the Beit-el-Mal did not enjoy statutory recognition in Zanzibar, I would have no difficulty in this and in similar cases in ordering the whole of the return to be paid to the

surviving spouse, where there are no blood relations, in accordance with the trend of modern development of Mohamedan law in India. I am, however, satisfied that s. 327 of the Succession Decree precludes me from awarding the defendant in this case more than her Koranic share plus 500 rupees.

It does, however, seem to me that although the court is without discretion to direct payment of the whole residue to the defendant, the treasurer of the Zanzibar Protectorate is in a position to alleviate the hardship which must ensue in cases such as this if the law is strictly applied. There is no statutory duty placed on him to ensure that the Beit-el-Mal's entitlements are strictly enforced. In a case such as this, he might content himself with accepting the available cash (Shs. 1,441/45) and allowing the defendant to remain in her home for the rest of her days, perhaps by giving her a lease at a nominal rental; or else he could waive the whole entitlement absolutely.

I can only answer the question posed in the summons by saying that the residue of the deceased's estate, after payment of testamentary expenses and legacies (including the widow's Koranic share and statutory increase), must in accordance with the provisions of sub-s. (2) of s. 327 of the Succession Decree be paid by the plaintiff to the treasurer of the Zanzibar Protectorate for the benefit of the Beit-el-Mal.

I recommend that in this, and all similar cases, a report be made to the treasurer of the precise circumstances before payment is made. In such report the Administrator-General or other person administering the estate will be able to recommend to the treasurer such action as may seem equitable to relieve distress.

I direct that copies of this order be sent to the Honourable the Chief Secretary, the Honourable the Attorney-General, and the Treasurer of the Zanzibar Protectorate, as I should like them to be aware of the existing position in relation to the escheating of the residues of estates which up till now has taken place in a manner which undoubtedly causes unnecessary distress and hardship, for such action as they may deem necessary to take.

The costs of this application will be paid out of the residue of the estate, after payment to the defendant of her lawful dues.

Order accordingly.

For the Administrator-General:
S Walshe

The defendant in person.

For the plaintiff:
The Administrator-General, Zanzibar

Barney Confait v R
[1958] 1 EA 289 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment:	27 June 1958
Case Number:	72/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Seychelles–Souyave, J

[1] Criminal law – Perjury – Voluntary statement to police repudiated by witness at trial – Whether when proved by policeman who recorded it the statement becomes corroboration of the falsity of the evidence given by witness – Penal Code, s. 102, *s.* 104 *and s.* 105 (*S.*).

Editor's Summary

Before the trial of a man charged with rape, the appellant had called at a police station and there volunteered a statement which, after a sergeant had recorded it, was read over to the appellant, who then signed it. Whilst the appellant was giving evidence at the trial an application was made and granted for the appellant to be treated as a hostile witness, whereupon his statement to the police sergeant was handed to him and he admitted the signature was his, but denied having made the statement. Subsequently, he was tried by the Supreme Court on two counts alleging perjury, and it was contended on his behalf that there was no proof that his evidence at the trial in which he was a witness was material, nor was there any corroboration of the evidence of the police sergeant that the statement made by the appellant was made or signed by him. The trial judge rejected these arguments and convicted the appellant. On appeal the same arguments were considered as had been advanced at his trial.

Held –

(i) the alleged false testimony of the appellant related to a matter which was material in the trial in which he gave evidence.

(ii) the police sergeant, having given evidence that he took, and having identified, the statement of the appellant, was a competent witness to prove the statement, whereupon the statement itself became evidence and was sufficient to prove the evidence of the police sergeant as to the falsity of the appellant's evidence at the trial. *Jeffery v. Johnson*, [1952] 1 All E.R. 450 followed.

(iii) s. 105 of the Penal Code only requires corroboration of the falsity of statement alleged to be false.

Appeal dismissed.

Case referred to:

(1) *Jeffery v. Johnson*, [1952] 1 All E.R. 450.

Judgment

Forbes JA: read the following judgment of the court: This was an appeal against conviction by the Supreme Court of the Seychelles upon two counts of perjury contrary to s. 104 of the Penal Code. We dismissed the appeal and now give reasons.

The charges against the appellant were that, being a witness in a trial, in the Supreme Court of Seychelles at Victoria, in which one Andre Brice was prosecuted on charges of rape and of assault with intent to commit the felony of rape, he

(*a*) knowingly gave false testimony that he did not give a statement to the police in that case; and

(*b*) knowingly gave false testimony that he never signed any document concerned with that case.

It appeared that the appellant had been called as a witness for the prosecution upon the trial of Andre Brice. Upon application made by the attorney-general, the court, having taken cognizance of a statement alleged to have been made to the police by the appellant, declared the appellant to be a hostile witness and permitted the attorney-general to cross-examine him. The alleged statement was then handed to the appellant and he was asked whether he recognised his signature. His evidence from this point is recorded as follows:

> "Witness: 'Yes, I recognise my signature on the document just handed over to me. It is not true I gave a statement to the police. This is my signature but I still maintain that I did not sign any document. I cannot understand how my signature has come to be on this document.' (At this stage witness is handed a blank sheet of paper and court has him to sign thereon–he does so in presence of the court)–Document is put in and marked exhibit '4'–A.-G. puts in alleged statement which is marked exhibit '5'."
>
> "Witness continues: 'I never signed any document'."

This evidence, which is the evidence upon which the charges were based, was read over to and signed by the appellant.

At the appellant's trial, the Brice trial and the appellant's evidence at that trial were proved by the court clerk, Mr. Butler, who had himself recorded the evidence; the disputed statement was marked exhibit 4. A Sergeant Joseph Sicobo was then called who gave evidence to the effect that on May 11, 1957, the appellant had called at the police station and volunteered a statement in connection with the Brice case; that he, the sergeant, recorded what the appellant told him and read the statement back to the appellant who then signed it; and that this was the statement now marked exhibit 4 which had been subsequently repudiated by the appellant in his evidence at the Brice trial. Apart from some formal evidence this comprised the case for the Crown.

Counsel for the appellant at the trial argued (1) that the alleged false evidence given by the appellant was not and had not been proved to be material in the Brice trial; and (2) that there was no corroboration of the evidence of Sergeant Sicobo on the point that the statement was made or signed by the appellant. The learned trial judge did not accept these arguments, and the grounds of appeal in substance were that he was wrong in failing to do so.

The material provisions of the Penal Code on the two points raised are the first paragraph of s. 102 (1), and s. 105, which read as follows:

> "102. (1) Any person who, in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony touching any matter which is material to any question then depending in that proceeding or intended to be raised in that proceeding, is guilty of the misdemeanour termed perjury."
>
> "105. A person cannot be convicted of committing perjury or of subornation of perjury solely upon the evidence of one witness as to the falsity of any statement alleged to be false."

As to the first point, it is sufficient to say that we were satisfied that the learned trial judge was correct in holding that, in the circumstances of the Brice trial, the alleged false testimony did relate to a matter which was material in that trial.

As to the second point, the learned trial judge held that

> "in giving his evidence at the trial of Andre Brice, the accused clearly and unequivocally admitted that the signature on exhibit 4 was his own",

and that this was sufficient corroboration of the evidence given by Sergeant Sicobo.

We were in some doubt whether the appellant's evidence at the Brice trial, which is quoted above, amounted to a clear and unequivocal admission that the signature on exhibit 4 was in fact his, but in view of the arguments, which we accepted, put forward in support of the conviction by counsel for the Crown, we concluded that the point was not material.

Counsel for the Crown relied on the case of *Jeffery v. Johnson* (1), [1952] 1 All E.R. 450. That was a case under the English Bastardy Laws Amendment Act, 1872. Section 4 of that Act provides *inter alia* that justices hearing a bastardy application may adjudge a man to be the putative father of a bastard child

> "if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices".

The complainant in that case gave evidence alleging that the respondent was the father of her child, and put in evidence, and sought to rely on, a letter which she swore was in the respondent's handwriting. The question was whether the letter could be relied on as corroboration of the complainant's evidence in some material particular. The justices dismissed the summons, but the Court of Appeal, upon a case being stated by the justices, held that the complainant was a competent witness to prove the handwriting of the letter, and that, the letter being then in evidence, the statements in the letter became material corroboration of the complainant's evidence Denning, L.J., said:

> "The evidence of the mother can be divided into two parts. First, the part in which she proves orally that the man was the father. Secondly, the part in which she proves the handwriting of the letter. It is the first part, her evidence as to paternity, which needs corroboration. That corroboration is afforded by the contents of the letter. She does not prove the contents of the letter. She only proves the handwriting to be that of the man. Once the handwriting is proved, the contents prove themselves, rather in the nature of evidence like an exhibit which, once it is properly identified, proves itself. Her evidence as to paternity is, therefore, corroborated by other evidence, namely, the contents of the letter."

In the instant case Sergeant Sicobo gave evidence of the taking of the statement and identified the statement in evidence and swore that the signature on the statement was that of the appellant. Following *Jeffery v. Johnson* (1), we were of opinion that Sergeant Sicobo was a competent witness to prove the statement, and that the statement then became evidence in the case and was sufficient itself to corroborate the evidence of Sergeant Sicobo as to the falsity of the evidence given by the appellant at the Brice trial. It is to be noted that it is only on the question of falsity of the statement charged that corroboration is required by s. 105. If the requirement were a general one that the evidence of the one witness must be corroborated, the position might be different. But here the sergeant's evidence proving the document did not require corroboration in order to render the document itself evidence in the case. As soon as it became evidence, it corroborated the sergeant's evidence of the falsity of the appellant's evidence at the Brice trial.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:
JP Webber (Crown Counsel, Kenya)
The Attorney-General, Seychelles

For the appellant:
R Valabhji Shah, Seychelles

Finley Roselie v R
[1958] 1 EA 292 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	2 June 1958
Case Number:	NAI 7/1958
Before:	Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Seychelles–Bonnetard, Ag. C.J

[1] Criminal law – Bail – Conviction by Supreme Court – Notice of appeal given and application for leave to appeal made – Principles on which bail granted – Criminal Procedure Code, s. 301 (*S.*).

Editor's Summary

The applicant, having been convicted by the Supreme Court of an offence under s. 339 of the Penal Code, was, on April 14, 1958 sentenced to a fine of Rs. 300 or, in default, three months' imprisonment. On April 19 he filed a notice of appeal with an application for leave to appeal. He failed to pay the fine within the time allowed and was on May 8, committed to prison. An application for bail had been made to and refused by the acting chief justice on the ground that there must be and were no exceptional circumstances shown to exist. The applicant then applied for bail to the Court of Appeal in chambers.

Held –

(i) there is no distinction in principle between a case when the court in its discretion imposes a fine notwithstanding that peremptory imprisonment could have been imposed and a case where the court is required by law to impose a fine with imprisonment only in default. *Lambert Houareau v. R.*, [1957] E.A. 414 (C.A.) explained.

(ii) since there was no suggestion that the application for leave to appeal was frivolous or vexatious, nor that it was made for the purpose of delay, the application should have been granted.

Application for bail allowed, conditional upon the applicant entering into a bond for Rs. 300 to the satisfaction of the registrar.

Case referred to:

(1) *Lambert Houareau v. R.*, [1957] E.A. 414 (C.A.).

Judgment

Forbes JA: This was an application for bail pending appeal to this court.

The applicant was convicted by the Supreme Court of the Seychelles on April 14, 1958, of an offence under s. 339 of the Penal Code. On the material before me it would appear that he was convicted on two counts, but was sentenced on the second count only, the sentence being a fine of three hundred rupees or, in default, three months' imprisonment. On April 19 he filed notice of appeal to this court together with application for leave to appeal. Subsequently he failed to pay the fine within the time allowed for payment, and was accordingly committed to prison. Committal occurred on May 8, 1958, and he was still in prison serving his sentence when the application came before me.

In the first instance an application for bail was made to the learned acting chief justice, presumably under s. 286 of the Criminal Procedure Code, although it is stated by the learned acting chief justice, apparently in error, to have been under sub-s. 3 of s. 301 of the Code. This application was not opposed by the Crown, but nevertheless was refused.

The learned acting chief justice based his refusal to admit the applicant to bail on a passage in the judgment of this court in *Lambert Houareau v. R.* (1), [1957] E.A. 414 (C.A.). That passage reads as follows:

> "We are aware that it has been said by several courts on several occasions that bail pending appeal should only be granted in exceptional circumstances: see, for example, *Habib Kara Vesta and others v. R.* (1934), 1 E.A.C.A. 197 (Court of Appeal); *R. v. Maganlal Vallabhai Patel* (1935), 16 K.L.R. 123 (Supreme Court of Kenya); *R. v. A.B.* (1926), 1 T.L.R. (R.) 118 (High Court of Tanganyika); *R. v. Fraser*, 17 Cr. App. R. 182; *R. v. Greenberg*, 17 Cr. App. R. 106, and *R. v. Leinster* (*Duke*), 17 Cr. App. R. 147 (Court of Criminal Appeal), etc. There is no need for us to consider now how far those dicta are in consonance with modern practice: They all related to cases of peremptory imprisonment. We think they have no relevance to such a case as is now before us where the Legislature has imposed punishment of fine, with imprisonment only in default."

The court went on in *Houareau's* case (1) to say that in such a case it thought that the main relevant considerations should be,

> "is the intended appeal frivolous or vexatious? If not, has it a reasonable chance of success or is the application made merely to delay?"

From the passage quoted the learned acting chief justice inferred that the vital distinction between *Houareau's* case (1) and the other reported cases regarding the considerations applicable to the granting of bail was whether or not the maximum penalty prescribed by the Legislature for the particular offence was one of imprisonment, or one of fine, with imprisonment only in default.

He said:

> "It is clear from the above-quoted passage of the Court of Appeal for E.A. that the considerations which apply in the present case, conviction for an offence punishable by imprisonment, are not those which should apply in a case where the punishment for the offence is one of fine, with imprisonment only in default as in the *Lambert Houareau* case.
>
> "The Court of Appeal has drawn a distinction between the two."

He accordingly held, following the line of cases relating to peremptory imprisonment, that exceptional circumstances must be shown to exist in the instant case before bail could be granted, and, in the absence of such circumstances he refused the application for bail.

It is true that in the passage from the judgment in *Houareau's* case (1) quoted above the sentence appears

> "We think they have no relevance to such a case as is now before us where the Legislature has imposed punishment of fine, with imprisonment only in default."

I am clearly of opinion, however, that that sentence must be read in relation to the facts in *Houareau's* case (1). It happened that in *Houareau's* case (1) the maximum penalty that the court could impose was limited to one of fine, with imprisonment only in default. But I can see no distinction in principle between a case where the court in the exercise of its discretion imposes a fine notwithstanding that it could have imposed peremptory imprisonment, and a case where the court is required by the terms of the section under which the conviction is had to impose a fine with imprisonment only in default. In my view the question is whether or not peremptory imprisonment has been imposed. The vital consideration is not what the court has power to do, but what in fact the court has done. Accordingly, with the greatest respect to the learned

acting chief justice, I am of opinion that in the instant case he applied the wrong principles, and that he ought to have applied the principles set out above which were held to be applicable in *Houareau's* case (1). It was not suggested, either before the learned acting chief justice or before me, that the application for leave to appeal in this case was frivolous or vexatious, nor was it said that it was made merely to delay. I accordingly granted the application in terms of the formal order annexed to this ruling.

This decision may be reported.

Application for bail allowed, conditional upon the applicant entering into a bond for Rs. 300 *to the satisfaction of the registrar.*

The applicant did not appear and was not represented.

For the respondent:
DD Charters (Crown Counsel, Kenya)
The Attorney-General, Seychelles

R v Issa Ndarama and others
[1958] 1 EA 294 (SCZ)

Division:	His Highness the Sultan's Court for Zanzibar at Zanzibar
Date of judgment:	5 May 1958
Case Number:	9/1958
Before:	Gray Ag J
Sourced by:	LawAfrica

[1] Criminal law – Behaviour likely to cause breach of the peace – Accused lawfully occupying and cultivating land as squatters ordered to remove by owner's overseer – Threat to overseer – Whether threat is an assault.

Editor's Summary

The four accused were convicted by a magistrate of behaving in a manner likely to cause a breach of the peace, contrary to s. 173 (*d*) of the Penal Decree. The accused were squatters, who had been allowed by the owner to live and to plant banana trees on her land. When the owner wanted to use the land she told her overseer to tell the accused to remove to another part of her shamba, which they refused to do. At the suggestion of the police, the overseer asked the Mudir to settle the dispute and the day after the Mudir had unsuccessfully intervened, the overseer, finding the accused still cultivating the shamba, told them to stop. The first accused then told the overseer that he would hit him with a bush knife if he came near, whereupon the overseer ran away. The accused did not attempt to follow up his threat. At the hearing in

revision it was contended that an essential ingredient of the offence of which the accused were convicted was that it must be committed in a public place, whereas there was no evidence that the offence, if committed at all, was committed in a public place.

Held –

(i) a shamba appears not to be a public place within s. 4 of the Penal Decree, but

(ii) the accused as squatters were entitled to remain on the land unless and until compensated. *Bibi Sheikha Binti Nassor v. Said Bin Suleiman*, Zanzibar High Court Civil Case No. 369 of 1955 (unreported), followed.

(iii) the overseer had gone on to land in the lawful occupation of the accused and had then assumed the right to prevent the accused from exercising their lawful rights; persons cannot be convicted of a breach of the peace simply because when told to desist they insist upon the exercise of their lawful rights, and since there was no evidence of the use of personal violence, or of any steps to commit violence on the overseer, the threat was not an assault.

Appeal allowed. Convictions and sentences set aside.

Case referred to in judgment:

(1) *Bibi Sheikha Binti Nassor v. Said Bin Suleiman*, Zanzibar High Court Civil Case No. 369 of 1955 (unreported).

(2) *Hamadi Bin Khamis v. Said Bin Shamis*, Zanzibar High Court Civil Case No. 237 of 1957 (unreported).

(3) *Beatty v. Gillbanks* (1882), 9 Q.B.D. 308.

(4) *R. v. Hussey*, 18 Cr. App. R. 160.

(5) *Green v. Goddard*, 91 E.R. 540.

(6) *Stephens v. Myers* (1830), 4 Car. & P. 349; 172 E.R. 735.

(7) *R. v. Ahmed Deedhar Gadabursi Jibrain*, [1958] E.A. 107 (C.A.).

Judgment

Gray Ag J: The accused in this case have been convicted of the Penal Decree of behaving in a manner likely to cause a breach of the peace contrary to s. 173 (*d*) of the Penal Decree.

All four accused live on a shamba belonging to a lady. They are all squatters, who have been allowed to live on the land rent free, to build themselves huts and to plant banana trees. The landowner now wants the land occupied by them for other purposes and instructed her overseer to tell accused to remove to another part of her shamba. This they have hitherto declined to do. The overseer then laid a complaint at Mahonda police station. The sergeant-major in charge of the police station sent for the accused, who again refused to quit the land. He accordingly advised the overseer to go to the mudir, who likewise sent for the accused. The mudir tried to effect a settlement, but failed to do so and on April 9, 1958, referred the parties to the district commissioner. The accused appeared six days later before the district commissioner, who tried and convicted all four of an offence under s. 173 (*d*) of the Penal Decree.

The conduct likely to cause a breach of the peace as laid in the charge consisted in an allegation that on the morning following the abortive attempt of the mudir to settle the dispute, the overseer again went to the shamba and found the accused cultivating on the same ground as before and that, on his telling them to stop doing so, the first accused said, “If you come near me, I shall hit you with this bush knife”; whereupon the overseer ran away. As the overseer admits, the threat was not followed up by any attempt to put it into execution.

With regard to the charge, it has been pointed out by Mr. Talati for the accused that an essential ingredient of the offence is that it should be committed in a public place. It was not alleged in the charge

and, according to Mr. Talati, it was not proved that the offence (if committed at all) was committed in a public place as defined in s. 4 of the Penal Decree. I am disposed to think that a shamba is not a public place as defined in that section and that Mr. Talati's contention is correct. But I can see other and more important grounds upon which this conviction must be set aside.

The four accused are squatters on the shamba in question. The nature of their tenure has been fully described by Law, J., in *Bibi Sheikha Binti Nassor v. Said Bin Suleiman* (1), Zanzibar High Court Civil Case No. 369 of 1955 (unreported). After hearing evidence as to local custom and referring to a

passage in Minhaj et Talibin (Howard's translation, 1914 Edn., p. 196) the learned judge held that the statement of the law in Minhaj "exactly covered the situation created by the squatter system in Zanzibar" and that

> "a landlord who has invited squatters on to his land is bound to compensate them, if he gives them notice to leave".

Hamadi Bin Khamis v. Said Bin Shamis (2), Zanzibar High Court Civil Case No. 237 of 1957 (unreported), sets out the mode of assessment of such compensation.

I respectfully concur in the learned judge's judgment in *Bibi Sheikha's* case (1) and am satisfied that in the present case the accused cannot be compelled to leave the land, unless and until they receive adequate compensation. As the district commissioner who tried this case gave directions for a broker to assess the compensation due to the accused, I gather that he fully realised that this was the legal position.

Such being the legal rights of four accused, the law to be applied to the facts in the present case appears to me to be perfectly clear.

The overseer went on behalf of his employer on to land in the lawful occupation of the four accused and assumed to himself the right to prevent the accused from exercising rights which they were lawfully entitled to exercise. As said by Field, J., in *Beatty v. Gillbanks* (3) (1882), 9 Q.B.D. 308, people cannot be convicted of a breach of the peace merely because, when told to desist by some person or persons antagonistic to themselves, they insist in continuing to exercise their lawful rights.

In this connection it must further be pointed out that in defence of his property, a man is not bound to retreat and yield his property to his adversary, but may stand his ground and use all reasonable force, which may be necessary, to resist an attempt to deprive him thereof (Penal Decree, s. 17 (as substituted by Decree No. 16 of 1939, s. 2); *R. v. Hussey* (4), 18 Cr. App. R. 160). Furthermore, the facts disclosed in evidence show that the overseer was a trespasser when he entered on the land occupied by the accused for the purpose of trying to evict them. Such being the case, the law requires that a trespasser entering, as the overseer did, peaceably on the land of the accused, must first of all be requested to depart, but if he fails to comply with that request, then reasonable force may be applied to evict him (*Green v. Goddard* (5), 91 E.R. 540). It is only when the force used is excessive, having regard to all the circumstances of the case, that the person using such force can be held legally liable for the consequences of such excess of force (Penal Decree, s. 228).

Here, there is no evidence of the use of any force at all–not even the manus molliter imposuit (sc. he gently laid hands on him), which so often appeared in the old forms of English pleading. One of the accused uttered a threat about using a bush knife, if the overseer came near him. I will assume the other three accused approved and endorsed the words of their companion. When the overseer heard this threat, he very wisely withdrew. There was no attempt to pursue him with the knife. In the absence of any evidence of the use of personal violence or the taking of any active measures to commit such violence, the threat was not an assault (*Stephens v. Myers* (6) (1830), 4 Car. & P. 349).

As said by the East African Court of Appeal in *R. v. Ahmed Deedhar Gadabursi Jibrain* (7) [1958], E.A. 107 (C.A.), threats may be uttered by a person with the intent to induce another to desist from entering upon certain land and the person uttering the threat may bona fide (though possibly mistakenly) believe that there was vested in himself a legal right to occupy such land. If such is the case, the party accused cannot be convicted on a charge of criminal intimidation, even though there is a possible doubt as to whether his claim can be substantiated in law.

In *Ahmed Deedhar's* case (7) there existed a reasonable doubt as to the accused person's right of occupancy. Here there is no doubt. The accused are entitled in law to occupy the land, unless and until the landowner pays them reasonable compensation. Until then they cannot be evicted. The fact that one of their number used strong language when told to quit does not alter the legal position. They had a right to refuse to quit and have done nothing in assertion of that right which was unlawful or criminal.

Their convictions and sentences are accordingly set aside.

The order appended by the district commissioner to his judgment is of no legal effect, but may possibly form the basis for peaceable negotiations between the parties.

Appeal allowed Conviction and sentence set aside.

For the Crown:
SS Kahrusi
The Attorney-General, Zanzibar

For the accused:
KS Talati
Wiggins & Stephens, Zanzibar

Ramji Dewji v Ali Bin Hassan
[1958] 1 EA 297 (HCZ)

Division:	HM High Court for Zanzibar at Zanzibar
Date of judgment:	27 June 1958
Case Number:	3/1958
Before:	Law Ag CJ
Sourced by:	LawAfrica

[1] Jurisdiction – Action for declaration – Whether Zanzibar courts have power to make declaratory judgments – Zanzibar Order in Council, 1924, *Article* 24 – *Civil Procedure Decree* (*Cap.* 4), *s.* 4. (*Z.*).

[2] Evidence – Agreement for planting seedlings in open land – Express provision for division of land and trees between parties after ten years – Whether unregistered agreement admissible in evidence – Registration of Documents Decree (*Cap.* 111), *s.* 4 (*Z.*).

Editor's Summary

The respondent suing as a poor person in the magistrate's court claimed that by an agreement made with the appellant in 1953 the respondent had agreed to plant clove and coconut seedlings in the appellant's

shamba, which the respondent was to maintain for ten years, after which the land and trees were to be divided between the parties. The respondent alleged that the appellant was trying to evict him from the premises and sought a declaration in terms of the agreement, or alternatively Shs. 3,000/- compensation, if ejected. The appellant admitted the agreement, but denied having tried to eject the respondent. At the trial the respondent produced an unregistered agreement, signed by the parties, which was admitted in evidence, without objection. The magistrate found for the respondent and made the declaration. On appeal it was contended that the courts of Zanzibar had no power to grant, and in the circumstances even if power existed, the court should not have granted a Declaratory Decree, that under Mohamedan law the agreement as a lease of open land for planting was invalid and that the agreement was inadmissible under s. 4 of the Registration of Documents Decree (Cap. 111).

Held –

(i) having regard to art. 24 of the Zanzibar Order in Council, 1924, the courts of Zanzibar are empowered to try all cases of a civil nature, unless barred, and there is no bar express or implied in the laws of Zanzibar to declaratory judgments.

(ii) it is notorious in Zanzibar that leases and licences of open land for planting are commonly and lawfully made, and in any event, the agreement by merely conferring on the respondent a conditional right in the future to obtain a conveyance of half the land, was exempt from registration under s. 6 of the Registration of Documents Decree.

Appeal dismissed.

Case referred to in judgment:

(1) *Abdubrab Ali Dungersi and others v. Hassan Virji and others*, Zanzibar High Court Civil Case No. 4 of 1934 (unreported).

(2) *Bai Shri Yaktuba v. Thakore Agarsinghji Raisinghji* (1910), 34 Born. 676.

(3) *Sheikh Muhammed Yakub v. Mangru Rai* (1910), 7 I.C. 318.

(4) *Bombay Burma Trading Corporation v. F. Yorke Smith* (1893), 17 Bom. 197.

Judgment

Law Ag CJ: This is an appeal from a judgment and decree of the first class subordinate court at Zanzibar in Civil Case No. 155 of 1956. The appellant is the unsuccessful defendant in that case, and the respondent the successful plaintiff.

The respondent sued as a poor person and was unrepresented at the hearing of the suit; his plaint was drafted by the High Court pleadings clerk. In his plaint, the respondent alleged that he had been allotted a piece of land by the appellant 3 years earlier on which to plant clove and coconut trees, but that the appellant now wished to eject him. The respondent alleged that if he were to be ejected he would suffer great damage, and he prayed for a declaration that he was entitled to occupy the land until compensation was paid, alternatively that he was entitled to Shs. 3,000/- compensation if ejected.

In his written statement the appellant alleged that there was an agreement between the parties whereby the respondent would plant clove and coconut seedlings on the appellant's land for two years and then look after them until they were 10 years old, after which time they would be divided equally between the parties. He denied that he had tried to eject the respondent and prayed that the suit be dismissed.

At the hearing the respondent produced a written agreement made between himself and the appellant on March 11, 1953 in the following terms–

> "We, Ali bin Hassan and Ramji Dewji Leela, have agreed and promised each other to plant clove and coconut seedlings in the shamba of Ramji Dewji at Kitope. Ali bin Hassan is the person who will maintain the trees ten years from today. After ten years these trees will be equally divided between Ali bin Hassan and Ramji Dewji. When these trees are divided, the land on which these trees stand will also be divided."

The agreement was signed by the parties and witnessed by the Mudir of Mkokotoni Chaani, Mr.

Suleiman Said Kharussi, who had drawn up the document. The agreement was not registered, but was produced at the trial without objection on the part of the appellant who was legally represented. Mr. Kharussi who was called a witness by the appellant testified that the agreement was in accordance with local custom, whereby a landlord would allow a cultivator to occupy an uncultivated part of his shamba to clear and plant with clove

and coconut seedlings. The planting takes place during the first 2 or 3 years, and after the agreed period has elapsed the land on which the trees have been planted is equally divided between the parties.

The learned magistrate found that in 1956 the appellant began to interfere with the respondent's occupation of the land and made "abortive efforts" through the Mudir of Mkokotoni and another person to make him vacate the land on payment of compensation. He found that there was no evidence to support the appellant's allegation that the respondent was in breach of the agreement by reason of failure to plant sufficient seedlings in time. He also found that the respondent was not a squatter but was in occupation of the land by virtue of the written agreement which purported to create in his favour an interest in the land upon the performance by him of his part of the contract, that is to say after the lapse of 10 years. The learned magistrate decided that in these circumstances the respondent was entitled to a declaration that he had the right to occupy the land allocated to him by the appellant for cultivation subject to the terms embodied in the agreement (exhibit A) and that, if compensation was payable on the respondent leaving or being required to leave the land then the figure of Shs. 3,000/- claimed by the respondent was not unreasonable.

The first and main ground of appeal is that the courts of Zanzibar have no power to grant decrees which are purely declaratory. Mr. Balsara for the appellant, in an able and exhaustive argument, has drawn my attention to a number of Indian authorities. He submits that the Zanzibar Civil Procedure Decree and rules are silent on the question of declaratory judgments; that they are exhaustive; that the legislature must be presumed to have intended to exclude declaratory decrees from the jurisdiction of local courts as these have not been provided for, and that if the courts have an inherent power to make declaratory judgments, the power should only be exercised where substantial other relief is claimed or can be given. Mr. Balsara referred to various authorities, including an unreported judgment of this court, *Abdubrab Ali Dungersi and others v. Hassan Virji and others* (1), Zanzibar High Court Civil Case No. 4 of 1934 in which Law, C.J., obiter inclined to the view that a claim for subsequent relief was necessary before a declaration could be made; *Bai Shri Yaktuba v. Thakore Agarsinghji Raisinghji* (2) (1910), 34 Bom. 676 which lays down that the general power vested in the courts in India does not include a power to make declarations except where specially authorized by statute; and *Sheikh Muhammed Yakub v. Mangru Rai* (3) (1910), 7 I.C. 318 where it was held that a suit for declaration of an abstract right cannot be maintained. On the other hand in *Bombay Burma Trading Corporation Ltd. v. F. Yorke Smith* (4) (1893), 17 Bom. 197 the court made a declaratory decree with regard to a right which was both future and contingent, holding that it was in the interests of both parties and in the exercise of a sound discretion that it should do so. But as Mr. Balsara points out there is statutory authority in s. 42 of the Indian Specific Relief Act, 1877, for the making of declaratory decrees, and no corresponding authority in our local legislation, from which he deduces that the Zanzibar courts have no power to make declarations at all. That is I think a mistaken proposition for the following reasons:

By s. 4 of the Civil Procedure Decree (Cap. 4) the courts are given jurisdiction to try all cases of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. It is thus clear that the Decree does not purport to be exhaustive in the matter of what suits may be entertained by the courts of Zanzibar. Section 102 of the Decree reads as follows–

> "Nothing in this decree shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

Article 24 of the Zanzibar Order in Council, 1924, provides that Her Majesty's civil and criminal jurisdiction in Zanzibar shall be exercised in conformity with any Order of Her Majesty in Council extending to Zanzibar, with decrees of the Sultan or the British Resident,

> ". . . and subject thereto and so far as the same shall not extend or apply shall be exercised in conformity with the substance of the common law the doctrines of equity and the statutes of general application in force in England on July 7, 1897, and with the powers vested in and according to the procedure and practice observed by and before courts of justice and justices of the peace in England according to their respective jurisdictions and authorities at that date."

The position would therefore seem to be that the courts of Zanzibar are empowered to try all cases of a civil nature unless barred; that no such bar whether express or implied is to be found in the laws of Zanzibar in relation to declaratory judgments, and that therefore the law in force in England on July 7, 1897, is relevant. The English common law to that effect was declared and codified in O. XXV, r. 5 as enacted in October 1883, and is perhaps best summed up in Odgers on the Common Law, Vol. 2, (3rd Edn.) at p. 494 as follows–

> "Hence the court can now declare what the rights of the parties are or will be, although no ancillary relief is claimed, and even where no substantive relief can at present be given."

That I hold to be the position in Zanzibar also, and the first ground of appeal accordingly fails, together with the second ground.

The third ground is that the learned magistrate erred in declaring the respondent

> "to be entitled to occupy the land allocated to him by the defendant (appellant) for cultivation subject to the terms embodied in the agreement exhibit 'A' "

and ought to have held that the said agreement was bad in law. Mr. Balsara bases his argument on two grounds, the first being that under Mohamedan law, as expounded in the Hedaya, a lease of open land for planting is invalid. What this vague proposition of law purports to mean, I do not know. It is notorious that in Zanzibar leases and licences of open land for planting are commonly and lawfully made and granted. The second and more substantial objection to the validity of exhibit 'A' is that it was inadmissible in evidence having regard to the provisions of s. 4 of the Registration of Documents Decree (Cap. 111) which states that no unregistered document purporting or operating to create any right title or interest to immovable property shall be received in evidence in any civil proceedings. Now this agreement was admitted in evidence without any objection by the appellant, who was legally represented, so that the learned magistrate was not called upon to rule upon its admissibility or validity. The objection could and should have been made at the proper time, that is to say when the agreement was produced by the respondent. There was ample evidence from the respondent, the appellant and the appellant's witness as to the lawful nature of the respondent's occupation of the land in question, irrespective of whether the written agreement was good or bad in law. Mr. Balsara concedes that he is bound by the production in evidence of exhibit "A", not having objected to it. His argument is that the agreement creates a future or contingent interest in the land and is invalid for want of registration, a matter not affected by his failure to object to its production in evidence. I am however of opinion that exhibit "A" does not itself create an interest in the land in dispute. It gives the respondent the right, 10 years after its execution, to call upon the appellant to convey to him one half of the land

cleared and planted by the respondent. Exhibit "A" is thus a document which merely confers upon the respondent a conditional right to obtain in the future another document, that is to say a deed of conveyance of half the cleared and planted land. It was therefore exempt from the requirement of registration under s. 6 para. (*e*) of the Registration of Documents Decree, was properly admitted by the learned magistrate, and was not bad in law. This ground of appeal also fails.

The fourth ground of appeal is that the learned magistrate erred in holding that exhibit "A" followed the customary agreement described by Sheikh Suleiman and constituted a valid contract between the parties to the agreement and ought to have held that no such custom had either been pleaded or proved.

I must confess to some difficulty in understanding this ground of appeal. It is quite true that where custom is relied upon it must be pleaded, and unless so notorious as to be the subject of judicial knowledge, it must be proved. The respondent did not base his claim upon custom but on an agreement, there was no reason for him to plead the custom. The only evidence as to custom was given by Sheikh Suleiman, a defence witness. It ill becomes the appellant to complain that he was taken by surprise by evidence of custom given by his own witness whom he apparently called for the purpose of giving such evidence. The learned magistrate did not hold that the agreement exhibit "A" was valid because of custom, he merely remarked that it followed or did not conflict with local custom. This ground of appeal fails.

The fifth ground of appeal is that the learned magistrate ought to have held that the respondent was not entitled to a declaration in terms of the contract between the parties, other reliefs for the breach of the contract being available. No breach of contract was however pleaded by the respondent who merely feared, from approaches made to him by the appellant to terminate the contract between them on payment of compensation, that the appellant was about to commit a breach of the contract. All the respondent sought was a declaration of his legal rights should certain anticipated events take place. As Odgers remarks (op. cit. p. 494)

> "the court can in its discretion make a declaration as to a future right, but it will not do so if such a declaration would be embarrassing or useless for any good purpose."

I have already held that the lower court had the power to give a declaratory judgment, even though no ancillary relief was claimed, so that this ground of appeal fails. Whether in the circumstances the learned magistrate ought to have made a declaration is the subject of the sixth ground of appeal. A court should be slow to make a declaration as to future rights where, as in this case, those rights may be the subject of litigation in future. It may well be that I would have refused to give a declaratory judgment in the case appealed from, but it does not follow that the magistrate wrongly exercised his discretion in doing so. He obviously thought that it would be in the interest of justice and of the parties themselves for their rights to be declared at this stage, before any specific relief could be claimed on one side or the other. In *Bombay Burma Trading Corporation Ltd. v. F. Yorke Smith* (4) (1893), 17 Bom. 197, the court of appeal in India upheld a decision of the lower court in making a declaration with regard to a right which was both future and contingent, holding that it was in the interests of both parties and in the exercise of a sound discretion to have done so. The Court of Appeal went on to say that objection to the making of a declaratory decree should be taken in the lower court, and that to raise such an objection for the first time on appeal would, by itself, be fatal to the appeal. I respectfully associate myself with those views. Mr. Balsara also submitted that the court has no power to make a declaration different from that which the plaintiff has specifically claimed. The respondent's claim in the case now under consideration was for a declaration that he is entitled to occupy

the land until compensation is paid; and the declaration in the decree is that the respondent

> ". . . be and is hereby declared to be entitled to occupy the land allocated to him by the defendant . . . for proper cultivation subject to the conditions embodied in the agreement exhibit 'A' . . ."

Admittedly this declaration does not deal with the question of compensation, but in view of the unqualified nature of the declaration the right to compensation did not fall to be considered, as it would have done had the learned magistrate found that the appellant was entitled to put an end to the agreement on payment of compensation. In my opinion the declaration made was not different from that claimed. This ground of appeal also fails.

The other grounds of appeal relate to the assessment by the learned magistrate as to the compensation to which the respondent would be entitled in case he was ejected in breach of his legal rights. It is I think sufficient to say that there was evidence on the record to justify the learned magistrate's findings in this respect.

It follows that in my view this appeal fails and must be dismissed with such costs as are payable in the case of a pauper appeal.

I wish to express my appreciation of the helpful and learned arguments of the advocates on both sides.

Appeal dismissed.

For the appellant:
JS Balsara
Balsara & Lakha, Zanzibar

For the respondent:
JF Jasavala (Crown Counsel, Zanzibar)
The Registrar, High Court, Zanzibar

H v The Commissioner of Income Tax
[1958] 1 EA 303 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	18 June 1958
Case Number:	36/1957
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Income Tax – Undistributed profits – Company in voluntary liquidation – Profits for penultimate accounting period deemed to have been distributed – Year of income in which deemed distribution to be included in income of shareholders – East African Income Tax (*Management*) *Act,* 1952, *s.* 22 *sub-s.* (8)

and sub-s. (10).

Editor's Summary

By notice dated April 17, 1956, the Commissioner of Income Tax ordered that under s. 22 of the East African Income Tax (Management) Act, 1952, 60 per cent. of the undistributed profits of the Liverpool Uganda Company (Africa) Limited were to be deemed to have been distributed among the shareholders as at July 31, 1953. The taxpayer was assessed accordingly for the year of income 1953 and he appealed to the Local Committee. The Committee allowed the appeal, stating that the dividends should have been deemed to be distributed on July 21, 1954. A fresh assessment was accordingly issued in respect of the year of income 1954, from which the appellant unsuccessfully appealed to the Committee. The Company had, on July 21, 1954, passed a special resolution to wind up as a members' voluntary winding up. By sub-s. (8) and sub-s. (10) of s. 22 of the East African Income Tax (Management) Act, 1952, provision is made for such a resolution as follows:

> "(8) Where an order has been made or a resolution passed for the winding-up of a company to which this section applies, the income of the company for the period from the end of the last year or other period for which accounts of the company have been made up to the date of the order or resolution for the winding-up shall, for the purposes of this section, be deemed to be income of that period available for distribution to the shareholders of the company, and, as respects that period and the next preceding year or other preceding period or periods ending within that next preceding year for which accounts have been made up, this section shall apply as if the words 'up to the end of twelve months after the date to which such accounts have been made up', and 'as at the end of the sixth month after the date to which such accounts have been made up' in sub-section (1) were omitted therefrom.
>
> "(10) The income apportioned to a shareholder of a company for the period from the end of the last year or other period for which accounts have been made up to the date of the order or resolution for winding-up shall, for the purposes of this Act, be deemed to have been received by him on the date of that order or resolution."

By the application of this legislation to the facts, the final period referred to in the beginning of sub-s. (8) was from August 1, 1953 to July 21, 1954, and the penultimate period was from August 1, 1952, to July 31, 1953. The company had declared no dividend for the penultimate period. The taxpayer contended that the date of the deemed distribution of income for the year ending July 31, 1953 should be the date of the commissioner's order dated April 17, 1956, alternatively July 31, 1953, and in any event, not a date in 1954. For the commissioner it was contended that the date is within his discretion and that, as the local committee had held, was a date in 1954. The commissioner relied on the absence of any express provision in the Act as giving him a discretion to appoint a date.

Held –

(i) the apparent omission of any express references to the date on which the deemed distribution is to be made in the case of the penultimate period would not under the Act be meaningless, since the provisions of sub-s. (1) of s. 22 (as modified by sub-s. (8)) can reasonably be construed as making that date the date of the commissioner's order.

(ii) the assessment was wrong and the income from the deemed distribution should have been assessed for the year of income 1956.

Appeal allowed. Decision of local committee reversed and assessment annulled.

Case referred to in judgment:

(1) *Commissioner of Stamps, Straits Settlements v. Oei Tjong Swan*, [1933] A.C. 378.

(2) *Cape Brandy Syndicate v. Inland Revenue Commissioners*, [1921] 1 K.B. 64.

Judgment

Lyon J: read the following judgment of **Sir Audley McKisack CJ:** This is an appeal from a decision of the Kampala Income Tax Local Committee dismissing an appeal by the taxpayer in respect of an assessment for the year of income 1954.

The appeal turns on the construction to be put upon the relevant provisions of s. 22 of the East African Income Tax (Management) Act, 1952. Sub-s. (1) of that section empowers the commissioner to order that a proportion of the undistributed income of a company shall be deemed to have been distributed among the shareholders, and the sub-section (with a proviso not relevant to the present case omitted) is in the following terms:

> "22. (1) Where the commissioner is satisfied that, in respect of any period for which the accounts of a company resident in the territories have been made up, the amounts distributed as dividends by that company up to the end of twelve months after the date to which such accounts have been made up, increased by any tax payable thereon, are less than sixty per cent. of the total income of the company ascertained in accordance with the provisions of this Act for that period, he may, unless he is satisfied that having regard to losses previously incurred by the company or to the smallness of the profits made the payment of a dividend or a larger dividend than that declared would be unreasonable, by notice in writing order that the undistributed portion of sixty per cent. of such total income of the company for that period shall be deemed to have been distributed as dividends amongst the shareholders as at the end of the sixth month after the date to which such accounts have been made up and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purposes of this Act."

By notice dated April 17, 1956, the commissioner ordered that 60 per cent. of the undistributed profits of the Liverpool Uganda Company (Africa) Limited were to be deemed to have been distributed to the shareholders of the company as at July 31, 1953. The taxpayer was assessed accordingly for the year of income 1953, and he appealed to the local committee. That committee allowed the appeal, stating that the dividends should have been deemed distributed on July, 21, 1954. A fresh assessment was issued accordingly in respect of the year of income 1954.

The company above-mentioned had passed, on July 21, 1954, a special resolution for a members' voluntary winding-up. Special provision is made

in s. 22 of the Act to meet the case where there has been such a resolution. Sub-section (8) and sub-s. (10) of that section are in the following terms:

> "(8) Where an order has been made or a resolution passed for the winding-up of a company to which this section applies, the income of the company for the period from the end of the last year or other period for which accounts of the company have been made up to the date of the order or resolution for the winding-up shall, for the purposes of this section, be deemed to be income of that period available for distribution to the shareholders of the company, and, as respects that period and the next preceding year for which accounts have been made up, this section shall apply as if the words 'up to the end of twelve months after the date to which such accounts have been made up' and 'as at the end of the sixth month after the date to which such accounts have been made up' in sub-s. (1) were omitted therefrom.
>
> "(10) The income apportioned to a shareholder of a company for the period from the end of the last year or other period for which accounts have been made up to the date of the order or resolution for winding-up shall, for the purposes of this Act, be deemed to have been received by him on the date of that order or resolution."

For the purposes of the application of those provisions to the facts of the present case, the final period referred to at the beginning of sub-s. (8) was from August 1, 1953, to July 21, 1954, and the penultimate accounting period was August 1, 1952, to July 31, 1953. No dividends had been declared by the company in respect of the last-mentioned period.

The question to be decided in this appeal is–on what date is the "deemed" distribution of the undistributed income for the year ending July 31, 1953, to be taken as having been made? For the appellant (the taxpayer) it is contended that the date was the date of the notice issued by the commissioner under s. 22 (1), i.e., April 17, 1956; alternatively, that it was the last day of the penultimate accounting period, i.e., July 31, 1953; and that in any event it was not a date in 1954. For the commissioner it is contended that the date is within the commissioner's discretion and he may appoint such date as he thinks proper; and that, as the local committee on the first appeal had properly found, the date was a date in 1954.

From the provisions of s. 22 which have been cited, it will be seen that there is no difficulty over the deemed date of distribution in the case of the final period of a company in respect of which there has been a resolution for winding-up. By sub-s. (10) the shareholder is deemed to have received the undistributed income on the date of the resolution. Again, in the case where there has been no order or resolution for winding-up, the deemed date of distribution is–by sub-s. (1)–the end of the sixth month following the end of the accounting period in question. But in the case where there has been such order or resolution, has the Act made any provision as to the date of distribution of the income for the penultimate period? In relation to that period the relevant part of sub-s. (1) of s. 22 is, by virtue of sub-s. (8) (which provides for the omission of certain words), to be read as follows:

> "22. (1) Where the commissioner is satisfied that, in respect of any period for which the accounts of a company resident in the territories have been made up, the amounts distributed as dividends by that company, increased by any tax payable thereon, are less than sixty per cent. of the total income of the company ascertained in accordance with the provisions of this Act for that period, he may . . . by notice in writing order that the undistributed portion of sixty per cent. of such total income of the company

> for that period shall be deemed to have been distributed as dividends among the shareholders and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purposes of this Act."

Mr. Macdougall for the appellant argues that sub-s. (1), as modified by sub-s. (8), means that the deemed date of distribution is the date of the commissioner's notice. For the commissioner, however, it is said that the absence of any express provision concerning the date of the deemed distribution means that the commissioner is given a discretion to fix such date as he may think fit for that purpose.

It may be that the draftsman, having duly provided for the case of the final period, neglected to make provision for the penultimate period. It may be that, in framing s. 22, he took as his model certain provisions of the English Income Tax Act, 1952, (in particular s. 253) and overlooked others (for example, s. 249). But such speculations and comparisons are of no assistance in seeking the meaning of s.22 of the East African Act; see *Commissioner of Stamps, Straits Settlements v. Oei Tjong Swan* (1), [1933] A.C. 378, at p. 389.

It seems to me that, if I am to adopt the construction for which the commissioner contends, I should have to imply certain words in sub-s. (1) which are not in fact there. But it is well established that it is not permissible to imply words, unless the provisions of the Act concerned would otherwise be rendered meaningless or of no effect (see Craies on Statute Law (5th Edn.) pp. 103–106 and cases there cited). Moreover this is a taxing statute and no liberties are to be taken with its meaning. As Rowlatt, J. observed in the well-known passage in *Cape Brandy Syndicate v. Inland Revenue Commissioners* (2), [1921] 1 K.B. 64, at p. 71,

> ". . . in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

In my view, the apparent omission of any express reference to the deemed date of distribution in the case of the penultimate period does not render the Act meaningless or of no effect in that respect. Sufficient provision in that behalf can be found in the words of sub-s. (1) of s. 22 (as modified by sub-s. (8)), without undue straining of the language and without its being necessary to imply words which are not there. This sub-section, having said that the commissioner may issue a written order that the company's income "shall be deemed to have been distributed as dividends among the shareholders", goes on to say

> "and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purposes of this Act."

To my mind those latter words can, in the absence of any other relevant provision, be reasonably construed as meaning that the inclusion of the dividends in the shareholder's income takes effect upon the issue of the commissioner's order. This construction gives to the word "thereupon" one of its ordinary meanings, viz., that the second event takes place immediately after the first event.

This view did not commend itself to the local committee when they considered the first appeal (i.e., against the assessment for the year of income 1953). Indeed they described it as "an absurd interpretation", because its effect is that, while the company's income for the final period is deemed to have been distributed on the date of the winding-up resolution, the income for the penultimate period is to be taken as having been distributed subsequently to that resolution.

This certainly seems a strange inversion of the course of normal events, but it is not normal events which are under consideration; it is a wholly artificial situation–a statutory provision that income which has not been distributed is to be deemed to have been distributed. I do not see why, having regard to the plain purpose of s. 22, it should be necessary for matters incidental to this artificial situation to be clothed with any approximation to reality. The purpose of the section is to ensure that income tax is levied on what would otherwise escape that tax. If, in effecting that purpose, a highly artificial situation is created, that does not seem to me sufficient ground for implying words which are not there.

The same conclusion applies to another objection which has been mentioned in argument. The legislature has set no time limit to the making of an order by the commissioner under s. 22 (1), so that the shareholder might be assessed years after the winding-up. The answer to that is simply that one must conclude that the legislature thought any such time limit was unnecessary, and it is not for the court to speculate as to their reasons.

In the result, therefore, I find that the assessment was wrong, in that the income in question should have been assessed for the year of income 1956, not 1954. The decision of the local committee must be reversed and the assessment annulled. The appeal is accordingly allowed, with costs.

Appeal allowed. Decision of local committee reversed and assessment annulled.

For the appellant:
JA Macdougall
JA Macdougall, Kampala

For the respondent:
JC Hooton (Deputy Legal Secretary, East Africa High Commission)
The Legal Secretary, East Africa High Commission

Re Juma Sadala's Estate
[1958] 1 EA 308 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	24 June 1958
Case Number:	1102/1957
Before:	Edmonds J
Sourced by:	LawAfrica

[1] Mohamedan law – Succession – Deceased leaving widow and no other heir – Wakf Commissioners claiming rights of Bait-ul-Mal – Whether widow entitled to residue under doctrine of "return" – Public Trustee Ordinance (*Cap.* 37), *s.* 11 (3) (*K.*) – *Wakf Commissioners Ordinance*, 1951, *s.* 18 (*K.*).

Editor's Summary

The deceased, who was a convert to the Muslim faith of the Shafii sect, died near Mombasa in 1955, leaving a widow and no other heirs. The Shafii are a sub-sect of the Sunni Mohamedans, who belong mainly to the Hanafi school of Mohamedan law. Under Shafii law there was originally no recognition of distant kindred or of the doctrine of "return", but in the twelfth century distant kindred were recognised, in the absence of any Bait-ul-Mal, but the widow was still excluded. The Public Trustee, as administrator of the deceased's estate, petitioned the court for a declaration authorising him to pass the whole estate to the widow. The Wakf Commissioners who, with the Attorney-General, were cited as respondents, opposed the petition, claiming that the widow was only entitled to her one-fourth share and that the balance should go to them.

Held –

(i) since the reason for the change in the law of inheritance among the Hanafi was the absence of any properly constituted and administered Bait-ul-Mal, and in the absence of any known authority against a widow being entitled to the return, the only reasonable view is that if there are no other heirs and no Bait-ul-Mal, a widow of the Shafii sect is entitled to the "return".

(ii) the "Surplus Fund" created by s. 18 (1) of the Wakf Commissioners Ordinance, 1951, was not intended to be a Bait-ul-Mal, and in the absence of express provision to that effect (which would reverse a practice which had obtained among the Hanafis for centuries), the whole residue of the estate should revert to the widow.

Declaration accordingly.

Case referred to in judgment:

(1) *Abdul Hamid Khan v. Peare Mirza* (1935), 10 Luck. 550; 153 I.C. 379.

(2) *Saumu binti Uledi v. Khamis bin Songoro* (1944), 7 Z.L.R. 126.

(3) *Mahomed Arshad Chowdhry v. Sajida Banoo* (1878), 3 Cal. 702.

Judgment

Edmonds J: The petitioner is the Public Trustee as the administrator of the estate of the late Juma Sadala who died intestate on August 23, 1955, at Mtongwe, Mombasa, leaving as his sole surviving heir his wife, Dogo binti Faraji. The deceased was by religion a Muslim convert of the Shafii sect. The Public Trustee has filed this petition seeking a declaration that he may pass the whole of the deceased's net estate to the widow, and has cited the Attorney-General and the Wakf Commissioners as respondents to the petition. At the hearing the former appeared as amicus curiae, while the latter opposed the petition, contending that the widow is entitled to no more than one-fourth of the estate and the Wakf Commissioners to the balance. The entitlement of the widow is thus the issue before the court.

The Shafii are a sub-sect of the Sunni Mohamedans, who belong principally to the Hanafi school of Mohamedan law since the majority of Sunnis in India are of the Hanafi sub-sect. The respective laws of inheritance among the Hanafis and the Shafiis have differed and still differ. The former have always accepted distant kindred as heirs, and from early times accepted the doctrine of "return" in the absence of any other heirs to the husband, though excluding the wife, the residue in the case of a surviving wife escheating to the State Treasury, the Bait-ul-Mal. Subsequently, however, the law was further modified so as to allow the residue of an estate to go to the wife. (Syed Ameer Ali on Mahommedan Law (2nd Edn.), Vol. 2, 119). Under Shafii law there was originally no place reserved for distant kindred and no return, so that in default of sharers and residuaries, the property would escheat to the Bait-ul-Mal. In the twelfth century distant kindred were admitted to the return in default of sharers and residuaries "in all cases in which the public revenues are not administered conformably to the law" (Wilson, (5th Edn.), 415), but the modification did not extend to the husband or the wife (Minhaj et Taliben, 247). The Shias are the other main Mohamedan sect, and, at one time, according to the Shia school, the wife was not entitled to inherit the residue by return in the absence of any other heir, though the husband was. But it was decided by the Oudh Court in *Abdul Hamid Khan v. Peare Mirza* (1) (1935), 10 Luck. 550; 153 I.C. 379, that a widow is entitled to take by return. The following passage is worthy of quotation from a judgment of Gray, C.J., in *Saumu binti Uledi v. Khamis bin Songoro* (2) (1944), 7 Z.L.R. 126 at p. 129:

> "The Hanafi rule was at one time the same as the Shafei rule, but later the rule was altered and Indian decisions have been to the same effect as that laid down in Ibathi law. The Sirajiyyah laid it down that 'in the absence of residuaries, the surplus amount, after assignment of shares to the sharers, is returned to the sharers according to their respective rights, except the husband and wife, and, where there is no heir, the surplus goes to the public treasury. But (as said in *Baftun v. Bilaiti Khanum* (supra)), although that was the original rule, an equitable practice has prevailed in modern times of returning to the husband or the wife in default of sharers by blood and distant kindred (see Sharma Charan Sarkar's Al Sirajiyyah, p. 17)'. This practice was already in existence in 1811 when it was referred to in *Mussumaut Soobhanee v. Bhetun* (1811) 1 Sel. Rep. S.D.A. Bengal, 464. In that case it was held that the return went to the surviving husband or wife on the ground of 'it being ruled by futwas that there is in modern times no Bytoolmal or public treasury regularly established'. In a footnote to that case (at p. 469) Sir William MacNaughton cites a passage from the Hedaya, which reads: 'There is no proper Bytoolmal in our time; nor was there except in the time of the companions of the Prophet and their successors. Cazee Imam Abdool Wahid in his Furaiz has noticed that the shares of the husband or wife, whatever it may be, should not be placed in the Bytoolmal for the reasons stated, but should be given to the husband or wife'. Though in *Mussamut Hurmut-Ool-Nissa Begum v. Alladhia Khan* (1871), 17 W.R. 108, the Privy Council went no further than to say that 'some authorities seem to hold' that this modification of the original rule is correct, the equitable practice has none the less been consistently followed by Indian courts ever since 1811. (*Musst. Ekin Bebee v. Meer Ashruf Ali* (1864), 1 W.R. 152; *Mahomed Arshad Chowdhry v. Sajibanoo* (1878), 3 Cal. 702; *Koonari Bibi v. Dalin Bibi* (*supra*)*; Mir Isab v. Isab* (1920), 44 I.L.R. Bom. 947).
>
> "In this connection it may also be noted that Shia law is to the same effect as Ibathi and Hanafi law, though the reason given for the rule is somewhat different. Originally in default of heirs the return went to the

> Imam, but in the absence of an Imam in the actual flesh the practice grew up of returning to the husband or wife."

In the case of *Mahomed Arshad Chowdhry v. Sajida Banoo* (3) (1878), 3 Cal. 702, the plaintiff, a widow, is described as being of the Sunni sect of Mohamedans though, unfortunately, her sub-sect is not given. It was decided in that case that by the Mohamedan law of inheritance, in default of other sharers and the absence of distant kindred, the widow is entitled to the return to the exclusion of the Public Treasury. Fyzee (2nd Edn.) 356, in his Outlines of Muhammedan Law, has this to say:

> "If there is no other surviving heir, the residue returns to the husband or the wife in India; this rule is, however, contrary to the strict letter of the *sharia*, whereby the residue would escheat to the State, the spouse being entitled only to the Koranic share."

The author is there dealing generally with Sunnite inheritances, and he makes no distinction between the Hanafi, the Shafii and the other sub-sects. In setting out the agnates in order of succession Ruxton on Maliki Law, 389, places the Bait-ul-Mal as the last of the agnates,

> "which receives the whole succession in default of sharers and others agnates, or else, the residue, if any, when these have been satisfied".

In a footnote he adds this:

> "The Maliki school differs from those of Abu Hanifah and al-Shafii in not granting the position of heirs under any circumstances to relatives other than the sharers and agnates'. (Risalah, note 277.) Thus in Maliki law the Hanafi doctrines of 'distant kindred' and of 'return' are not known. Cognates can therefore never succeed. The Shafii school only follows the Hanafi doctrine when the Bait-al-mal is considered to be badly administered."

In Sheikh Ali bin Hamedi el Buhuri's Mirathi, a handbook of the Mohamedan Law of Inheritance according to the Shafii school as practised among Mohamedans of the East African coast, of whom the majority are of the Shafii sub-sect, the author states in his introduction that

> "If there be no Beit-el-Mal the money will be returned to the limited heirs, if there be any, except a wife or husband, in proportion to their shares",

and he repeats this at p.27 of his work when he says that the wife or the husband "never receive anything in addition to their fixed shares". The author does not, however, state what the position is in the absence of other heirs and of the Bait-ul-Mal.

It would appear that the reason for the change or modification of the law of inheritance as to "return" among the Hanafi and Shia schools was the absence of any properly constituted and administered Bait-ul-Mal. There would appear to be no known decision of any court as to the present-day situation so far as followers of the Shafii sub-sect are concerned, and Ruxton, so far as I am aware, is the only authority who has stated that the Shafii school has adopted the modification. According to Abdur Rahim, in his Principles of Muhammedan Jurisprudence, 28, the founder of the Shafii school, which

> "takes rank in the number and importance of its followers next only to the Hanafi school"

was noted

> "for his balance of judgment and moderation of views and though reckoned among the upholders of traditions, he examined the traditions more critically and made more use of analogy than Malik".

The decision by the Shia and Hanafi schools to depart from the traditional law as to the exclusion of the husband or wife from the return was made as a result of what I think may fairly be described as a moderate and reasonable application of fundamental equity. And as the founder of the Shafii school was known for his moderation and for his critical examination of traditions, it would seem that he would not have disapproved of a departure from the traditional law as to Radd in the absence of any other heirs and of any properly established Bait-ul-Mal. There are no known authorities (apart from Ruxton) who have expressly approved such a modification, but equally are there none which have ruled against it, and, in view of the fact that the modification has been accepted for so long a period by the Hanafis and Shias, I think that the only reasonable view to take is that in the absence of any other heirs and of any Bait-ul-Mal the husband and wife of the Shafii sub-sect are entitled to the return.

It is now necessary to consider if in Kenya there is any Bait-ul-Mal. Section 11(3) of the Public Trustee Ordinance (Cap. 37) provides as follows:

> "Estates shall be distributable by the Public Trustee according to the ordinary rules of law within any period not exceeding twelve years computed from the date of the final completion of the account; on the expiry of that period all estates or portions thereof in respect of which no claim shall have been lodged with the Public Trustee shall lapse or be escheat to the Crown:"

By s. 18 of the Wakf Commissioners Ordinance, No. 30 of 1951, it is provided–

> "(1) Notwithstanding anything to the contrary in the Indian Succession Act, 1865, any property of a deceased Muslim to which no claim has been established within one year from the date upon which such property vested in the administrator of the estate or in the Public Trustee shall be handed over to the Wakf Commissioners by the said administrator or Public Trustee, as the case may be, and shall, if not handed over in the form of money, be converted into money and paid by the Wakf Commissioners into a special fund created for the purpose to be known as the Surplus Fund.
>
> "(2) The Surplus Fund shall be utilised by the Wakf Commissioners for such benevolent or charitable purposes for the benefit of Muslims as the Wakf Commissioners may consider proper:"

I think it was contended for the Public Trustee that, as the latter Ordinance did not repeal s. 11 (3) of the former, the provisions of s. 18 (1) do not operate to override the provisions of s. 11 (3), that consequently s. 18 (1) was not intended by the legislature to create a Bait-ul-Mal and that s. 11 (3), must be applied to Muslims. I do not think that it can be held that the provisions of s. 18 (1) are repugnant to or inconsistent with those of s. 11 (3). The latter, in my view, is a general provision and the former a particular provision, which must be regarded as an exception to the general rule. The Ordinance of 1951 deals, and is meant to deal, specifically with, *inter alia*, certain property of deceased Muslims, and the provisions made in regard thereto must, I think, be read as exceptional to the provisions of s. 11 (3) of the earlier Ordinance which deals with estates generally. It is, however, the contention of Mr. Inamdar, for the Wakf Commissioners, that s. 18 (1) makes provision for a Bait-ul-Mal, and that consequently, as this Treasury exists, the widow, Dogo binti Faraji, is entitled to only one-fourth of her late husband's estate and the balance must escheat to the Wakf Commissioners' Surplus Fund. The Ordinance of 1951 defines Muslim as meaning

> "an Arab, a member of the Twelve Tribes, a Baluchi, a Somali, a Comoro Islander, a Malagasy or a native of Africa, of the Muslim faith".

It follows, therefore, that the Ordinance has no application to Indian Muslims, in respect of whom there is no provision in any Ordinance similar to s. 18. A Bait-ul-Mal Committee has been registered under the Societies Ordinance, No. 52 of 1952, but this committee has reference only to Indian Muslims. The question which I must decide is whether it can be held that the Surplus Fund referred to in s. 18 (1) is in effect and for all intents and purposes a Bait-ul-Mal. Anderson, in his work Islamic Law in Africa, thinks it is designed to take the place of the Bait-ul-Mal, but, if he is right, that is not saying that the legislature intended that it should, in all respects, operate as a Bait-ul-Mal. If something is said to take the place of something else, surely that connotes change and not a retention of the status quo. The Surplus Fund under the Ordinance is to be built up solely from the money proceeds of property of a deceased Muslim, and has to be utilised for benevolent and charitable purposes. The traditional Bait-ul-Mal was built up of funds from various sources: land tax, poll tax, the legal alms, the fifth part of booty, of the produce of mines and of treasure-trove, and, finally, the estates of all Muslims who died without agnatic heirs and without sharers to exhaust the estate: and there were strict rules as to the ends to which the receipts must be devoted (Anderson, 360). In Tanganyika there is special provision as regards Bait-ul-Mal in the Mohammedan Estates (Benevolent Payments) Ordinance (Cap. 29) where it is provided:

> "In any case which, according to the law of Islam, the whole or any part of an estate is payable to the Public Treasury (Beit-el-Mal), the District Officer may, in his discretion, order that the whole or a part of the amount . . . not exceeding a sum of Shs. 1,000/- be distributed, in . . . such proportions as he may think fit, among the husband, wife or wives, or other dependants of the deceased".

It is notable that the Tanganyika Legislature took it upon itself to modify a traditional Mohamedan law by allowing a share of the proceeds due to the Bait-ul-Mal to go to the husband or wife.

It is my view that had the legislature in Kenya intended that the Surplus Fund, for which provision is made in s. 18 (1) of the Wakf Commissioners Ordinance, should in fact operate and be operated as a Bait-ul-Mal it would clearly have said so and have as clearly identified the Fund with the functions of a Bait-ul-Mal. Had that indeed been the intention of the legislature, the result would be to reverse a practice which has obtained among the Shias and Hanafis for centuries–for the Ordinance is of general application to all sects of "African" Muslims. I do not think that the intention behind s. 18 was to restore the traditional Mohamedan law, since modified, of no return to the husband or the wife. In the result, therefore, I take the view that s. 18 (1) does not create a Bait-ul-Mal and that the whole residue of the estate should revert to the widow, Dogo binti Faraji. The costs of all parties will, by consent of the Attorney-General, be borne by the Crown.

Declaration accordingly.

For the Public Trustee:
AJ Naronah (Office of the Public Trustee)

For the Attorney-General:
GP Nazareth (Crown Counsel, Kenya)

For the Wakf Commissioners:
ST Inamdar

For the petitioner:
The Public Trustee, Kenya

For the first respondent:
The Attorney-General, Kenya

For the second respondents:
Inamdar & Inamdar, Mombasa

James v The Commissioner of Transport
[1958] 1 EA 313 (SCK)

Division:	HM Supreme Court of Kenya at Nakuru
Date of judgment:	21 April 1958
Case Number:	131/1957
Before:	Goudie Ag J
Sourced by:	LawAfrica

[1] Negligence – Railway – Level crossing – Private accommodation crossing – Crossing badly sited – Visibility restricted – Common law duty to take care – Whether railway negligent – East African Railways Ordinance (*Cap.* 115) *s.* 11 *and s.* 12 (*K.*) *– East African Railways and Harbours Act,* 1950, *s.* 17.

[2] Railway – Level crossing – Private accommodation crossing – Collision of train with motor vehicle – Common law duty to take care – Whether siting of crossing exceptionally dangerous.

Editor's Summary

On the morning of July 11, 1956, the plaintiff was driving his pick-up over a level crossing on a private road off the main road between Molo and Turi, when his vehicle was struck by a train. The vehicle was damaged beyond repair and the plaintiff suffered injury. He sued for damages, alleging negligence of the defendant and his servants. It was admitted that the level crossing had been constructed by the railway as a private accommodation crossing in 1925, and had never been altered since then, that the average traffic over the crossing was six trains a day in each direction, and that warning boards and whistle boards were installed and maintained, but no other precautions were taken, except to cut the grass and weeds in the vicinity from time to time. Road traffic over the crossing had, in recent years, increased, owing to the number of farms it now served. In support of the defendant's denial of liability evidence was called that the crossing was not dangerous, but it was admitted that there was a risk of danger at level crossings and that this crossing was a little badly sited.

Held –

(i) this crossing was dangerous and the defendant's servants had added to the risks for users of the

road by failing to make improvements and allowing weeds to obstruct visibility.

(ii) the defendant and his servants were also negligent in failing to keep a look out or to whistle at the whistle board or in time to warn users of the road of the approach of the train.

(iii) there was no contributory negligence on the part of the plaintiff.

(iv) neither the East African Railways Ordinance (Cap. 115), nor the East African Railways and Harbours Act, 1950, had altered or modified the common law liability of the defendant, and since the degree of care required of a railway authority depends on whether there are circumstances of exceptional danger at the crossing requiring special precautions, the defendant was liable in damages to the plaintiff.

(v) the plaintiff was entitled to the special damages claimed and, since the medical evidence failed to show that several months later the plaintiff was suffering any ill-effects from the accident, general damages of £300.

Judgment accordingly.

Case referred to in judgment:

(1) *Lloyds Bank Ltd. v. Railway Executive*, [1952] 1 All E.R. 1248.

(2) *Cliff v. Midland Railway Co.* (1870), L.R. 5 Q.B. 258.

(3) *Lloyds Bank Ltd. v. British Transport Commission*, [1956] 3 All E.R. 291.

(4) *Smith v. London, Midland & Scottish Railway Co*., [1948] S.C. 125.

(5) *Kemshead v. British Transport Commission*, [1958] 1 All E.R. 119.

(6) *Hazell v. British Transport Commission*, [1958] 1 All E.R. 116.

(7) *Trznadel v. British Transport Commission*, [1957] 3 All E.R. 196.

(8) *Burrows v. Southern Railway Company*–referred to in *Knight v. Great Western Railway Company*, [1942] 2 All E.R. 286.

(9) *Knight v. Great Western Railway Company*, [1942] 2 All E.R. 286.

Judgment

Goudie Ag J: On the morning of July 11, 1956, the plaintiff, a farmer, was driving his Mercedes Benz diesel pick-up across a level crossing on a private road off the main Molo/Turi road when his vehicle was struck by a train passing over the level crossing. The vehicle was damaged beyond repair and the plaintiff sustained personal injuries. He is now suing the Commissioner of Transport for damages arising out of the incident which he alleges were caused by the negligence of the defendant and his servants.

The following facts were admitted before action:

(1) The section of the railway concerned was opened to traffic in 1901.

(2) The level crossing concerned was constructed by defendant's predecessors as a private accommodation crossing in 1925.

(3) The crossing has not been altered in any way since its original construction.

(4) The average daily traffic over the crossing at the date of the incident was six trains in either direction.

(5) At the time of the construction of the crossing warning boards and whistle boards were installed but no further precautions have subsequently been carried out at the site other than to maintain and paint the said boards and to cut the grass and weeds in the vicinity of the crossing "from time to time".

I further find on the evidence that there has been a substantial increase in road traffic over the crossing since its construction. Whereas the crossing would appear originally only to have served one or two farms, it would appear at the date of the incident to have served at least partially, some eight or ten farms. I think it is also reasonable to assume that there has been some increase in rail traffic over the crossing in the last thirty years.

It is not suggested on behalf of the plaintiff that there has been any breach of the defendant's statutory liability in the construction or maintenance of the crossing and the negligence alleged is confined to the defendant's common law liability. It will be convenient, however, first to examine the statutory duty of the defendant to provide and maintain level crossings in order to ascertain how far, if at all, it affects the common law position.

Section 11 of the East African Railways Ordinance (Cap. 115 Laws of Kenya, 1926 Edn.) provides as follows:

"(1) A railway administration shall make and maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway, namely–

(*a*) Such and so many convenient crossings . . . and passages over, under or by the sides of, or leading to or from the railway as may, in the opinion of the Governor-in-Council, be necessary for the purpose of making good any interruptions caused by the railway to the use of lands

through which the railway is made; and . . .

> "(2) . . . the works specified . . . shall be made during or immediately after the laying out or formation of the railway over the lands traversed thereby and in such manner as to cause as little damage or inconvenience as possible to persons interested in the lands or affected by the works."

Sub-s. (3) contains (*inter alia*) the following proviso:

> "(*b*) . . . a railway administration shall not . . . be compelled to defray the cost of executing any further or additional accommodation works for the use of the owners or occupiers of the lands after the expiration of ten years from the date on which the railway passing through the lands was first opened for public traffic."

Section 12 gives power, notwithstanding the above proviso, for the owner, occupier or a local authority to cause additional accommodation works to be made by the railway administration if existing works are insufficient for the commodious use of the land. Such additional works to be agreed by the railway administration or approved by the Governor-in-Council in default of agreement between the landowner and the railway administration.

Since the ten year proviso was not invoked as the crossing was not constructed for more than twenty years after the opening of the railway, it would appear probable that the railway administration agreed to construct this particular crossing under the provisions of s. 12.

All the above provisions were substantially re-enacted in the East African Railways & Harbours Act, 1950 (Cap. 3 Laws of the High Commission) when the responsibility for administration of the railways was transferred to the High Commission.

In my view there is nothing in any of these statutory provisions which shows clearly an intention to diminish the common law duties of the Railway Administration with regard to the maintenance and, where necessary, the improvement of level crossings adequately to meet the needs of any increase in road or rail traffic over the crossing. Statutes conferring statutory powers on public undertakings must be strictly construed and it has been repeatedly held that they are not to be construed so as to affect the common law rights of the individual unless such an intention is clear from the wording of the statute. The use of the words "further or additional accommodation works" in the ten year proviso contained in s. 11 (3) (*b*) of the East African Railways Ordinance as re-enacted in s. 17 (*a*) (iii) of the East African Railways and Harbours Act by substituting the words "any accommodation works" for "further or additional accommodation works" in the Ordinance does not, in my view, show a clear intention on the part of the legislature to relieve the railway administration from their liability where necessary to improve existing works, as distinct from executing fresh works, to meet changing conditions in order to implement their common law duty to users of the level crossing. It would in my view not only be illogical but contrary to accepted rules of construction in the case of Acts conferring statutory powers to hold that the intention of the legislature must have been to relieve the railway administration of all responsibility for "moving with the times" by holding that the duty of the railway administration towards a user of the crossing could not be greater in 1956 than it was in 1911 if this involved any improvement to the crossing.

I now proceed to consider the common law duty owed by the defendant and his servants towards users of motor vehicles at an accommodation crossing such as this. Unfortunately there are not to my knowledge any, and I am sure learned counsel, to whom I am greatly indebted for their assistance throughout this case, would have cited them had there been any, East African decisions in this matter. It therefore rests with this court to undertake the onerous task of deciding how far the English authorities should be followed in assessing the responsibilities of a railway administration operating in vastly

different conditions from those operated by British Railways.

The Kenya Colony Order-in-Council, 1921, s. 4 (2) provides that subject to statutory exception this court must exercise its jurisdiction

> ". . . in conformity with the substance of Common Law . . . in force in England on the twelfth day of August, 1897 . . . Provided always that the said Common Law . . . shall be in force in the Colony so far only as the circumstances of the Colony and its inhabitants permit and subject to such qualifications as local circumstances render necessary."

Moreover, the English decisions on the interpretation of the Common Law after 1897 are not binding on this court although it has been the practice of the courts in this Colony to regard themselves as bound by decisions prior to 1897 and to attach persuasive weight to English decision subsequent thereto. In my view the correct approach to the question of how far to follow the English authorities is first, to realise that there is virtually no local law applicable and one must, therefore, look for guidance to the English courts; secondly, to attempt to extract the principles underlying the English decisions rather than to feel compelled slavishly to follow factual decisions probably applied in vastly differing circumstances; and finally, to appreciate that just as the English courts have not hesitated to develop the law to suit changing circumstances since the first railway operated in England in 1825 it is the duty of this court, perhaps even more so in a young and developing Colony, to ensure that the law keeps pace with the demands of progress. At one stage of this case I seemed to detect an argument which seemed to imply that if a level crossing was adequate for the needs of traffic in 1925 it followed that it must be adequate today. To accept such an argument would be tantamount to saying that the law had been moribund since 1925 which is a heresy. It may be not without some significance that the East African Railways Act would not appear to contain a general power such as is contained in the English Railways Clauses Consolidation Act, 1845, s. 16, to alter, repair or substitute other works in place of the original works, but this does not in my view affect the responsibilities of the railway administration at Common Law. In this connection I refer with great respect to the words of Denning, L.J., in *Lloyds Bank Ltd. v. Railway Executive* (1), [1952] 1 All E.R. 1248 at p. 1253:

> "If the statute has stood still, however, the common law has not. It is I think now clearly established that the defendants must take reasonable care to prevent danger at their crossings, and this is an obligation which keeps pace with the times . . . The defendants cannot stand by . . . and say 'This increased traffic on the road is no concern of ours'. It is their concern. It is their trains which help to cause the accidents, and it is often the increased number of trains which increases the danger as well as the increased traffic on the road. The defendants must, therefore, do whatever is reasonable on their part to prevent the accidents. They need not at common law go so far as to turn the crossing into a public level crossing . . . but they must do all that may be reasonably required of them, in the shape of warnings, whistles, and as so forth, so as to reduce the danger to people using the crossing."

This clear exposition of the principles underlying the common law in England is in my view as applicable to this Colony as it is to English conditions and I do not consider either the fact that the facilities may not be so great or that there may be many times more crossings comparatively in this Colony affects the degree of care properly to be expected of the railway administration. I wish to make it quite clear, however, that it is the principle expounded in this case with which I am at present concerned and I fully appreciate that the facts themselves have no bearing on the case at present before me. Moreover, I have not overlooked the possibility that the words used may have been deliberately admonitory in nature since in the English case there was a history

of former accidents whereas so far as I am aware this is the only recorded accident at this crossing.

The degree of care required of a railway authority at accommodation crossings depends to a large extent on whether the crossing is a normal crossing or whether there are circumstances of exceptional danger relating to the particular crossing which require the use of "special precautions" of some kind. This distinction has been clearly recognised for may years in the English decisions.

In *Cliff v. Midland Railway Co*. (2) (1870), L.R. 5 Q.B. 258 at p. 264, Lush, J., said:

> "I think that where the legislature authorizes a railway to cross a way, public or private, upon a level, and does not require from the company any precaution to avoid danger, the legislature intends that the persons who have to cross that line should take the risk incident to that state of things. But, it may be, and I am inclined to think that it is, a sound principle that if the railway company, in the construction of the works so authorized,–in the exercise of the discretion which the legislature has vested in them,–do anything which prevents persons passing over the line from taking care of themselves, and exposes them to greater peril than is ordinarily incident to a level crossing, the company thereby impose upon themselves an obligation to take other than the usual precautions for the protection of persons who have a right to pass there, and, as it were, to make up to the public for that which they have taken away from them."

This distinction has been approved in numerous cases since this and in *Lloyds Bank Ltd. v. British Transport Commission* (3), [1956] 3 All E.R. 291 at pp. 295-6, Morris, L.J., said:

> "I think that there was a duty not to expose users of this crossing to any perils beyond those ordinarily inherent in the user of an accommodation crossing . . . As Lush, J., has stated (in *Cliff v. Midland Railway Co*., (supra)): 'There are certain perils which must be incident to and inevitable in the user of a crossing of this kind. Those persons, however, who operate the system must take reasonable care not to expose people crossing to perils beyond those which are ordinarily incident to the user. For example, those responsible for the railway should consider whether the line is straight for a reasonable distance from the crossing, or whether there is a curve at such at a distance as may create a danger to those who are using the crossing. If there is a curve nearby, then those using the crossing may not see the approach of a train, and the railway authority must do what in particular circumstances is reasonable in order to minimise or not to add to the risk. So a railway authority should consider whether there are any unusual circumstances relating to a crossing which add to the danger of those who use it."

In an earlier Scottish case *Smith v. London, Midland & Scottish Rly. Co*. (4), [1948] S.C. 125, Lord Russell put it in this way:

> "It appears to me that the duty of a railway company whose line travels over what is called an 'accommodation crossing' is to use all reasonable precautions, care and skill to protect members of the public who may be using that crossing. The result accordingly is that every case requires its own formulation of the particular duty devolving upon the company, dependent upon the special features which are present, physically and otherwise, in relation to the particular crossing."

Adverting to *Lloyds Bank v. British Transport Commission* (3), it is of particular significance in my view in this particular case that in considering whether or not there were any circumstances of exceptional danger in the

crossing there under review, Parker, L.J., specifically referred to the layout of the crossing itself and particularly examined the position with regard to the visibility to the left along the line from the position in which a prudent driver of a motor car would pull up and stop and look.

Finally, before leaving the question of the legal principle involved in the degree of care required of a railway authority at an accommodation crossing I would refer to two recent cases: *Kemshead v. British Transport Commission* (5), [1958] 1 All E.R. 119 and *Hazell v. British Transport Commission* (6), [1958] 1 All E.R. 116. These were both cases involving the respective duties of an engine driver and the driver of a motor vehicle in fog. However, most of the cases to which I have referred were cited and considered and in both cases the distinction between the duty owed at a normal crossing was differentiated from the "special precautions" necessary at a crossing where there were circumstances of unusual danger.

I now pass on to consider the nature of this particular crossing. Let me say at the outset that I was frankly amazed to hear the district engineer, East African Railways and Harbours (D.W.7) say that in his opinion this was not a dangerous crossing, an opinion which he appeared to share with Mr. Gilliland (D.W.5), a man with many years experience on the footplate. I noted however, that Mr. Railton (D.W.7) admitted that he would in principle resist this crossing today and gave as his reason in cross-examination

> "We tend to resist all crossings these days. We do not like the idea of railway property being a danger to the other users of the road."

I also noted that Mr. Gilliland admitted somewhat grudgingly

> "Perhaps the crossing is a little badly sited. It is unfortunate that the crossing is just by the gradient board."

Whatever the liability in my view no impartial observer could reasonably suggest other than that this particular crossing, apart from the presence or absence of weeds, is a highly dangerous crossing. This view is abundantly justified by the evidence of defendant's own surveyor (D.W.1):

> "The first possible point at which train visible at all would be about fifty yards from the crossing when approaching the crossing on the road and when the train about seventy yards from the crossing."

The photographs (exhibits 3A, 3B and 3D in particular) emphasize the highly dangerous nature of the crossing. As one approaches the crossing along the road there is a considerable gradient and a vehicle driver's view of the railway is to all intents and purposes entirely obstructed by a long belt of fairly thick and fifty/seventy-five feet high trees, running approximately parallel to the railway at a distance of forty yards from the railway (see sketch exhibit D). It was suggested that the outline of the engine on the railway line was "clearly visible" in photograph exhibit 3D through the trees. I consider this is a considerable exaggeration and it is probable that even the slight patch of dark between the trees which is presumably the engine which is said to be clearly visible might well have been unseen after a considerable period of rain which had occurred immediately prior to this incident. Approaching closer to the railway there is still no visibility of the line towards Molo and there would in my view be no substantial view of anything such as a train at the normal height of a train on this line. This is well illustrated at one point thirty-four feet from the crossing by a man standing up in the back of a vehicle in photograph exhibit 3C. I am satisfied that the first approachable view that a vehicle driver has of an approaching train is along the drain shown in photograph exhibit 3B, when the car is thirty-four feet from the rail and the train fifty feet from the crossing. Even this is only a fleeting view along a drain which was

fairly clear of weeds when viewed by the court but may well have been not nearly so clear at the time of this incident in view of the evidence as to weeds and their removal shortly after the accident, to which I shall refer later. The vehicle driver proceeding on to the railway side of the cut-away drain encounters a further bank which entirely obstructs his view of anything on the line until he is right up on the crossing itself. This bank is shown on sketch exhibit D as commencing ten feet from the rail itself and the front of a vehicle would have to be about six feet in front of the bank to enable a person in the driver's seat to get any view of the track. Bearing in mind the overhang of the train it will be seen that the evidence of Mr. Torrens (P.W.2)

> "The front wheels would be two/three feet from the line before I can see down the line"

is hardly an exaggeration. This is also partially corroborated by the evidence of Mr. Hodges (P.W.4)

> "You can see very little to the left. The first one would see of train approaching would be the funnel at about twenty yards when I was with my two front wheels say two yards clear of the track. I tested this a few days ago."

I consider, however, that Mr. Torrens' estimate is probably the more accurate of the two.

The conclusions reached by me as to the amount of visibility from given positions are founded entirely on the evidence of witnesses and the sketches and photographs put in by witnesses and I have been careful to avoid making myself a witness. Moreover, I have carefully considered the evidence of defendant's witnesses as to visibility, particularly that of Mr. Heyes (D.W.1), but unfortunately his evidence regarding the visibility of the crossing approach from the position of an engine driver is largely irrelevant since neither the driver nor the fireman were looking out whilst approaching the crossing and his evidence regarding visibility of the railway from the road is hardly helpful at all since he admitted in cross-examination that his surveys were made from the centre of the road and not in the position and at the height of a vehicle driver sitting in the driving seat.

In my view the lack of visibility at the crossing coupled with some increase in road and rail traffic since the crossing was constructed would itself demand of the railway authority either that the crossing be re-sited or improved, or that extraordinary additional precautions should be taken by the railway authority

> "in the shape of warnings, whistles and so forth to reduce the danger to people using the crossing."

So far as improvement to the crossing is concerned Mr. Heyes, defendant's surveyor, admitted that the bank forward of the drainage cut-away could be removed in half a day and this would result in a far greater visibility. If this were not done it is, in my view, doubtful whether the crossing could be made really safe, apart from its inherent dangers as a crossing, without each train stopping before the crossing and whistling and restarting after a fairly prolonged whistle. But apart from the natural lack of visibility due to the bank forward of the drainage cutting this has been seriously aggravated by spoil being thrown up on to this bank from the drainage excavation and it is reasonable to assume in the circumstances and has not been disputed that this was done by railway servants.

I therefore find not only that there are circumstances of exceptional danger at the crossing but also that the defendant's servants have very appreciably added to the risk of users of the road both by failure to make necessary improvements to the crossing to meet the demands of increased traffic and also by raising

the bank forward of the drain artificially. I thus have no hesitation in saying that in the circumstances of this particular crossing the plaintiff is fully justified in his first allegation of negligence, namely

> "that the defendant and his servants neglected to make and maintain a safe and sufficient approach to the level crossing so as to give a safe and clear view of the railway."

I am certainly not prepared to hold that it is reasonable to expect a vehicle driver to approach a crossing in such a way as to be able to halt with his front wheels only about two/three feet clear of the rail itself before he can look to see whether a train is approaching, as the slightest error in judgment, particularly in wet weather, might result in the driver colliding with the overhang of an oncoming train. I do not accept Mr. Railton's evidence that a driver could go back about twenty feet from the position of the vehicle shown in exhibit C 11 and still get a view of the track. Had this been the case I should expect to have seen photographs from this position similar to exhibits C 11 and C 12.

The plaintiff's next allegation of negligence is that the defendant and his servants

> "neglected to erect all necessary and sufficient whistle boards, signals and other signs to give proper warning of approaching trains."

It is admitted that the train driver, if he sounded his whistle at all, did not do so after passing the whistle board which is round the bend in the track at a distance of 1,341 feet from the crossing itself. Apparently this considerable distance is accounted for by the fact that it was thought advisable to site the whistle board on the far side of the cutting. Be that as it may, it is not in my view sufficiently close to the crossing to give adequate warning to persons in the vicinity of this particular crossing and the whistle should have been sounded again, even if it were not possible to keep a look out, after passing the bend in the track when the train would come into the view of anyone on the crossing itself. Indeed whilst the court was inspecting the crossing a train passed and whistled on three separate occasions, the first being presumably at the whistle board. It must, in my view, be borne in mind that the visibility being almost nil until a car gets almost on to the permanent way, the train whistle is the only way of warning road users of the train's approach. I do not accept that a vehicle driver inside the cab of his vehicle must necessarily see smoke from the engine if alert, or hear the train if his engine is running. As to the question of whether or not the train driver whistled at all, even at the whistle board, I consider the balance of probabilities is in favour of his not having done so. The plaintiff was adamant that he did not do so, or at least that he did not hear it. I believe, however, that in a Diesel truck it would be possible he would not have done so even had the whistle been sounded at the whistle board. The driver of the train said he actually remembered whistling but he added: "It is a matter of routine". I was not impressed by his evidence and Mr. Gilliland (D.W.5) who had had twenty years' experience on the footplate said that if the driver had cut off steam when he said he did he would have stalled and that his evidence was unreliable on this point. The evidence of the fireman to the effect that the driver whistled may have been honestly given but he admitted that it was

> "because of the accident I remember the blowing of the whistle. I cannot remember it on any other day."

Evidence was read from two African witnesses in an adjoining pyrethrum field who said they heard no whistle but I do not attach any great weight to this. On the question of probabilities, however, I do attach considerable weight to the evidence of Mr. Torrens (P.W.2) that the train which passed

when he was doing measurements definitely did not whistle, and the evidence of Mr. Hodges (P.W.4) that on four specific occasions trains which passed did not whistle at all.

There is in my view no evidence of excessive speed on the part of the train driver except in the sense that any movement at all at this particular crossing can hardly fail to occasion some danger since to all intents and purposes the crossing is a concealed crossing.

I have no hesitation in finding that the plaintiff's allegation that weeds were allowed to grow at the crossing and further obstruct visibility is fully proved. I refer to the evidence of defendant's witness, Inspector Findlay (D.W.6)

> "The permanent way inspector told me he had cut down the weeds. They were completely uncut immediately after the accident but had been cut down by the following morning."

I do not regard this as fortuitous. Inspector Findlay continued:

> "The weeds did not cut off the view entirely from some points but quite considerably, and from other points they cut off the view entirely. The weeds were in my opinion a very serious obstruction."

I was not impressed with the suggestion that I should try to gauge the height of the standing weeds from indistinct photographs of the weeds lying on the ground after they had been cut down. I find it safer to accept the evidence of an unbiased eye witness of the standing weeds immediately after the accident. Mr. Railton (D.W.7), admitted that it was the duty of the permanent way inspector to see that weeds were cut down if they seriously obstructed the view. I can only say that the evidence suggests that if there was any system of inspection at all it would not appear to have been at regular short intervals but entirely haphazard.

I now propose to consider the complete lack of any look out by the driver or his fireman. I accept the evidence of Mr. Gilliland (D.W.5) that when approaching the gradient board the driver and fireman would have been fully occupied in engine duties and the Railway Regulations only require a look out to be kept when not so engaged. Moreover, Lord Goddard in *Kemshead v. British Transport Commission* (5), held that there was no obligation on an engine driver to keep a look out, at least at normal crossings, and would appear to have gone even further than Morris, L.J., in *Trznadel v. British Transport Commission* (7), [1957] 3 All E.R. 196, in this respect.

It has, however, so far as I am aware never been decided that there is no obligation to keep a look out at abnormal crossings when there are circumstances of exceptional danger and Mr. Gilliland stated that the driver should have looked out before approaching the gradient board and closing his regulator. It may be argued that the driver would have no knowledge of the exceptional danger. I think the simple answer to that is that either the knowledge must be imputed to him if in fact anyone in the railway's employ was cognisant of the danger and if nobody was aware of the danger there is negligence in having failed to appreciate the danger which again must be imputed vicariously to the engine driver. I consider it is reasonably possible but by no means certain that if the fireman or engine driver had looked out before shutting off steam at the gradient board they might have seen the vehicle and avoided the collision.

I find that there was negligence in the defendant or his servants in the following respects:

(1) In permitting the continuance of the crossing at the site where it had originally been negligently sited. I accept that the Railway Administration have a complete discretion as to permitting or refusing permission for a crossing to be sited at any particular spot, which appears to be implicit from the evidence of Mr. Railton.

(2) In failing to remove the bank to the right of the cut away drain or otherwise to improve the visibility towards the railway from the road at the crossing, if the crossing were to be allowed to remain as originally sited.

(3) In aggravating the lack of visibility at the crossing by allowing spoil from the excavated drain to be thrown up on to the bank.

(4) In the driver of the train failing to whistle at the whistle board.

(5) In his failing to whistle thereafter before the crossing in sufficient time to warn users of the road of the approach of the train.

(6) In permitting weeds to grow up in the vicinity of the crossing and further aggravate the lack of visibility of the railway line to users of the road.

(7) In the driver of the train or his fireman failing to keep any look out towards the crossing.

It remains to consider whether there is evidence of any contributory negligence on the part of the plaintiff. He struck me as a completely honest witness and genuinely puzzled at having previously admitted seeing the train on the line approaching the crossing whilst he was on the main road about six hundred yards away. I believe the truth of the matter to be that he quite automatically saw the train but that it did not register with him that that train might reach the crossing at about the same time as himself. Now, if this failure to appreciate the situation fully resulted in his failing to take any reasonable additional precautions open to him which a reasonable man would have taken, appreciating the possible impending danger, I think I have no option but to hold that the failure to take the additional precautions must amount at least to some degree of contributory negligence if the additional precaution might have avoided the accident. It will be convenient therefore to examine the plaintiff's evidence as to his actions when approaching the crossing, first to ascertain whether there was anything negligent about this which might have contributed to the accident; and, secondly, to ascertain what additional precautions, if any, might have been taken which might reasonably have avoided the accident.

The plaintiff said his vehicle had a load up consisting of cattle food and a ploughshare. The road was rutted and a bit muddy but it was a dry day. On approaching the crossing he stopped to engage first gear and proceeded cautiously up the embankment to cross the line, stopped and listened for a second or so and looked so far as he was able and then crossed and was hit by the approaching train in the front of his vehicle. The only other precaution he might have taken, in my view, either with or without having registered the presence of a train on the line whilst he was on the main road, was to have switched off his engine before listening. Had he done so I think it is reasonably probable that he might have heard the approaching train. It was held in both the recent fog cases to which I have already referred that the failure to switch off before listening constituted negligence but those cases were concerned with special precautions necessary in a fog and with normal crossings. In the present case not only have I held that there are circumstances of exceptional danger attaching to this crossing but that this is due in considerable degree to the acts and omission of the defendant's servants and I consider that it is their duty to minimise the dangers which they have created and not for the plaintiff to take exceptional precautions which in my view go beyond those which might be expected of a reasonably prudent man in normal circumstances. Next I must consider how far the plaintiff's position is affected, if at all, by the fact that the crossing was well known to him. This is a factor of considerable importance as a general rule. I refer to a passage from the judgment of

Scrutton, L.J., in *Burrows v. Southern Railway Company* (8) (unreported) set out in *Knight v. Great Western Railway Company* (9), [1942] 2 All E.R. 286 at p. 287.

> "But I ask myself, and I have considered the evidence very carefully, whether at this crossing as we see it, and on the facts we know, there was anything to distinguish it from any other private crossing where the railway company has for some reasons granted rights to particular people in the locality, but not to the whole public, because obviously there are great differences between cases where any member of the public, not having seen the crossing before, may come to a crossing and cases where the crossing is only used by people who are always using it because they are in the locality, and using it for the purposes of their business."

It seems to me that what I have to ask myself in this case is whether the plaintiff's local knowledge and use of the crossing daily ought to have led him to take any additional precautions which he had neglected to take. I have already referred to the matter of switching off the engine to listen. It does not appear to me that there were any other reasonable precautions which the plaintiff could have taken. In order to see an approaching train the plaintiff would have had to go right up on to the track and stop, judging the distance nicely enough, with his front wheels within a foot or two approximately from the position of the overhang of a passing train. The risk of collision is in my view too great to require such action of a normally prudent man. Alternatively the plaintiff could have stopped on the approach road and gone up on foot to see whether the track was clear. There is in my view no means of knowing whether had he done this the train would not have approached whilst he was returning to his car and switching on and moving up to the crossing. Such action, far from curing the danger, might even aggravate it. After most careful consideration of all the factors concerning the plaintiff's conduct I do not consider he was guilty of any negligence which contributed to the fact that through the negligence of the defendant and his servants their train collided with his car.

I do not consider that the fact that nobody asked for the banks to be lowered or the bank forward of the drainage cutting to be moved or the weeds to be cut down in any way relieves the defendant and his servants from taking all reasonable precautions to ensure the safety of persons at the crossing and, in my view, the burden of taking reasonable precautions cannot be shifted merely by saying

> "I would have done anything reasonable if only someone had asked me or suggested what ought to have been done."

These factors and the absence of any record of previous complaints over the years show that the omission of the railway authority was in no way wilful, otherwise in my view they prove nothing except Kenya apathy which is perhaps proverbial anyway.

It remains to assess the damages.

As regards the special damages I find that the plaintiff has proved these as claimed and that they are not disputed with the exception of the sum of Shs. 1,800/- for loss of use of plaintiff's motor vehicle since he has not proved the hire of another vehicle or otherwise strictly proved the loss. There will therefore be judgment for Shs. 11,173/- less Shs. 1,800/-=Shs. 9,373/- special damages.

As regards general damages, the plaintiff sustained a cut on the back of the head, a broken rib and was severely bruised and shocked. I accept his evidence that he had seventeen stitches and was detained two or three days in hospital and that he was in considerable pain after leaving hospital and was attended by

Mr. Mowatt for about nine months and was seen by Dr. Charters. Dr. Charters' report to a certain extent supports, and I accept the plaintiff's evidence, that after leaving the farm where he was managing in August, 1956, he

> "continued to suffer for the whole of the next year chiefly from pain and dizziness in head and legs."

Dr. Charters' report, however, is dated September 25, 1956, and there is no more up to date medical report in evidence and the plaintiff gave no evidence that he was still suffering from any ill effects from this accident. I must, therefore, presume that he is now fully recovered and at least in no worse physical condition than his pre-accident state.

After considering carefully the medical reports of Mr. Mowatt and Dr. Charters and the plaintiff's own evidence which together amount to pain and suffering attributable only partly to this particular accident and probably some increased interference with his normal activities caused by this particular accident, I assess the general damages at Shs. 6,000/-.

There will therefore be judgment for the plaintiff in the sum of Shs. 15,373/- (Shs. 9,373/- special damages plus Shs. 6,000/- general damages) with costs and the usual interests at court rates.

Judgment accordingly.

For the plaintiff:
CW Salter QC and *CS Rawlins*
Geoffrey White & Co, Nakuru

For the defendant:
HB Livingstone (Senior Assistant Legal Secretary, East Africa High Commission)
The Legal Secretary, East Africa High Commission

Purshottam Singh v R
[1958] 1 EA 324 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	18 April 1958
Case Number:	39/1958
Before:	Sir Ronald Sinclair CJ and Templeton J
Sourced by:	LawAfrica

[1] Street traffic – Practice – Accused charged with exceeding speed limit – Notice served under s. 113 *of Traffic Ordinance – Accused sentenced to fine or imprisonment in default and conviction to be endorsed on driving licence – Whether proceedings validly instituted – Traffic Ordinance,* 1953, *s.* 41 (3), *s.* 42, *s.* 73, *s.* 74 *and s.* 113 (*K.*).

Editor's Summary

The appellant was served with a notice under s. 113 of the Traffic Ordinance, 1953, to attend court to answer a charge of "speeding in the Municipality area". He was convicted on his own written plea of guilty, endorsed on the back of the notice, fined Shs. 60/- or imprisonment for one month in default of payment and was asked to produce his licence within 7 days for endorsement. He appealed against this order. The offence of exceeding the speed limit under s. 41 (3) is punishable under s. 42 by a fine not exceeding Shs. 1,000/-, but s. 73 empowers a court before which a person is convicted of "any offence in connection with the driving of a motor vehicle", to suspend or cancel and endorse the driving licence of the person convicted. Section 113 provides that:

> "It shall be lawful for any police officer to serve . . . upon any person who is reasonably suspected of having committed any offence in connection with the driving or use of any vehicle which is punishable only by a fine or by a fine and imprisonment for a period not exceeding six months, a notice in the prescribed form . . ."

It was contended on appeal that, as a court is empowered to cancel or suspend the driving licence of a person convicted of exceeding the speed limit contrary to s. 41 (3), that offence is not one punishable "only by a fine or by a fine and imprisonment for a period not exceeding six months", that s. 113 has no application in such a case, that the proceedings were not validly instituted, and that accordingly the trial was a nullity.

Held –

(i) "if the appellant's contention is correct, s. 113 can have no application to any offence connected with the driving of a motor vehicle. That would lead to a manifest contradiction of the apparent purpose of s. 113."

(ii) the general punishment provided by s. 73 is not to be taken into account as a punishment in respect of offences to which the provisions of s. 113 are applied.

Appeal dismissed.

No cases referred to in judgment

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court: Under the provisions of s. 113 of the Traffic Ordinance, 1953, the appellant was served with a notice to attend the traffic court at Nairobi on January 17, 1958, to answer a charge of "speeding in the Municipality area" an offence which was alleged to have been committed on January 3, 1958. The appellant entered a written plea of guilty which was endorsed on the back of the notice and on January 17 he was convicted on his plea by the second-class magistrate, Nairobi, of exceeding the speed limit in a township contrary to s. 41 (3) of the Traffic Ordinance. He was fined Shs. 60/- or imprisonment for one month in default of payment and was asked to produce his licence within seven days for endorsement. He appeals against the order that his driving licence be endorsed with the particulars of the conviction. Section 74 of the Traffic Ordinance provides that an appeal shall lie against such an order in the same manner as against a conviction.

The main ground of appeal is that the notice to attend court issued to the appellant under s. 113 (1) of the Ordinance was not a valid notice as the offence under s. 41 (3) of the Ordinance, in connection with which the notice was issued, was not punishable only by a fine or by a fine and imprisonment for a period not exceeding six months, that the proceedings were, therefore, not validly instituted and that, accordingly, the trial was a nullity.

Section 113 of the Ordinance reads:

> "113 (1) Notwithstanding the requirements of or provisions in any Ordinance contained it shall be lawful for any police officer to serve, either personally or by registered post, upon any person who is reasonably suspected of having committed any offence in connection with the driving or use of any vehicle which is punishable only by a fine or by a fine and imprisonment for a period not exceeding six months, a notice in the prescribed form requiring such person to attend court in answer to the charges stated thereon, at such place and on such date and time (not being less than ten days from the date of such service) as shown on such notice or to appear by advocate or to enter a written plea of guilty:
>
> "Provided that–

(i) such notice shall be served not later than fourteen days from the date upon which the offence is alleged to have been committed;

(ii) failure to comply with this requirement shall not be a bar to the conviction of the accused in any case where the court is satisfied

that the name and address of the accused could not with reasonable diligence have been ascertained in time for such notice to be served as aforesaid, or that the accused by his own conduct contributed to the failure.

"(2) Such notice as aforesaid shall for all purposes be regarded as a summons issued under the provisions of the Criminal Procedure Code.

"(3) A copy of such notice as aforesaid shall be placed before the court by which the charge is to be heard before the time fixed for such hearing."

The offence of exceeding the speed limit under s. 41 (3) is punishable under s. 42 by a fine not exceeding Shs. 1,000/-, but s. 73 empowers a court before which a person is convicted of "any offence in connection with the driving of a motor vehicle" to suspend or cancel and endorse the driving licence of the person convicted. It was contended that as a court is empowered to cancel or suspend the driving licence of a person convicted of exceeding the speed limit contrary to s. 41 (3), that offence is not one punishable

"only by a fine or by a fine and imprisonment for a period not exceeding six months"

and, therefore, that s. 113 has no application in such a case.

We agree that cancellation or suspension of a driving licence is a punishment; it is so described in s. 25 of the Penal Code. But we do not agree that such disqualification is a punishment contemplated by s. 113.

Section 113 is expressed to apply to offences in connection with the "driving or use of a motor vehicle". Section 73 empowers a court to cancel or suspend the driving licence of a person convicted of any offence in connection with the "driving of a motor vehicle". If the appellant's contention is correct, s. 113 can have no application to any offence connected with the driving of a motor vehicle. That would lead to a manifest contradiction of the apparent purpose of s. 113.

In Maxwell On Interpretation Of Statutes (10th Edn.) p. 229 it is stated:

"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the words and even the structure of the sentence."

The penalty sections in the Ordinance, with certain exceptions with which we are not concerned for present purposes, impose penalties of a fine or imprisonment or both a fine and imprisonment. Section 73 gives to the court a general power to suspend or cancel a licence in respect of driving offences in addition to the penalties provided for in those sections. The clear intention of s. 113 is to provide a simple form of procedure and a means by which an offender can save himself the inconvenience of attendance before a court in minor cases in both the use and driving of motor vehicles. If that be so then the intention of the draughtsman in using the words "punishable only by a fine or by a fine and imprisonment" in s. 113 is clearly to refer to the same wording in the penalty sections. Accordingly, applying the principle of interpretation quoted above and to give a meaning to the word "driving" in s. 113 which the intention of the legislature obviously requires, our view is that the general punishment provided for by s. 73 is not to be taken into account as a punishment in respect of offences to which the provisions of s. 113 are applied.

It was also argued that the learned magistrate should have inquired into the circumstances of the case and stated his reasons for making an order of endorsement and that, in any event, the circumstances of

the case did not justify an

order of endorsement. If the appellant wished the court to take mitigating circumstances into consideration, he should himself have brought those circumstances to the notice of the court either in a letter to the court or by appearing in person or by his advocate. We see no reason to interfere with the discretion of the learned magistrate in ordering the endorsement of the appellant's driving licence.

The appeal is dismissed.

Appeal dismissed.

For the appellant:
DV Kapila
DV Kapila, Nairobi

For the respondent:
AP Jack (Deputy Public Prosecutor)
The Attorney-General, Kenya

The Commissioner of Income Tax v Syed Abdul Hadi Abdulla
[1958] 1 EA 327 (SCA)

Division:	HM Supreme Court of Aden at Aden
Date of judgment:	11 April 1958
Case Number:	233/1957
Before:	Campbell CJ
Sourced by:	LawAfrica

[1] Income tax – Procedure – Notice of assessment served on taxpayer – No objection lodged with Commissioner nor appeal filed with the Supreme Court within prescribed time – Whether taxpayer can defend suit instituted by commissioner on merits – Income Tax Ordinance (*Cap.* 80), *s.* 54, *s.* 59, *s.* 60, *s.* 63, *s.* 64, *s.* 67, *s.* 69 (*A.*) – *Income Tax Act,* 1918 (*U.K.*) – *Finance Act,* 1941 (*U.K.*).

Editor's Summary

The plaintiff under s. 67 (1) of the Income Tax Ordinance (Cap. 80) filed a suit in respect of income tax for the years 1955/1956 and 1956/1957 amounting, with penalties, to Shs. 16,294/-. The defendant filed a written statement raising a number of points, viz., that the assessment was made arbitrarily; that he had never had an income such as that of which he had been assessed; that he had been taxed on property which he did not own, during the period assessed; that he made various objections to the assessment, but that the commissioner did not consider his objections or give a reply to them; and that the commissioner's silence must be construed as giving him an extension of time to take steps to safeguard

his rights. He had not, however, made an objection to the commissioner, as required by s. 59 (2), nor had he appealed to the Supreme Court as provided by s. 60 (1) within the prescribed period. The plaintiff applied for the written statement to be struck out as disclosing no defence to the suit and for judgment to be entered in his favour.

Held – since the defendant had failed to object to the commissioner or appeal to the Supreme Court within the prescribed time, he could not now defend upon the merits. The written statement must, therefore, be struck out.

Order accordingly.

Case referred to:

(1) *Inland Revenue Commissioners v. Pearlberg*, [1953] 1 All E.R. 388.

Judgment

Campbell CJ: The plaintiff, the Commissioner of Income Tax, has filed a suit in respect of income tax for the years 1955/56 and 1956/57 amounting, with penalties, to Shs. 16,294/-. The defendant has filed a written statement which the plaintiff claims discloses no defence to the suit. He therefore asks that the written statement be struck out and judgment be forthwith pronounced in his favour.

What the defendant seeks to do in his written statement is to show that he has not been "lawfully taxed".

Firstly he seeks to have the assessment set aside on the merits. He says that the assessment was made arbitrarily and that he has never had an income such as that at which he has been assessed. He says, *inter alia*, that he has been taxed on property which he did not own during the period assessed.

Secondly he says that he made various objections to the assessment but that the commissioner did not consider his objections or give a reply to them. He says that his silences must be construed as giving him an extension of time to take the necessary steps to safeguard his rights.

The procedure under the Income Tax Ordinance (Cap. 80) regarding the collection of income tax in Aden in so far as it affects this case is as follows. Under s. 54 the commissioner makes his assessment. He notifies the taxpayer personally or by registered post according to s. 59 (1). Section 59 (2) provides that the commissioner may, if he receives an objection within 15 days, revise the assessment. If the parties agree or do not agree another notice of assessment is then served on the taxpayer.

The taxpayer has then the right, under s. 60 (1) to appeal to the Supreme Court within 6 weeks. If the tax is not paid within the time set out in s. 63, which may be 30 days, or 3 months according to its amount, s. 69 (1) (*a*) provides that a penalty may be added and s. 64 (1) (*b*) provides that a demand note may be served, and if payment is not made within 30 days the commissioner may then proceed to enforce payment under the provisions of s. 67. He may do so by sending a certificate of what is owed to the Municipal Authority who must then enforce payment. Or he may, as he has chosen to do here, sue for the tax in the civil courts in accordance with s. 67 (1). Section 67 (3) provides as follows:

> "(3) In any suit under sub-s. (1) of this section, the production of a certificate signed by the commissioner giving the name and address of the defendant and the amount of tax due by him shall be sufficient evidence of the amount so due and sufficient authority for the court to give judgment for the said amount."

It is not pleaded that the proper notices have not been served. Nor is it disputed that no appeal was lodged.

Mr. Holmes, on behalf of the commissioner, has cited *Inland Revenue Commissioners v. Pearlberg* (1), [1953] 1 All E.R. 388. This was an appeal against the order of a master who had given leave to sign final judgment under R.S.C. Order 14 refusing leave to the taxpayer to defend. The appellant stated with regard to one group of properties in respect of which he had been taxed that he had never owned them or received any rents or profits from them and with regard to a second group of properties he said he was at no time the owner occupier or landlord of them. Denning, L.J., in dismissing the appeal says at page 389:

> "The issue which he raises in those affidavits is that he is not rightly chargeable with tax, for one or other of the reasons he has mentioned. The whole question in the case is whether that is an issue which the taxpayer is allowed to have tried in these proceedings in the High Court? The correct answer has been, I think, given by

counsel for the Crown, namely that the right way for him to have raised any of these matters was by appeal

> to the commissioners in the way provided by the Income Tax Acts, and, as he did not raise the matters by way of appeal, he is not allowed to raise them now."

Mr. Sanghani points to another part of the judgment which he claims to be in his favour. This is where, after stating that with regard to one group of properties the defendant had sworn that he never owned them and with regard to the other that he is not the landlord, Denning, L.J., says:

> "The provisions which exclude the taxpayer from raising the question of liability are these. So far as the first group of properties is concerned, there is a conclusive presumption against him under schedule I, Part I, para. 5 to the Act of 1941. So far as the second group of properties is concerned, once there is an assessment duly made and not appealed from, then, under s. 169 of the Income Tax Act, 1918, the tax charged may be sued for and recovered from the person charged therewith in the High Court as a debt due to the Crown."

Mr. Sanghani contends that we have no law in Aden corresponding to para. 5 of Part I of Schedule I of the Finance Act, 1941 where it is provided:

> "Where no appeal is brought . . . it shall be conclusively presumed that the person on whom the notice was served was the landlord of the land (at the material time) and that the amount of tax specified in the notice is due from him so far as it still remains unpaid . . ."

All we have in s. 67 (3) of the Income Tax Ordinance which does no more than say that the production of a certificate signed by the commissioner "shall be sufficient evidence." He therefore claims that *Pearlberg* (1) is distinguishable and inapplicable.

No doubt there is a difference in the meaning of the two expressions. But I do not think that this assists the defendant. The commissioner here does not have to rely on any "conclusive presumption" in order to assess the defendant. He merely makes the assessment and the person assessed has a right of appeal. Moreover it seems to me that *Pearlberg* (1) would have been decided similarly whether there had or had not been this "conclusive presumption" for immediately following upon the passage I have quoted, Denning, L.J., continues:

> "In my opinion, therefore, all (the underlining is mine) issues on the merits of these cases, as to fact or law, should have been determined on appeal to the commissioners and cannot be raised at this stage."

It cannot, of course, be said when the commissioner files the plaint in the form of his certificate after the time for appeal has elapsed that no defences can be raised and judgment must be given automatically. He can raise a number of defences: that in fact he has appealed, that he has not been properly served and so forth. But all he does here is to raise issues which I could have tried had he appealed: I cannot try them as a judge of first instance.

It is therefore ordered that the written statement be struck out and judgment as prayed be entered for the plaintiff with costs.

Order accordingly.

For the plaintiff:
RJ Holmes (Crown Counsel, Aden)
The Attorney-General, Aden

For the defendant:
PK Sanghani
PK Sanghani, Aden

Re an Application Under S 9 of the Land Acquisition Ordinance

[1958] 1 EA 330 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	6 June 1958
Case Number:	20/1957
Before:	Spry Ag J
Sourced by:	LawAfrica

[1] Compulsory purchase – Application to court to determine ownership of land and compensation payable – Procedure to be followed by parties to put material facts before court – Land Acquisition Ordinance (*Cap.* 118), *s.* 9 (*T.*).

Editor's Summary

The Member for Lands and Mines gave notice under s. 5 of the Land Acquisition Ordinance of his intention to acquire certain land at Dar-es-Salaam and subsequently took out a summons under s. 9 to determine the ownership of the land, the estate or interest of the owner and the compensation payable to him. The summons having been served on the respondent, a consent order was made by the High Court for the filing of a written statement of defence by him and a reply, if any, thereafter and for a hearing date. No written defence was filed and after several adjournments, when the hearing was eventually begun, the preliminary point was taken that no written statement of defence had been filed as ordered. The respondent's advocate contended that the Ordinance made no provision for any written statement of defence, that the object of pleadings is to discover the issues, that these were contained in the summons and he did not wish to add any further issue. For the Member it was argued that pleadings are intended to outline a case and, without a written statement of defence, none would know what the case of the respondent was to be.

Held – in view of the procedural deficiencies of the Land Acquisition Ordinance, where a summons under s. 9 of the Ordinance is taken out by the Member, it should be supported by an affidavit containing the material facts of the case and, following as far as possible the Code of Civil Procedure, all claimants wishing to be heard should file written statements setting out their claims in such a way that issues could be framed with much greater precision than the general question posed in the present summons.

Order that the applicant do file an affidavit accordingly and that the respondent do file a written statement in reply.

No cases referred to in judgment

Judgment

Spry Ag J: On February 10, 1952, the Member for Lands and Mines gave notice under s. 5 of the Land

Acquisition Ordinance of intention to acquire certain lands in Dar-es-Salaam. On April 27, 1957, a summons was taken out by the Member in the Form "F" of the Schedule to that Ordinance asking for the determination of three questions: first, who is the owner of a plot of land known as No. 95, Fluril, Msasani; secondly, what is the estate or interest of that person; and thirdly, what is the compensation payable to him. The summons was to be served on Mwasalama binti Mwinyimvua. On May 28, 1957, a consent order was made as follows:

> "Written statement of defence to be supplied by June 25, 1957, reply if any by July 9, 1957. Hearing date to be fixed by registrar."

No written statement of defence was in fact filed. After several adjournments the hearing was begun on May 29, 1958.

At the hearing Miss Sleigh for the Minister for Lands and Mineral Resources took the preliminary point that no written statement of defence had been filed. Mr. N. M. Patel who was appearing for Mwasalama contended that the Land Acquisition Ordinance does not provide for any written statement of defence. He argued that the object of pleadings is to discover the issues, that in this case the issues were contained in the summons, that those issues were agreed, and that he did not wish to add any further issue.

Miss Sleigh contended that pleadings are intended to do more than settle issues: they are intended to outline a case. She had no idea what evidence was likely to be produced or what she would have to rebut or admit. She argued that there is no procedure laid down in the Land Acquisition Ordinance or in the Code of Civil Procedure which governs these proceedings, that under art. 17 (2) of the Tanganyika Orders in Council, 1920–1955, English law must be looked to fill the gap, and, if I understood her aright, she suggested that the Lands Clauses Consolidation Acts applied as statutes of general application.

To deal first with this last point, where a subject has been dealt with by local ordinance it is not in my view possible to invoke English law to remedy minor defects, least of all where the defect is with regard to procedure. I have no hesitation in holding that the Lands Clauses Consolidation Acts have no application in the Territory.

I do not agree with Mr. Patel that there is nothing in the summons for his client to answer. He is presumably making a claim and I think the nature of the claim should be made clear. At the same time I appreciate his difficulty. The summons as it stands contains virtually no facts, and with respect I do not agree with Mr. Patel that it embodies the issues. It merely poses what are hardly more than abstract questions. It suggests that there is a disagreement between the Government and Mwasalama as to the title to the land and possibly also as to its value, but even this is not clear.

I think the answer to the difficulty must be a common-sense one. I think it should be possible as a matter of practice to make good the procedural deficiencies in the Land Acquisition Ordinance without raising any conflict with the express provisions of that ordinance, and at the same time following the broad lines of the Code of Civil Procedure. I think that where a summons of this nature is taken out by the Minister it should be supported by an affidavit. Without attempting to lay down any general rule I think that such affidavits should normally include the following matters:

(*a*) The publication of the notice of intention.

(*b*) Whether or not possession has been taken.

(*c*) The names of all persons who have lodged claims.

(*d*) Brief particulars of those claims.

(*e*) A statement that no other claims have been received.

(*f*) A denial of those claims which are denied.

(*g*) An assertion regarding the title to the land.

(*h*) An assertion regarding the value of the land.

Secondly, I consider that all claimants who wish to be heard in the matter should file written statements in reply. These would be in the form of an ordinary written statement of defence although strictly speaking they would not be statements of defence because the claimants, although respondents to the application, are really more in the position of plaintiffs than defendants. If this procedure were followed it would enable issues to be framed with much greater precision than the general question posed in the

present summons.

I accordingly direct that the applicant do file an affidavit on the lines I have indicated within fourteen days, and that the respondent do file a written statement in reply within fourteen days thereafter.

Order that the applicant do file an affidavit accordingly and that the respondent do file a statement in reply.

For the applicant:
Miss EK Sleigh
Minister for Lands and Mineral Resources, Tanganyika

For the respondent:
NM Patel
Atkinsons, Dar-es-Salaam

Hamraj Lalji Shah v R
[1958] 1 EA 332 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	30 May 1958
Case Number:	147/1958
Before:	Sir Ronald Sinclair CJ and MacDuff J
Sourced by:	LawAfrica

[1] Criminal Law – Perjury – Evidence – Whether one witness corroborated by document suffices – Whether documentary evidence alone suffices – Penal Code, s. 107 (*K.*).

Editor's Summary

The appellant was charged before the resident magistrate on three counts of perjury, *inter alia*, contrary to s. 104 of the Penal Code, was convicted and sentenced to a term of imprisonment on each count. The charges arose out of proceedings in a civil case in a magistrate's court in which the appellant was the defendant. The statements which were the subject of the charges of perjury were clearly material issues in the civil case, and if they were false, they must have been false to the knowledge of the appellant. With regard to one count direct evidence of the falsity of the appellant's testimony was given by a witness and the magistrate found corroboration in an entry in the appellant's ledger and in the evidence of another witness that the appellant's brother took delivery of the goods. Section 107 of the Penal Code states that "A person cannot be convicted of committing perjury or of subornation of perjury solely upon the evidence of one witness as to the falsity of any statement alleged to be false." The only grounds of appeal argued were that the trial magistrate misdirected himself as to the meaning of s. 107 of the Penal Code and that the evidence was insufficient to establish the falsity of the appellant's statements. During the

hearing of the appeal the question also arose whether the appellant was rightly charged with three offences of perjury in respect of evidence which he gave on the same oath.

Held –

(i) there was sufficient corroboration here because s. 107 of the Penal Code does not say that there must be two witnesses, each of whom swears specifically that the statement charged to have been made by the accused was false. The requirements of the section are satisfied if one witness swears to the falsity of the statement and there is, in addition, other evidence which corroborates that witness; as it was put in *R. v. Threlfall* (10 Cr. App. R. 112) "there must be one witness and something else in addition" (*R. v. Atkinson* (1943), 10 E.A.C.A. 119 followed);

(ii) a person may be convicted of perjury on documentary evidence alone. (Taylor on Evidence (12th Edn.) p. 610 approved).

(iii) while the more usual practice is to charge several assignments of perjury in one count, it is not wrong to charge them in separate counts. On the contrary in *R. v. Atkinson* (supra) the Court of Appeal for Eastern Africa affirmed two convictions for perjury committed by the accused in her evidence in one case.

Appeal dismissed on two counts, but allowed on the third count.

Case referred to in judgment:

(1) *R. v. Atkinson* (1943), 10 E.A.C.A. 119.

(2) *R. v. Parker* (1842), Car. & M. 639; 174 E.R. 669.

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court: The appellant was charged before the resident magistrate, Nairobi, on three counts of perjury contrary to s. 104 of the Penal Code (counts 1, 4 and 5), one count of fabricating evidence contrary to s. 108 (1) of the Penal Code (count 2), and one count of making use of fabricated evidence contrary to s. 108 (2) of the Penal Code (count 3). He was convicted on the three counts of perjury and acquitted on the 3rd count of making use of fabricated evidence. The learned trial magistrate made no finding on the 2nd count of fabricating evidence. The appellant now appeals against his conviction on the 1st, 4th and 5th counts.

The charge arose out of proceedings in Civil Case No. 4479 of 1957 in the resident magistrate's court, Nairobi, in which Shah Jethalal Bharmal and Brothers were the plaintiffs and the appellant was the defendant. The plaintiffs claimed from the appellant the sum of Shs. 660/- for five pieces of blue drill totalling two hundred yards sold and delivered by the plaintiffs to the appellant in the month of November, 1956. The defence filed was a denial of sale or delivery.

At the trial of that case the appellant gave evidence in the course of which he said, first, that he had not ordered the cloth from Shah Jethalal Bharmal and Brothers. That statement is the subject of the 4th count. Secondly, he said that Shah Jethalal Bharmal and Brothers did not deliver any goods (meaning the blue drill in question) to his shop and that none of the drill was ever delivered. That is the subject of the 5th count in which it is averred that the appellant

> "knowingly gave false testimony that no blue drill had been delivered to him by the said plaintiffs."

Thirdly, having produced his ledger for 1956 (exhibit B in that case and exhibit 5 in the present case), the appellant opened it at p. 124 on which was the account of Shah Jethalal Bharmal and Brothers and said that there were no other entries in the ledger of transactions with the plaintiffs and that no other transactions took place. The ledger was kept in Gujerati and the entries on p. 124 relating to the plaintiffs were translated by the court interpreter, Mr. Vyas. There was no entry relating to the purchase of the blue drill in question. That evidence is the subject of the 1st count.

The evidence adduced by the prosecution which was accepted by the learned trial magistrate as establishing the falsity of the appellant's statements was briefly as follows. R. B. Shah, (P.W.1) a partner in Shah Jethalal Bharmal and Brothers, said that on November 2, 1956, he went to the appellant's shop

where the appellant ordered two hundred yards of blue drill at Shs. 3/30 per yard making a total of Shs. 660/-. He produced the relevant invoice No. 12354 (exhibit 2) and the relevant entry in his ledger (exhibit 1). The

appellant told him the goods would be collected later that day by his brother and the brother did, in fact, collect them the same day. Jethalal Bharmal (P.W.2), another partner in Shah Jethalal Bharmal and Brothers, confirmed that on November 2, 1956, the appellant's brother, Nashabhai, took delivery of the blue drill at their shop. The executive officer of the resident magistrate's civil court, Nairobi, produced from his custody the ledger (exhibit 5) which had been put in evidence as exhibit B by the appellant in civil case No. 4479 of 1957. Mr. Vyas, the court interpreter, testified that on p. 114 of the ledger (exhibit 5) was an account relating to Shah Jethalal Bharmal and Brothers in addition to the account at p. 124, and that the plaintiff's account at p. 114 included the following entry:

> "660-00 Journal page 12, 14.11.56". He also put in a translation of the plaintiffs' account at p. 124 which confirmed that there was no entry on that page relating to the purchase of blue drill for Shs. 660/-. The appellant did not give evidence at the trial nor did he call any witnesses.

The statements which are the subject of the charges of perjury were clearly material to the issues in Civil Case No. 4479 of 1957 and, if they were false, they must have been false to the knowledge of the appellant. The only grounds of appeal which were argued before us were that the learned trial magistrate misdirected himself as to the meaning of s. 107 of the Penal Code and that the evidence was insufficient to establish the falsity of the appellant's statements.

Dealing first with the fifth count. The perjury assigned is that the appellant

> "knowingly gave false testimony that no blue drill had been delivered to him by the said plaintiffs."

According to the evidence, however, the blue drill was not delivered to the appellant but to the appellant's brother in his absence. The appellant may have given false evidence as to the delivery of the blue drill, but the statement as averred in the charge was literally true. The conviction on this count cannot, therefore, be sustained.

With regard to the fourth count, direct evidence of the falsity of the appellant's testimony that he had not ordered any cloth from the plaintiffs was given by R. B. Shah, a partner in the plaintiff firm. The learned magistrate found corroboration of R. B. Shah's evidence in the entry on p. 114 of the appellant's ledger (exhibit 5) to which we have referred, and in the evidence of Jethalal Bharmal that the appellant's brother took delivery of the blue cloth on the day on which R. B. Shah said it had been ordered by the appellant. Section 107 of the Penal Code reads:

> "A person cannot be convicted of committing perjury or of subornation of perjury solely upon the evidence of one witness as to the falsity of any statement alleged to be false."

In *R. v. Atkinson* (1) (1943), 10 E.A.C.A. 119, the Court of Appeal for Eastern Africa said:

> "That section (i.e. s. 107 of the Penal Code) says that the accused 'cannot be convicted . . . solely upon the evidence of one witness as to the falsity of any statement alleged to be false,' not that there must be two witnesses, each of whom swears specifically that the statement charged to have been made by the accused was false. In our opinion the requirements of the section are satisfied if one witness swears to the falsity of the statement and there is, in addition, other evidence which corroborates that witness; as it was put by the Court of Criminal Appeal in the case of *Threlfall* (10 C.A.R. 112), 'there must be one witness and something else in addition'."

In our view there was sufficient corroboration of R. B. Shah's evidence of the falsity of the appellant's statement. Jethalal Bharmal's testimony confirmed

the evidence of R. B. Shah in that it showed the cloth was delivered in accordance with the arrangements R. B. Shah said he had made with the appellant. As to the entry on p. 114 of the appellant's ledger, in the absence of any explanation from the appellant, the only reasonable conclusion is that it relates to the sale of the blue drill by the plaintiffs to the appellant in November, 1956. That entry affords the strongest corroboration of R. B. Shah's evidence that the appellant ordered the cloth.

We turn now to the first count. Referring to this count the learned magistrate said in his judgment:

> "I am of opinion that the evidence of the ledger is in itself sufficient to warrant a finding of the falsity of the accused's evidence. In so doing the falsity would not be found on the evidence of one witness. However in fact I do find corroboration. Mr. Vyas has given evidence that there is an entry in the ledger other than that to which accused testified. The P.W.1 has proved a transaction of this nature occurred and in the ordinary course of business such an entry would as a result have appeared in accused's ledger. Further such an entry in fact does appear. I find this suffices to convict the accused on count 1."

On behalf of the appellant it was contended that there was no corroboration of the evidence of Mr. Vyas as to the entry on p. 114 in the ledger and that the appellant was convicted on the evidence of one witness as to the falsity of his statement. We do not think that the evidence of R. B. Shah (P.W.1) that he sold the drill to the appellant corroborated the evidence of Mr. Vyas that there was an entry relating to that transaction in the ledger. But we do not agree that the appellant was convicted solely on the evidence of one witness. The rule that the evidence of a single witness is insufficient to convict on a charge of perjury is founded on the general apprehension that it would be unsafe to convict in a case where there is merely the oath of one man to be weighed against that of another: see Roscoe's Criminal Evidence (16th Edn.) p. 840.

The learned authors of Taylor on Evidence (12th Edn.), express the view that a man may be convicted of perjury on documentary evidence alone. At p. 610 of that edition it is stated:

> "The principle, that one witness, with corroborating circumstances, is sufficient to establish the charge of perjury, leads to the conclusion, that without any witness directly to disprove what is sworn, circumstances alone, when they exist in a documentary shape, may combine to the same effect, as they may combine, though altogether unaided by oral proof, except the evidence of their authenticity, to prove any other fact connected with the declarations of persons or the business of life. In accordance with these views it has been held in America that a man may be convicted of perjury on documentary and circumstantial evidence alone, first, where the falsehood of the matter sworn to by him is directly proved by written evidence springing from himself, with circumstances showing the corrupt intent; secondly, where the matter sworn to is contradicted by a public record, proved to have been well known to the prisoner when he took the oath; and thirdly, where the party is charged with taking an oath contrary to what he must necessarily have known to be true; the falsehood being shown by his own letters relating to the fact sworn to, or by any other writings which are found in his possession, and which have been treated by him as containing the evidence of the fact recited in them."

With respect, we agree with the views expressed in that passage. Applying that principle, there was an entry on p. 114 of the ledger of which the ledger

itself was evidence. This was authenticated by the evidence of Mr. Vyas. In our view, then, no further evidence was necessary than the production of the ledger itself coupled with the translation by Mr. Vyas of the entry on p. 114 of that ledger. We are therefore of the opinion that the appellant was rightly convicted on this count.

During the hearing of the appeal the question arose as to whether the appellant was rightly charged with three offences of perjury in respect of evidence which he gave on the same oath. While we think the more usual practice is to charge several assignments of perjury in one count, we know of no authority that it is wrong to charge them in separate counts. On the contrary in *R. v. Atkinson* (1) the Court of Appeal for Eastern Africa affirmed two convictions for perjury committed by the accused in her evidence in one case: see also *R. v. Parker* (2) (1842), Car. & M. 639.

Finally, we would observe that as the second count was not an alternative to any of the other charges, the learned magistrate should have made a finding on the count.

The appeal is accordingly dismissed in so far as it relates to the first and fourth counts and the concurrent sentences of imprisonment on those counts are maintained. The appeal against conviction on the fifth count is allowed and the conviction and sentence on that count are quashed.

Appeal dismissed on two counts, but allowed on the third count.

For the appellant:
DPR O'Beirne and *DN Nene*
DN Nene, Nairobi

For the respondent:
JS Rumbold (Crown Counsel, Kenya)
The Attorney-General, Kenya

Raghbir Singh Lamba v R
[1958] 1 EA 337 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	23 June 1958
Case Number:	207/1958
Before:	Spry Ag J
Sourced by:	LawAfrica

[1] Criminal law – Bail – Conviction by magistrate – Appeal to High Court against conviction and sentence – Principle on which bail granted pending appeal.

Editor's Summary

The applicant, having been convicted and sentenced to imprisonment, filed an appeal and applied for bail pending the hearing of his appeal. The main grounds of the application for bail were that an appeal from a magistrate was comparable to an appeal in England from petty sessions, in respect of which bail is commonly granted, that the case was complex, and the appeal could more easily be prepared if the applicant was on bail, the previous good character of the applicant and the hardship to his dependants if he remained in prison.

Held –

(i) the principle to be applied is that bail pending appeal should only be granted for exceptional and unusual reasons: *R. v. Leinster* (*Duke*), 17 Cr. App. R. 147 and *R. v. A. B.* (1926), 1 T.L.R. (R) 118 applied.

(ii) neither the complexity of the case nor the good character of the applicant, nor the alleged hardship to his dependants justified the grant of bail, but had the court been satisfied that there was an overwhelming probability that the appeal would succeed, the application would have been granted.

Application dismissed.

Case referred to in judgment:

(1) *R. v. A.B.*, (1926) 1 T.L.R. (R) 118.

(2) *R. v. Leinster* (*Duke*), 17 Cr. App. R. 147.

(3) *Habib Kara Vesta and others v. R.* (1934), 1 E.A.C.A. 191.

Judgment

Spry Ag J: The prisoner was charged before the learned resident magistrate, Tabora, with obtaining money by false pretences and, in the alternative, with stealing. He was convicted on the first count and sentenced to imprisonment for fifteen months. He has filed a petition of appeal, against conviction and sentence, and he now applies for bail pending the hearing of the appeal.

Mr. Lockhart-Smith referred to the decision in *R. v. A.B.* (1) (1926), 1 T.L.R. (*R*) 118 in which the learned chief justice, after reviewing certain of the English cases, particularly *R. v. Leinster* (*Duke*) (2), 17 Cr. App. R. 187, held that the principle to be applied was that bail pending appeal should only be granted for exceptional and unusual reasons. Mr. Lockhart-Smith argued that *R. v. A.B.* (1) is not binding in the present case because that was an application for bail pending an appeal from the High Court, whereas the present case is for bail pending an appeal from a magistrate. He argued that while appeals from the High Court may be compared with appeals in England from Assizes, appeals from magistrates ought to be compared with appeals in England from petty sessions, in respect of which bail is commonly granted.

As regards this argument, no authority has been cited to me, nor am I aware of any, laying down any different principle governing the grant of bail pending appeals from petty sessions. In the absence of any such authority, I can see

no reason for departing from the accepted principle. This, it seems to me, is based on the onus in the substantive proceedings. Where a person is awaiting trial, the onus of proving his guilt is on the prosecution and consequently the onus is also on the prosecution of showing cause why bail should not be allowed. On the other hand, when a person has been convicted, the onus is on him to show cause why the conviction should be set aside and similarly the onus is on him to show cause why as a convicted person he should be released on bail. If that is so, it follows that the reasons must be exceptional, otherwise bail would be granted in the majority of cases, which would clearly offend against the principle. I am confirmed in this view by the reasoning in *Habib Kara Vesta and others v. R.* (3) (1934), 1 E.A.C.A. 191.

The specific reasons for asking for bail in the present case are five: first, that the grant of bail would make it easier for counsel to prepare the appeal; secondly, the complexity of the case; thirdly, the period that the prisoner is likely to have been in custody before the appeal is decided; fourthly, the previous good character of the prisoner and, fifthly, the hardship suffered by the dependants of the prisoner. I will deal with each of these in turn.

As regards the position of counsel, I appreciate the difficulties peculiar to East African conditions, including difficulties of distance, communications and language. Unless, however, a principle entirely different from that which applies in England is to be adopted, these difficulties cannot in themselves justify the grant of bail. I think they can, however, and should, justify a more liberal attitude on what is one of the recognized grounds, the complexity of a case.

This was the second of the specific reasons advanced by Mr. Lockhart-Smith and it is to me the one which has presented the greatest difficulty. As I have said, I am prepared to give more weight to this reason than obtains in England, because of the difficulties experienced by counsel peculiar to local conditions. After a close examination of the record in the lower court and of the petition of appeal I have, however, come to the conclusion that there is not such complexity as to require the release of the prisoner. It appears to me that although the evidence contains a great deal of detail, particularly as to measuring of the stack of ballast, the appeal is essentially one on points of law.

The third reason advanced was the delay before the appeal could be expected to be heard. It was conceded by Mr. Denison for the Crown that it would not be less than fourteen days before the appeal could be heard. I do not think this unreasonable, and I do not think I should take into account the period the prisoner has already spent in custody.

The previous good character of the prisoner is not disputed but after examining the English authorities and having decided that I should follow the principle embodied in them, I have come to the conclusion that this alone is not a sufficient reason for the grant of bail, although previous good or bad character is certainly a factor to be considered in weighing the arguments for and against bail.

The fifth argument advanced was the hardship suffered by the dependants of the prisoner as the result of his imprisonment. As learned counsel for the Crown has said, this is a matter for sympathy but I am not aware of any authority that even suggests that it is a ground justifying the grant of bail. The fact remains that the prisoner has been convicted and the onus is on him to show that he was wrongly convicted.

If, on the examination of the record, I had thought that there was an over-whelming probability that the appeal would succeed, I should have granted this application. Short of that, it is not for me to assess the chances of success.

I should perhaps add that I disregard entirely the suggestion by learned counsel for the Crown that bail should be refused on the ground that investigations

are proceeding into the possibility of other charges against the prisoner. I think the principle is well established that any such allegations must be supported by affidavit before they can even be considered.

The application for bail is refused.

Application dismissed.

For the applicant:
WJ Lockhart-Smith
WJ Lockhart-Smith, Dar-es-Salaam

For the respondent:
WN Denison (Crown Counsel, Tanganyika)
The Attorney-General, Tanganyika

Mityana Ginners Limited v Public Health Officer, Kampala
[1958] 1 EA 339 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	11 June 1958
Case Number:	28/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda–Keatinge, J

[1] Appeal – Jurisdiction – Appeal from District Court to which appeal lay by statute – No right of appeal unless conferred by statute – Whether decision of District Court was a suit resulting in a decree – Public Health Ordinance (*Cap.* 61), *s.* 61, *s.* 132 (*U.*) *– Civil Procedure Ordinance* (*Cap.* 6), *s.* 2, *s.* 3, *s.* 77 (1), *s.* 85, *s.* 93. (*U.*)

Editor's Summary

The appellants occupied a cotton-buying store belonging to the Uganda Government. When served by the Medical Officer of Health with a notice under s. 61 of the Public Health Ordinance, requiring them to construct two latrines because a nuisance had arisen from lack of sanitary accommodation, they objected on substantial grounds, including that the work should be done by the owner rather than by a licensee and that to comply would involve trespass on land owned and occupied by others. They, accordingly, appealed under s. 132, sub-s. (3) and sub-s. (6) of the Ordinance, to the district court, Mengo, where their appeal was dismissed. The district court issued a "decree" in pursuance of this decision. The appellants then purported to appeal to the High Court, where the respondent successfully argued that no appeal lay.

On further appeal it was conceded that no right of appeal could exist, apart from statute, and that the ordinance made no provision in this respect, but it was contended that this was a civil appeal and the Civil Procedure Ordinance and Rules made thereunder permitted such an appeal.

Held –

(i) since the appeal to the district court was not commenced in any manner prescribed by Rules to regulate the procedure of the courts, that appeal was not a "suit", and the decision of the magistrate was an order and not a decree. *Mansion House Ltd. v. Wilkinson* (1954), 21 E.A.C.A. 98 adopted.

(ii) if the order was appealable at all, it was so under s. 77 (1) of the Civil Procedure Ordinance, but the order was not within any of the categories referred to in O. 40 r. 1, and in any event would, under r.1 sub-r. (2) require leave which was never asked for or given.

Appeal dismissed.

Case referred to in judgment:

(1) *K. J. Patel v. R.* (1953), 20 E.A.C.A. 291.

(2) *Bhagat Singh v. Ramanlal P. Chauhan and others* (1956), 23 E.A.C.A. 178.

(3) *Mansion House Ltd. v. Wilkinson* (1954), 21 E.A.C.A. 98.

(4) *Rene Dol v. Official Receiver* (1954), 21 E.A.C.A. 116.

(5) *Hem Singh v. Mahant Basant Das*, [1936] 1 All E.R. 356.

(6) *Secretary of State for India v. Chelekani Rama Rao* (1916), 43 I.A. 192.

(7) *Maung Ba Thaw v. Ma Pin* (1934), 61 I.A. 158.

(8) *Rangoon Botataung Co. v. Rangoon Collector* (1912), 39 I.A. 197; (1913), 40 Cal. 21.

(9) *Sheikh Noordin Gulmohamed v. Sheikh Bros. Ltd*. (1951), 18 E.A.C.A. 42.

(10) *National Telephone Co. Ltd. v. Postmaster-General*, [1913] A.C. 546.

June 11. The following judgments were read:

Judgment

Briggs VP: This is an appeal from a decision of the High Court of Uganda, which dismissed as incompetent an appeal from a decision of the district court of Mengo.

The appellants are licenses (or short-term tenants–the record is not clear) in occupation of a cotton-buying store at Bujongolo, which is the property of the Protectorate Government. In June 1957 the medical officer of health as local authority served on them a notice under s. 61 of the Public Health Ordinance (Cap. 61), requiring them to construct two latrines

> "at a distance not greater than sixty feet nor less than thirty feet from the store",

on the ground that a nuisance had arisen from lack of sanitary accommodation. The appellants objected to comply with the notice on grounds which were, at the lowest, substantial, *inter alia*, that this was work which, if necessary, should be carried out by the owner and not by a mere licensee, and that compliance with the notice would involve trespass on land owned and occupied by third parties. They therefore appealed under the provisions of s. 132, sub-s. (3) and sub-s. (6), of the ordinance to the district court, Mengo, where their appeal was heard and dismissed by the learned resident magistrate. Sub-section (6) gives power to the chief justice to make rules of procedure for appeals of this type, but it does not appear that this has been done. The appeal was launched by a document headed "Notice of motion chamber summons", which is intituled only

> "In the matter of Mityana Ginners Limited and in the matter of the Public Health Ordinance."

and of which the operative words are

> "Let all parties concerned attend the judge . . .when the court will be moved on the hearing of an application . . . that this honourable court be pleased to set aside the notice . . ."

We understand that documents in this form are habitually used in Uganda for applications to the court, whether original or interlocutory, but that they are sanctioned only by practice, since the Civil Procedure Ordinance and Rules make no proper provision for such applications, except in certain special cases. In view of the obvious necessity of such applications if litigation is to be reasonably conducted, the practice must be regarded as generally commendable

though the attempt to combine the features of a notice of motion and a summons may offend the purist.

The learned resident magistrate heard oral evidence for the appellants and for the respondent authority, who had been served, though not named in the title as respondent. He delivered a written decision which is headed "judgment", and this was embodied in a so-called "decree" dated July 20, 1957, which ordered the appellants to comply with the notice. The appellants purported to appeal to the High Court from this "judgment and decree", and the respondent's counsel submitted that no appeal lay. He argued that since no appeal can exist apart from statute, and the Public Health Ordinance gives no right of appeal from the magistrate's decision, the appeal, if any, could only be under the authority of the Civil Procedure Ordinance and Rules. This was agreed before us, and I think also in the High Court, but counsel for the appellants took issue on the question whether the Civil Procedure Ordinance and Rules permitted such an appeal. It was not disputed that this proceeding was civil, not criminal, in its nature. See *K. J. Patel v. R.* (1) (1953), 20 E.A.C.A. 291. It would have been possible for the appellants merely to remain inactive and allow criminal proceedings to be instituted against them under s. 62 of the Public Health Ordinance. In such a case any rights of appeal would be governed by different provisions of law. But here I agree that the question turns on the Civil Procedure Ordinance and Rules.

That being so, the first point to be decided is whether the decision of the learned resident magistrate was a decree or an order, and, if an order, whether it was an order in the strict sense of the definition in s. 2 of the ordinance, or only in a wider and more general sense. See *Bhagat Singh v. Ramanlal P. Chauhan and others* (2) (1956), 23 E.A.C.A. 178, pp. 183-4. The last possibility can at once be excluded. If this was an order and not a decree, it was an order of a civil court, the district court of Mengo, and was therefore within the definition in s. 2. On the question whether it was a decree, I refer to s. 93 of the Civil Procedure Ordinance, which is in pari materia with s. 89 of the Civil Procedure Ordinance of Kenya, to s. 85, which is for relevant purposes in pari materia with Kenya s. 81, and to the definitions in s. 2 of "suit", "prescribed" and "rules", which are indentical in both countries. Referring to s. 89 of the Kenya Ordinance, I said in *Mansion House Ltd. v. Wilkinson* (3) (1954), 21 E.A.C.A. 98, at pp. 101 and 102,

> "This makes it clear that the Supreme Court may have to entertain proceedings which are not "suits" within the meaning of the Ordinance. I next consider whether this proceeding was a "suit" in that sense. In s. 2 of the ordinance "suit" is defined to mean 'all civil proceedings commenced in any manner prescribed'. One might imagine that this would mean 'prescribed by any written law': but it does not, for 'prescribed' is again defined by the same section to mean 'prescribed by rules' and 'rules' are defined to mean 'rules and forms made by the Rules Committee to regulate the procedure of courts'. The Rules Committee is clearly that created by s. 81 of the Ordinance. Accordingly a 'suit' is any civil proceeding commenced in any manner prescribed by rules and forms made by the Rules Committee to regulate the procedure of courts under s. 81 of the Ordinance.
>
> "Mr. Khanna contended that 'suit' must for the purposes of this appeal be construed in a more liberal sense, under the overriding provision against repugnancy which governs the whole of s. 2. Without giving reasons at the moment, I would say that it is here that I must differ from his views. I am unable to discover any repugnancy whatever, and I consider that 'suit' must for the purposes of these proceedings have its precise and statutorily defined meaning."

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> "The importance of this is at once apparent on considering in detail the definition in s. 2 of the Ordinance of 'decree'. A decree means 'the formal expression of an adjudication. . .with regard to . . . matters of controversy in the suit . . .'. I put in immediate juxtaposition the definition of 'order' in the same section. 'Order' means 'the formal expression of any decision of a civil court which is not a decree, and shall include a rule nisi'. It seems clear that, whereas decrees arise only in suits, orders may arise in proceedings which are not suits, to which class of proceedings I have referred above. If, therefore, as I believe, the application to the Supreme Court was not a 'suit', it could not result in a decree, but only in an order."

The other members of the court agreed with this. In this case I find it impossible to say that the appeal to the district court was commenced in any manner prescribed by rules made by the Rules Committee to regulate the procedure of courts. It seems to have been commenced by a method invented by commonsense to fill a deplorable gap in those rules. In consequence I think the appeal was not a 'suit', and the decision of the district court could not in law be a decree, but was an order.

There was in this case no right of appeal to the High Court created by special provision of the Civil Procedure Ordinance or any other statute. Nor was this one of the special types of orders specified in s. 77 as being appealable. See *Rene Dol v. Official Receiver* (4)(1954), 21 E.A.C.A. 116, 118. If the order was appealable at all, it was so under para. (*h*) of s. 77 (1). But again, if one refers to O. 40 r. 1, it is apparent that this order is not within any of the categories set out in para. (*a*) to para. (*u*). If an appeal could lie at all, it lay under sub-r. (2) of r. 1 and required leave, which in this case was never asked for or given. This seems to conclude the matter.

I wish, however, to give a warning. Although the question was not argued before us, I am unable at the moment to see how the order of the district court could properly be considered to be an order "made under rules". See s. 77 (1) (*h*) and *Rene Dol's* case (4). I am far from saying that an appeal to the High Court would have been competent, even if leave had been given.

On the wider issue whether, if this order could be treated as a decree, an appeal would lie, I am inclined to the view that the line of authorities of which *Hem Singh v. Mahant Basant Das* (5) [1936] 1 All E.R. 356, *Secretary of State for India v. Chelekani Rama Rao* (6) (1916), 43 I.A. 192, and *Maung Ba Thaw v. Ma Pin* (7) (1934), 61 I.A. 158, are examples, would probably govern the matter, rather than the contrasting line, of which *Rangoon Botataung Co. v. Rangoon Collector* (8) (1912), 39 I.A. 197, is typical. But for reasons set out in *the Mansion House* case (3) and *Bhagat Singh's* case (2) I think that, although in India this order might have been treated as a decree for purposes of appeal, it cannot be so treated here. *Sheikh Noordin Gulmohamed v. Sheikh Bros. Ltd.* (9) (1951), 18 E.A.C.A. 42, which appears at first sight to suggest the contrary, is distinguishable. It dealt with an appeal from the Supreme Court to the Court of Appeal and, as is explained in *Bhagat Singh's* case (2), the decision of the Supreme Court was in the circumstances a decree.

I am accordingly of opinion that the decision of the High Court, that no appeal lay from the decision of the district court in this case, was correct. I would dismiss this appeal with costs.

Sir Kenneth O'Connor P: I have had the advantage of reading beforehand the judgment which has just been delivered and I agree with it.

I agree that the determination by the first-class magistrate was not a decree, but was an order and would only be appealable, if appealable at all, with leave.

There are now something like five lengthy, highly technical, and difficult decisions of this court upon the question of what is and what is not a "suit",

a “decree” and an appealable “order”. These have all been rendered necessary because of the difficulty and complexity of the provisions of the Civil Procedure Ordinances and Rules which, in these territories, govern appeals from decrees and orders. In this connection I desire to draw attention to, and to endorse the words of Sir Newnham Worley, P., in *Bhagat Singh v. Ramanlal P. Chauhan and others* (2) (1956), 23 E.A.C.A. 178 at p. 188:

> “I take this opportunity also of drawing attention to the unsatisfactory state of the law relating to civil procedure in the Supreme Court of Kenya and, in particular, to the provisions relating to appeals from decrees and orders. Briggs, J.A., has said the construction of the Civil Procedure Ordinance and Rules so far as they relate to appeals is a matter of some difficulty and the truth of that statement is evidenced by the decisions of this court in the cases he had cited and by decisions in other cases on similar issues. All these cases consume time and money in arid discussions on highly technical procedural points, and generally tend to obscure or preclude a decision on the merits of the dispute. The difficulties are created by the hybrid nature of the present procedural system, which is drawn partly from Indian sources, partly from English, and is partly of local origin. I would suggest that the authorities concerned should now consider whether the time has not come to change over completely to the English procedure.”

These words are at least as applicable to civil procedure in Uganda as to civil procedure in Kenya, and I venture to suggest that simplification and rationalization of the existing Civil Procedure Ordinance and Rules is overdue.

On the wider issue, I also agree with the learned Vice-President. For the benefit of magistrates and those who have not ready access to English and Indian legal authorities, it may be desirable for me to set out the argument and the gist of some of the cases a little more fully.

Mr. McMullin, for the respondent, argued that even if the determination of the first-class magistrate on a reference under s. 134 of the Public Health Ordinance was a “decree”, an appeal from it would still not be competent, in that the right of appeal to the court of a first-class magistrate conferred by that section was a “special jurisdiction” and did not include the right to carry a determination made under it to the High Court on appeal. He referred to s. 3 of the Civil Procedure Ordinance and relied on *Rangoon Botataung Co. Ltd. v. Rangoon Collector* (8) (1913), 40 Cal. 21 (P.C.). In that case the appeal was from an award of the Chief Court of Lower Burma to the High Court and the question at issue was the quantum of compensation payable for compulsory acquisition of land. The appeal to the High Court was brought under statutory provisions which permitted an aggrieved party to have the collector’s award referred to the Chief Court and provided that an appeal should lie from the award of the Chief Court to the High Court. No further right of appeal was conferred by the statute. Their lordships of the Privy Council said that they could not accept the argument or suggestion that when once the claimant was admitted to the High Court, he had all the rights of an ordinary suitor, including the right to carry an award made in an arbitration as to the value of land taken for public purposes up to the board as if it were a decree of the High Court made in its ordinary jurisdiction, and they pointed out the inconvenience which would arise if their lordships were called on to determine, as a question of fact, the value of land situate in another country.

On the other hand, in *Secretary of State for India v. Chelekani Rama Rao and others* (6) (1916), 43 I.A. 192 (P.C.) their lordships indicated that the decision in the *Rangoon* case (8) was to be explained by the fact that the proceedings in that case were “ostensibly and actually arbitration proceedings”.

In *National Telephone Co. Ltd. v. Postmaster-General* (10), [1913] A.C. 546 Lord Haldane L.C. said, at p. 552:

> "When a question is stated to be referred to an established court without more, it . . . imports that the ordinary incidents of the procedure of that court are to attach, and also that any general right of appeal from its decision attaches likewise."

This principle was applied by the Privy Council in *Hem Singh v. Mahant Basant Das* (5), [1936] 1 All E.R. 356. In *Sheikh Noordin Gulmohamed v. Sheikh Bros. Ltd*. (9) (1951), 18 E.A.C.A. 42, a decision of this court, the authorities are reviewed.

Had this appeal not fallen to be decided on the first issue, I should have inclined to the view that this case would fall within the principle of the *National Telephone* (10) and the *Hem Singh* (5) line of authorities rather than the Rangoon Botataung case (8). I would dismiss the appeal with costs.

Forbes JA: I agree.

Appeal dismissed.

For the appellant:
YV Phadke
Hunter & Greig, Kampala

For the respondent:
AM McMullin (Crown Counsel, Uganda)
The Attorney-General, Uganda

Ramadhani Ali v R
[1958] 1 EA 344 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	14 May 1958
Case Number:	91/1958
Before:	Davies CJ
Sourced by:	LawAfrica

[1] Insurance – Motor vehicle – Passengers in commercial vehicle – Payment for carriage – Commercial vehicle insurance providing no cover for risks of carriage for reward – When owner liable to insure for such risks – Motor Vehicles Insurance Ordinance (*Cap.* 169), *s.* 4. (*T.*).

Editor's Summary

The appellant was the driver of a commercial vehicle and was insured under a commercial vehicle policy, but not insured for risks concerned with the conveyance of passengers for hire or reward, nor licensed for such purpose. The appellant whilst carrying as passengers two women who had each agreed to pay him

fifty cents for the journey, was involved in an accident and the women were injured. He was subsequently charged with and convicted of carrying fare passengers in a vehicle not licensed as a public service vehicle, and of using a motor vehicle without a policy of insurance in respect of third party risks. There was no evidence to show that the appellant had on any other occasion carried any passengers for hire or reward. On appeal it was contended, *inter alia*, that the appellant was not required by s. 4 of the Motor Vehicles Insurance Ordinance to have in force a policy to cover any liability he might incur in the circumstances.

Held – section 4 of the Motor Vehicles Insurance Ordinance requires the owner of a vehicle to insure for third party risks where the vehicle is habitually used for the carriage of passengers for hire or reward, and since this was an isolated case, the appellant had not committed the offence alleged under s. 4. *Wyatt v. Guildhall Insurance Co. Ltd*., [1937] 1 All E.R. 792 applied.

Appeal allowed on one count.

Case referred to:

(1) *Wyatt v. Guildhall Insurance Co. Ltd*., [1937] 1 All E.R. 792.

Judgment

Davies CJ: The appellant was convicted in the district court at Dar-es-Salaam on the following charges:

(i) Carrying fare passengers in a vehicle not licensed as a public service vehicle contrary to the provisions of s. 20 (5) and s. 63 of the Traffic Ordinance (Cap. 168),

(ii) Using a motor vehicle on a road without a policy of insurance in respect of third party risks contrary to the provision of s. 4 of the Motor Vehicle Insurance Ordinance (Cap. 169).

The facts upon which the convictions are based are briefly these: The appellant was the driver of a commercial vehicle insured under a Commercial Vehicle Policy with the New India Assurance Company Ltd. The policy did not cover its use for the conveyance for hire or reward, nor was the vehicle licensed as a public service vehicle. On December 8 while on a journey the appellant carried as passengers two women who had asked to be taken to Kunduchi. While on the journey the vehicle was involved in an accident in which the two women were injured.

The two women testified that they agreed to pay 50 cts. each for the journey. No money was in fact paid. There was no evidence to show that the appellant had on any other occasion carried any passengers for hire or reward.

So far as the second charge is concerned counsel for the appellant submitted that the owner of the vehicle was not required by the Motor Vehicles Insurance Ordinance to have in force a policy of insurance to cover any liability he might incur in the circumstances of this case, and referred to the case of *Wyatt v. Guildhall Insurance Co. Ltd*. (1), [1937] 1 All E.R. 792.

That authority is directly in point both as to the circumstances of the carrying and as to the interpretation for the section in the Motor Vehicles Insurance Ordinance is in precisely similar terms as that in English Traffic Act, 1930. I agree with the reasoning of that authority and I propose to follow it. The appeal therefore is allowed in respect of the conviction on the second of the charges under appeal.

Counsel for the appellant submitted that the same reasoning applied to the conviction on the first charge. I am not able to agree with that submission. The language of s. 20 sub-s. (5) in my view creates a positive prohibition against the carrying of passengers for hire or reward in any vehicle except a vehicle duly licensed as a public service vehicle. It is not disputed that no such licence was issued in respect of the vehicle in this case, and the trial magistrate has found as of fact that the two women were carried in it for reward and there is no good reason disclosed that would justify this court in rejecting that finding. The fact that no money was paid was merely fortuitous. The appeal in respect of the conviction on the first of the charges under appeal is dismissed.

In the result, the conviction on the first charge is maintained, but the conviction and sentence on the second charge are set aside and it is ordered that the fine imposed in respect thereof be refunded. The order of disqualification is also set aside.

Appeal allowed on one court

For the appellant:
KA Master and *NS Patel*
NS Patel, Dar-es-Salaam

For the respondent:
GC Thornton (Crown Counsel, Tanganyika)
The Attorney-General, Tanganyika

Kanji Purshottam Toprani t/a "Colonial Commercial Company" v Khushaldas Chhaganbhai Patel t/a "Khushaldas & Son"

[1958] 1 EA 346 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	1 April 1958
Case Number:	61/1957
Before:	Briggs V-P, Forbes JA and Sir Owen Corrie Ag JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Harley, Ag. J

[1] Practice and procedure – Application to set aside decree – Payment into court of decretal amount plus security for costs – Intervening bankruptcy proceedings – Application for extending time for payment into court – Judge's discretion – Whether court has power to enlarge time if action still in existence.

Editor's Summary

The respondent, a money lender, had obtained *ex parte* a decree against the appellant and "X" for Shs. 36,000/-, interest and costs. The appellant and "X" moved to set aside the decree and on January 21, 1957, obtained an order to the effect that the *ex parte* judgment be set aside provided the total amount of the judgment debt and costs were paid into court within six weeks together with Shs. 4,000/- each by way of security for costs of the hearing. No appeal from this order was lodged by either side. Immediately after the order was made the appellant was served with a bankruptcy petition by another creditor and on March 25 a receiving order was made against him. On March 2, the appellant filed a motion applying to extend the time for paying into court the sums referred to in the order of January 21 on the grounds that the bankruptcy proceedings made it difficult or impossible to raise funds and that an appeal against the receiving order had been filed. This motion was filed before time for making payment into court ran out. The appeal was duly heard on June 11 and the receiving order was set aside. Meanwhile the motion to extend time had lain in the registry and the notice of motion was not sealed until June 13. It was heard on June 18 and dismissed. The judge did not record any reasons for his order, but gave leave to appeal. Meanwhile "X" had left the country and was not a party to the subsequent appeal. During July the

appellant paid into court the full amount of the decree and Shs. 4,000/- in terms of the order of January 21 for security for costs of the re-hearing. The amount due to the respondent was paid out to him. At the hearing of the appeal the respondent tried to argue that since time had run out before the order was made, there was no longer any jurisdiction to enlarge.

Held –

(i) the application to extend time was a matter for the discretion of the trial judge; this court will not interfere with the exercise of such discretion, save on grounds recognised as sufficient to justify such interference in England, and although the trial judge had not given reasons, it must be assumed that he exercised his discretion correctly unless the contrary is shown;

(ii) there were, however, possibly two grounds and certainly one which would require this court to interfere. First, it was probable that the trial judge took the view that the application to extend time was not made bona fide, but made merely for purposes of delay, which was not unreasonable at all, but which was not in accordance with the facts as the money had since been paid. Secondly, and more strongly, the refusal to enlarge time would in the circumstances have resulted in injustice, for the only interest of the respondent requiring further protection was in respect of security for further costs, and subject to

the payment into court of the further sum of Shs. 4,000/- the justice of the case required that the appellant's defence be heard on the merits;

(iii) the court had power to enlarge the time since the action was still in existence (*Manley Estates Limited v. Benedek*, [1941] 1 All E.R. 248, followed).

Appeal allowed. Order of Supreme Court set aside. Time for payment into court extended to twenty-one days from the date of the order of this court.

Case referred to:

(1) *Manley Estates Limited v. Benedek*, [1941] 1 All E.R. 248.

Judgment

Briggs VP: read the following judgment of the court: The respondent, who is a money lender, filed three suits, which were later consolidated, against one Battistini and the appellant in the Supreme Court of Kenya. They did not appear or defend, and the respondent on December 28, 1956, obtained *ex parte* a decree against both defendants for some Shs. 36,000/- interest and costs. The defendants moved to set aside the decree and on January 21, 1957, obtained an order of which the operative parts were as follows:

> "IT IS ORDERED that (i) the ex-parte judgments dated the 6th day of December, 1956, be set aside provided the full amount of the judgment debt with costs be paid into court within six weeks from the date hereof: plus further, the sum of four thousand shillings (Shs. 4,000/-) by each defendant, making a total of eight thousand shillings (Shs. 8,000/-) be paid by way of security for the costs of re-hearing, and that (ii) if that money is paid, the costs of the present application be reserved and (iii) that if the money is not paid, the present application by notice of motion be dismissed with costs and (iv) that the application for stay of execution be refused AND IT IS FURTHER ORDERED that the defendants/applicants do have leave to appeal against this order."

No appeal from this order was lodged by either side. Immediately after the order was made the appellant was served with a bankruptcy petition by another creditor, and on February 25 a receiving order was made against him. On March 2 he filed a motion applying to extend the time for paying into court the sums referred to in the order of January 21. His affidavit in support referred to the difficulty or impossibility of raising funds to make the payment in view of the bankruptcy proceedings, and to an intended appeal against the receiving order. It will be noted that this motion was filed before time for making payment into court ran out, and also that there had not then been time to prepare the record or lodge the appeal. But the appeal was prosecuted with all reasonable speed and on June 11, 1957, was allowed, the receiving order being set aside. Meanwhile the motion to enlarge time had lain in the registry, and the notice of motion was not sealed until June 13. A note on the file satisfies us that the delay was approved, if not caused, by the appellant's counsel, who clearly wished to dispose of the bankruptcy proceedings first. The motion was heard on June 18 and was dismissed with costs. The learned judge's note is very short and gives no account of the arguments. We presume he must have been told of the result of the bankruptcy appeal, but no affidavit was filed concerning this. Nor was there any affidavit in opposition to the motion. The learned judge did not record any reasons for his order, but gave leave to appeal from it, and the appellant appealed accordingly. The first defendant has apparently left the country. He was not a party to the motion to extend time, or to this appeal. During July the appellant paid into court the full amount due under the decree, including costs, and also a sum of

Shs. 4,000/- in terms of the order of January 21 for security for costs of the re-hearing. The amount due to the respondent was paid out to him. It seems that the appellant was then prepared to pay in another sum of Shs. 4,000/- in respect of the first defendant, but that was then considered either unnecessary or impossible. He submitted before us to be put on terms to make this payment as a condition of obtaining enlargement of time. After hearing the appeal we gave judgment in the following terms:

> "We are agreed that this appeal must be allowed and make the following order:
>
> "The order of the Supreme Court dated June 18, 1957, is set aside and in lieu thereof it is ordered that the time limited by the order of January 21, 1957, for paying into court the amount of the judgment debt and costs and the two sums of Shs. 4,000/- each for security for costs therein referred to be extended to twenty-one days after the date of this order, and that the appellant do pay to the respondent the costs of the application in the Supreme Court for such extension of time. It is also ordered that the respondent do pay to the appellant the costs of this appeal.
>
> "The effect of this will be that, in addition to the payments already made into court, it will be necessary for a further sum of Shs. 4,000/- to be paid in by way of security for costs, and if such payment is made by the appellant it shall not be a legitimate objection that it was not paid in by the first defendant, as contemplated by the order of January 21, 1957, since in the opinion of this court the true intention of that order was that a total of Shs. 8,000/- should be furnished as security for costs by either or both defendants. In the event of such payment being made within due time the ex-parte judgments and decrees of December 6, 1956, will be set aside and the case will be re-heard in accordance with the intention of the order of January 21, 1957. There will be liberty to apply to the Supreme Court for any directions necessary for the purpose of such re-hearing. It will be observed that the provisions of the order of January 21, 1957, relating to the costs of the application resulting in that order will stand.
>
> "We shall give our reasons for this decision in writing at a later date."

We now give our reasons for the decision.

The order of January 21, 1957, must be taken to have been made correctly and for sufficient reasons, but in addition there were on record before us affidavits setting out matters which might well afford a sufficient defence to the respondent's claims against the appellant. It appeared to us that in making the order the court had very properly been influenced by two considerations, first, a desire to protect the respondent against any loss by reason of delay caused by further proceedings, and also against the risk of inability to recover the costs of such further proceedings, and secondly, a desire to permit the appellant and his co-defendant or either of them to make a defence on the merits to the respondent's claims. These matters must, we thought, have been apparent to the learned judge on hearing the application to extend time. He must also have appreciated that the order of January 21 was made without knowledge of the bankruptcy proceedings, or the difficulties with which in consequence of them the appellant was later faced. We thought that this change of circumstances would have been quite sufficient to justify an extension of time, unless strong reasons were shown against it. An attempt was made to argue before us that, since time had run out before the order was made, there was no longer any jurisdiction to enlarge; but this is fully answered by the decision of the Court of Appeal in *Manley Estates Ltd. v. Benedek* (1), [1941] 1 All E.R. 248, which we follow in preference to any earlier Indian decisions in the contrary sense.

The matter was, however, one within the discretion of the learned judge, and this court will not interfere with the exercise of such a discretion, save on the grounds recognised as sufficient to justify such interference in England. These are conveniently summarised at p. 1657 of the 1958 Annual Practice. Although the learned judge has not given reasons, it will be assumed that he has exercised his discretion correctly, unless the contrary is shown. We thought, however, that there were possibly two grounds which would require us to intervene, and certainly one. We thought it probable that the learned judge took the view that the application to enlarge time was not made bona fide or in any genuine expectation of being able to make the payments, but merely for purposes of delay. This would not have been at all an unreasonable view, but we know now that it was not in accordance with the facts, for the money has been paid. We relied, however, much more strongly on the other ground, that refusal to enlarge time would in the circumstances have resulted in injustice. The only interest of the respondent which required further protection was in regard to security for future costs. He has not been in any way prejudiced by delay and, subject to the payment into court of the further sum of Shs. 4,000/-, the justice of this case requires still, as it did in January, 1957, that the appellant's defence on the merits be heard. We thought that the appellant's failure to comply with the conditions of the order of January 21 was not due to any fault of his, but to circumstances beyond his control, and that in consequence, if the respondent's interests could be adequately protected, the appellant ought to have a reasonable opportunity to put his case before the court. We would add, finally, that in this appeal our task was made more difficult by the fact that we did not know the reasons which had led the learned judge to his decision, and we think it would have been of advantage if the appellant had made an application under r. 55 of the Court of Appeal Rules.

Appeal allowed. Order of Supreme Court set aside. Time for payment into court extended to twenty-one days from the date of the order of this court.

For the appellant:
GR Mandavia
GR Mandavia, Nairobi

For the respondent:
JM Nazareth QC and *ML Anand*
ML Anand, Nairobi

Houry v The Commissioner of Income Tax
[1958] 1 EA 350 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	2 April 1958
Case Number:	4/1957
Before:	Sir Kenneth O'Connor P, Forbes JA and MacDuff J
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika–Lowe, J

[1] Income Tax – Income deemed to have been distributed – Settlement of shares in company upon children – Whether notional income from such shares to be treated as income paid to or for benefit of child of settler – Whether notional income paid by virtue of or in consequence of settlement – East African Income Tax (*Management*) *Act,* 1952, *s.* 22 (1), (4) *and* (6), *and s.* 24 (1), (2) (*a*) *and* (9) – *War Revenue* (*Income Tax*) *Ordinance, s.* 21 (1) (*T.*) – *Income Tax Ordinance s.* 21 (1) (*U.*).

Editor's Summary

The appellant had transferred certain shares in a company to his two sons, who were both "children" within the meaning of s. 24 (9) of the East African Income Tax (Management) Act, 1952. The Commissioner of Income Tax made an order under s. 22 (1) of the Act, directing that a portion of the undistributed income of the company should be deemed to have been distributed as dividends among the shareholders. The appellant conceded that the commissioner's order under s. 22 (1) was properly made, and that the transfer of the shares to his sons constituted a settlement for the purposes of s. 24 of the Act, the appellant being the settlor. The High Court of Tanganyika, having dismissed the appellant's appeal from certain assessments made on him, the appellant brought this further appeal, wherein the questions for decision were (*a*) whether the notional income arising on such shares by reason of the commissioner's order made under s. 22 (1) of the Act was, or was to be treated as "income paid to or for the benefit of a child of the settlor", under s. 24 (1), and (*b*), if so, whether the income was paid "by virtue or in consequence of" the settlement. For the appellant it was contended that "paid" in s. 24 (1) meant "paid in cash", and that express provision would be necessary to extend that meaning; that "paid" is not used anywhere else in the Act in a sense which would include notional income, that there was no authority for giving an extended meaning to the word "paid", and that in the case of a notional dividend it was not a payment "by virtue or in consequence of" the settlement, but arose from the action of the Commissioner of Income Tax.

Held –

(i) the subject matter to which the word "paid" (where used in the Act) refers, must be governed in each case by the context; the plain meaning of the section is that notional income arising in consequence of an order made under s. 22 (1) is to be treated for all purposes of the Act as income actually paid to the shareholder, and, therefore, for the purposes of s. 24 such notional income must be treated as income actually paid.

(ii) the notional income accrues to the children by virtue of the shares settled upon and held by them, and the notional dividend, therefore, accrues "by virtue of or in consequence of" the settlement.

Appeal dismissed.

Case referred to in judgment:

(1) *Commissioner of Stamps, Straits Settlement v. Oei Tjong Swan,* [1933] A.C. 378.

(2) *G. v. Commissioner of Income Tax,* 1 E.A.T.C. 43.

(3) *Commissioner of Income Tax v. U.,* 2 E.A.T.C. 1.

(4) *Ex parte Walton* (1881), 17 Ch. D. 746.

April 2. The following judgments were read:

Judgment

Forbes JA: This is an appeal from a judgment of the High Court of Tanganyika dismissing an appeal by a taxpayer against certain assessments to income tax.

There was no dispute as to the facts of the case, which were agreed by the parties and are set out in the statement of facts filed in the High Court. For the purposes of this appeal it is sufficient to state that the appeal concerns notional income arising by reason of an order made by the Commissioner of Income Tax under s. 22 (1) of the East African Income Tax (Management) Act, 1952 (hereinafter referred to as the Act) directing that a portion of the undistributed income of a company shall be deemed to have been distributed as dividends amongst the shareholders. The particular shares to which the appeal relates were held by sons of the appellant who, at the material time, were "children" within the meaning of s. 24 (9) of the Act. The appellant conceded (and had conceded before the High Court) that the commissioner's order under s. 22 (1) was properly made, and that the transfer of the shares in the company by the appellant to his sons constituted a settlement for the purposes of s. 24 of the Act, the appellant being the settlor. The short points for decision were (*a*) whether the notional income arising on such shares by reason of the commissioner's order under s. 22 (1) of the Act was, or was to be treated as, "income paid to or for the benefit of a child of the settlor" under s. 24 (1) of the Act, and (*b*) if it was to be so treated, whether it was so paid "by virtue or in consequence of" the settlement.

Section 22 (1) of the Act provides that in certain circumstances where the commissioner is satisfied that, in respect of any period for which the accounts of a company have been made up, the amounts distributed as dividends by the company, increased by any tax thereon, are less than sixty per cent. of the total income of the company, he may

> ". . . by notice in writing order that the undistributed portion of sixty per cent. of such total income of the company for that period shall be deemed to have been distributed as dividends amongst the shareholders . . . and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purposes of this Act."

And s. 24 (1) of the Act provides

> "Where, by virtue or in consequence of any settlement to which this section applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of income, the income shall be treated for all the purposes of this Act as the income of the settlor for that year and not as the income of any other person."

The learned judge in the court below, in dismissing the appellant's appeal to the High Court, relied largely on para. (*a*) of sub-s. (2) of s. 24 of the Act, which reads as follows:

> "(2) Subject as hereafter provided, for the purposes of this section–
>
> (*a*) income which, by virtue or in consequence of a settlement to which this section applies, is so dealt with that it, or assets representing it, will or may become payable or applicable to or for the benefit of a child of the settlor in the future (whether on the fulfilment of a condition, or the happening of a contingency, or as the result of the exercise of a power or discretion, or otherwise) shall be deemed to be paid to or for the benefit of that child."

He said:

> "Section 24 goes further. The income of the company included certain moneys or perhaps assets represented in the company's accounts as moneys, which may have become payable or applicable to the benefit of Christopher and Robin in the future. The section deems those moneys to be paid to or for the benefit of those children of the settlor and by sub-s. (1) any income paid to or for the benefit of a child of the settlor in any year of income is to be treated for all the purposes of the Act as income of the settlor for that year . . . I cannot accept the submission of learned counsel for the appellant that the income must arise by reason of some internal provision within the settlement . . . The income arises in the accounts of the company and so to the ultimate benefit of the shareholders of whom Christopher and Robin became part in consequence of the shares having been settled on them by the settlor. For that reason it seems to me that the income arose, in so far as the children are concerned, in consequence of the settlement . . . The company has 'so dealt with' the income by including it in its accounts for that particular year and the children being shareholders, I do not think it could reasonably be suggested that it will not or may not become payable or applicable to their benefit at some time in the future . . . As to the second ground, this income which was deemed to have been distributed under s. 22, is not perhaps income factually paid to the sons but is in fact income which has been so dealt with by the company that it will or may become payable or applicable to the benefit and is to be treated as the income of the appellant. It is therefore, in my view, correctly included in the respondent's assessment."

With great respect to the learned judge, I think his argument shows some confusion of thought between sub-s. (1) and sub-s. (2) of s. 24. So far as para. (*a*) of sub-s. (2) is concerned, the question is not merely whether the income arises by virtue or in consequence of the settlement, but whether "by virtue or in consequence of the settlement" the income is

> "so dealt with that it, or assets representing it, will or may become payable or applicable to or for the benefit of a child of the settlor in the future."

It appears to me that this clearly contemplates a "dealing" with the income by reason of some internal provision within the settlement, e.g. a direction to accumulate income during minority. It is true that the action of the company in withholding the profits from distribution may result eventually in a share of the profits or assets representing that share becoming payable to the children of the appellant in the future. But I am unable to see that the withholding of distribution is in any sense a dealing with the income "by virtue or in consequence of the settlement". In my opinion, therefore, the assessment cannot be supported on the basis of para. (*a*) of sub-s. (2) of s. 24, and, in fact, counsel for the respondent did not seek to rely on that paragraph, either on the appeal before the High Court or on this appeal.

Counsel for the respondent did, however, rely on sub-s. (1) of s. 24 read in conjunction with sub-s. (1) of s. 22 to justify the assessment.

For the appellant it was argued that "paid" in s. 24 (1) meant paid in cash, that is physically paid, and not "deemed to have been paid"; that that was the natural *prima facie* meaning of the words in s. 24 (1), and that express provision would be necessary to extend it; that s. 22 (1) and s. 24 each created a fiction and that express provision would be necessary to superimpose one fiction on the other; that in sub-s. (6) of s. 22 where income deemed under the section to have been paid is referred to, the phrase "deemed to have been paid" is used, but that no such phrase appears in s. 24; that sub-s. (6) of s. 22 does in fact make express provision for superimposing one fiction upon another; that if

notional income under s. 22 is to be treated as income of a settlor under s. 24, a settlor would be unduly penalised since he would not be entitled to recover the amount of tax from the company under s. 22 (4) and that such an injustice cannot have been intended. Counsel for the appellant also described s. 24 as a "hotchpotch of the provisions of the English Act", and sought to draw a comparison between the provisions of the English Income Tax Act, 1952, and the provisions of the East African Act, arguing that in the East African Act the legislature had failed to achieve the results for which the Crown contended, that result being achieved by other means in the English Act.

It is, of course, legitimate to refer to corresponding legislation in other territories when seeking to ascertain the true construction to be placed on provisions of a local statute and, if the provisions in question are identical or nearly identical, judicial decisions relating to the provisions of the foreign statute may be of great assistance in the consideration of the local provisions. Where, however, the scheme of the two statutes is different, it is difficult to draw a conclusion as to the effect of the one from a study of the method by which a particular result has been achieved in the other. The question was considered by the Privy Council in *Commissioner of Stamps, Straits Settlements v. Oei Tjong Swan*, (1) [1933] A.C. 378 at pp. 387 and 389, where Lord Macmillan in the course of his judgment says

> "The answer to the question must be found from an examination of the Ordinance itself, for the best and safest guide to the intention of all legislation is afforded by what the legislation has itself said.
>
>
>
> "The difficulty in which the learned judges find themselves in accounting for the terms of s. 73, sub-s. (2) and sub-s. (3), consistently with their decision is entirely occasioned by their approach to the problem of construction which the case presents. Instead of first considering the terms of the Ordinance itself, they have at once entered upon an elaborate comparison of its provisions with those of the (Imperial) Finance Act of 1894, and proceeded to draw inferences from the variations between the Ordinance and the Imperial statute. This is a perilous course to adopt and one which certainly does not commend itself to their lordships. Decisions of the Imperial courts on statutes dealing with the same subject-matter may often be useful in the interpretation of similar provisions in colonial measures, and a comparison between similar measures of the Imperial and the Colonial Legislatures may on occasion be helpful: cf. *Alcock, Ashdown & Co. v. Chief Revenue Authority, Bombay* (1923), L.R. 50 I.A. 227, 238. But it is quite a different thing to institute a textual comparison such as has here been made and to rely on conjectures as to the intention of the draftsman in selecting some and rejecting other provisions of his presumed model."

In the instant case I have studied the provisions of the Income Tax Act, 1952, to which the court was referred (i.e. Chapter III of Part IX and Chapter II and Chapter III of Part XVIII) but find myself unable to derive any useful guidance from a textual comparison between those provisions and the provisions of s. 22 and s. 24 of the East African Act. I propose therefore to base my conclusions as to the construction to be placed on those sections of the East African Act purely on a consideration of the provisions of the Act itself.

In the first place, I agree with counsel for the appellant that "paid" in s. 24 (1) *prima facie* means physically paid, and that special provision is necessary to extend that meaning. I disagree, however, that such special provision does not exist. If I understood counsel's argument correctly, he contended that such special provision ought to be contained within s. 24 itself. I cannot, however, see any reason for this so long as the Act makes it clear that the special

provision is intended to apply to s. 24; as, for instance, is normal procedure in the case of an interpretation section. The relevant special provision here is the material part of s. 22 (1) which is set out above. That section expressly provides that the undistributed portion of sixty per cent. of the total income of the company "shall be deemed to have been distributed as dividends" and that notional income which is deemed to have been distributed to each shareholder

> "shall be included in the total income of such shareholder for the purposes of this Act."

It seems to me that the plain meaning of the words of the section is that notional income arising in consequence of an order made under the section is to be treated for all the purposes of the Act as income actually paid to the shareholder, and that, therefore, for the purposes of s. 24 such notional income must be treated as income actually paid. I see no inference arising from the inclusion in s. 22 of sub-s. (6) which would affect the construction I have put on sub-s. (1). Sub-section (6) is intended to remove any possible doubts as to the construction to be placed on the earlier provisions of sub-s. (1) itself, and I do not see that it can affect the application of sub-s. (1) to other provisions of the Act. As to the phrase "deemed to have been paid" in sub-s. (6), its use in the context to indicate notional income arising under sub-s. (1), and that notional income only, appears to me to be a normal and natural use of language. I certainly cannot draw the inference that throughout the rest of the Act there should be express reference to the income "deemed to have been paid" whenever an instance arises where that income is to be treated as income actually paid. To do so would render superfluous the final provision of sub-s. (1) of s. 22. In my view, the main significance of sub-s. (6) is that it makes it quite clear that income "deemed to have been distributed" under sub-s. (1) is regarded as "deemed to have been paid" to a shareholder.

Counsel for the appellant also argued that apart from s. 24 there is no instance in the Act where the word "paid" is used in a sense which would include notional income under s. 22. That may well be so, but clearly the subject matter to which the word "paid" refers in each case must be governed by the context. Certainly no instance was pointed out where a reference to income paid was coupled with an express reference to income deemed to have been paid under s. 22.

As to the argument that a settlor would be unable to recover from a company under s. 22 (4) any tax paid by him on notional income and so be unduly prejudiced, if this were indeed the case I should still find difficulty in putting any construction other than that which I have indicated on s. 22 (1). In fact, however, it appears to me that prejudice would not result to the settlor. Sub-section (4) of s. 22 provides that

> "Where the proportionate share of any shareholder of a company in the undistributed profits of the company has been included in his total income for any year under the provisions of sub-s. (1) the tax payable in respect of such proportionate share may . . . be recovered from the company . . ."

It is perfectly true that the settlor is not the shareholder for the purposes of this sub-section. But the settlor's remedy is under sub-s. (4) of s. 24 which provides

> "Where by virtue of sub-s. (1) any tax becomes chargeable on and is paid by the person by whom the settlement was made, that person shall be entitled to recover from any trustee or other person to whom the income is payable by virtue or in consequence of the settlement the amount of the tax so paid . . ."

In the instant case income from the shares in the company, whether notional or otherwise, is payable to each child and the settlor is entitled to recover the

tax paid from the children. I see nothing to prevent the children in their turn from recovering the amount of the tax from the company under sub-s. (4) of s. 22.

Two cases have been cited which contain dicta which tend to support the view I have taken of the construction to be placed on s. 22 and s. 24 of the Act. These are *G. v. Commissioner of Income Tax* (2), 1 E.A.T.C. 43, and *Commissioner of Income Tax v. U.* (3), 2 E.A.T.C. 1. These dicta relate respectively to s. 21 (1) of the War Revenue (Income Tax) Ordinance of Tanganyika and s. 21 (1) of the Income Tax Ordinance of Uganda, the material parts of which are identical with s. 22 (1) of the Act. In the former case the then President of this court said (at p. 62):

> "Similarly, when s. 21 (1) of the Income Tax Ordinance enacts that 'the undistributed portion of sixty per cent. of such total income of the company for that period shall be deemed to have been distributed as dividends amongst the shareholders', a shareholder cannot be heard to say that the undistributed portion so distributed ought to be less than 60 per cent. When the legislature enacts that something shall be deemed to have been done, which in fact and in truth has not been done, and plainly indicates between what persons that statutory fiction is to be resorted to, the court is bound to treat the thing which 'shall be deemed' to have been done as having been done and cannot go behind the plain language of the enactment. In Darling, J.'s words in *Brooks v. Baker,* [1906] 1 K.B. 11 at p. 15 'the court is sometimes obliged by the legislature to put an interpretation on a word which it does not ordinarily bear when it has been enacted that something "shall be deemed" to be something else.' "

And in the latter case the following passage appears in the judgment of the Privy Council at p. 25:

> "It will be seen that when the conditions stated in sub-s. (1) of existing s. 21 are satisfied the commissioner has the power to make an order under which the undistributed portion of 60 per cent. of the total income of a company for a period specified in the sub-s. is notionally to be regarded as having been distributed, and the 'proportionate share thereof of such shareholder' is to be regarded as having been received by the shareholder for purposes of assessing the amount of income tax payable by him."

It is true that neither case relates to the point at issue here. Nevertheless I find myself fortified in the view I have taken by the dicta contained in the passages I have quoted.

Counsel for the appellant, if I understood him correctly, submitted that there was no authority for the proposition that "paid" included "deemed to have been paid" and that

> "most of the cases in Stroud or Burrows dealing with 'deemed' are opposed to that construction."

In the view I take, however, it is not a question whether the word "paid" ordinarily includes "deemed to have been paid" but whether income deemed to have been paid by virtue of the provisions of the Act is to be treated for the purposes of the Act as actually paid. I can find nothing in the cases cited in Stroud's Judicial Dictionary (3rd Edn.) or Burrows' Words and Phrases opposed to the view I take. On the contrary, they appear to me to support it. It is true that the cases indicate that it is necessary

> "to ascertain for what purposes and between what persons the statutory fiction is to be resorted to"

(*Ex parte Walton* (4) (1881), 17 Ch. D. 746 at p. 756 and *G. v. Commissioner of Income Tax* (2)). But I do not see that that presents any difficulty here. The object of the legislature is clear. It is to prevent the use of certain devices

for the avoidance of tax. These devices are (*a*) accumulation of profits by a company, so that there is no dividend to include in the shareholders' taxable income, and (*b*) reduction of a taxpayer's income by means of settlements of capital on the taxpayer's children. It appears to me wholly consistent with the clear object of the legislature that notional income which, under s. 22 (1), falls to be included in the total income of a child arising under a settlement, should be included in the income of the settlor under s. 24, and that the persons to whom the statutory fiction arising under s. 22 applies must include the person made responsible by the legislature for payment of tax arising under a settlement to which s. 24 applies.

This brings me to the second ground of appeal, which is that the notional payment was not a payment "by virtue or in consequence" of a settlement. Counsel for the appellant conceded that if an actual payment of dividend had been made, it would have been a payment "by virtue or in consequence" of the settlement, but argued that in the case of a notional dividend it arose by virtue or in consequence of the action of the Commissioner of Income Tax and not by virtue of the settlement. I cannot accept that argument. It is true an act of the commissioner is necessary to create the notional dividend, but for that matter an act of the company is necessary to create an actual dividend. The fact remains that the notional dividend accrues to the particular infant by virtue of his holding shares settled on him under the settlement. I consider it clear that the notional dividend can only accrue to the particular child "by virtue or in consequence" of the settlement.

For the reasons given above I consider that both grounds of appeal fail. Some suggestion was made by counsel for the appellant to the effect that, if the appeal were dismissed, the question of costs might be affected if the reasoning of the learned judge in the court below were held to be unsound. I do, in fact, hold the view that that reasoning was unsound, but nevertheless I consider that the costs should follow the event. Accordingly I would order that the appeal be dismissed with costs.

Sir Kenneth O'connor P: I also agree. The appeal is dismissed with costs.

MacDuff J: I agree and have nothing to add.

For the appellant:
K Bechgaard
K Bechgaard, Nairobi

For the respondent:
JC Hooton (Deputy Legal Secretary, East Africa High Commission)

The Legal Secretary, East Africa High Commission

Quick Service Stores v Thakrar
[1958] 1 EA 357 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	13 June 1958
Case Number:	6/1957
Before:	Crawshaw J

Sourced by: LawAfrica

[1] Judgment – Amendment – No order for costs – Costs not asked for nor considered by court when judgment given – Application for correction of judgment to include costs under slip rule – Whether application competent – Civil Procedure Code, s. 152 (*T.*) *– Subordinate Courts Ordinance* (*Cap.* 3), *s.* 10 (*T.*).

Editor's Summary

The applicants were the successful defendants in an action in the district court, Dar-es-Salaam. When the magistrate gave judgment he made no order as to costs and no application for costs was made. Later the applicants applied to the magistrate under s. 152 of the Code of Civil Procedure, for the correction of an accidental error or omission in the judgment and decree which had not provided for the costs of the defendants. The magistrate dismissed the application and in his order expressly stated that no application for costs having been made to him when he gave judgment, he had never considered the question. The applicants then applied to the High Court for revision under s. 115 of the Code, asking that the order of the magistrate be set aside and that the costs of the action be awarded to the defendants. No application for revision was made under the Subordinate Courts Ordinance, s. 10.

Held –

(i) the magistrate, on his own admission, having given no consideration to the question of costs, the omission to make an order for costs was not an error arising in the judgment from an accidental slip or omission.

(ii) although the court could of its own motion exercise its power of revision under s. 10 of the Subordinate Courts Ordinance, the circumstances did not warrant that course, since the applicants had been represented by counsel, who had made no application for costs to the magistrate.

Application dismissed.

Case referred to in judgment:

(1) *Wilson v. Carter*, [1893] A.C. 638.

(2) *Hulbert v. Thurston*, [1931] W.N. 17.

Judgment

Crawshaw J: Judgment was given for the defendants in the district court of Dar-es-Salaam on July 2, 1957, but no order as to costs was made.

On August 28 the defendants applied to the trial magistrate under s. 152 of the Code of Civil Procedure

> "for the correction of an accidental error or omission in the judgment and decree dated July 2, 1957, in not providing for the costs of the defendants in two sets or at all in such manner as the honourable court may direct."

On August 30 the learned magistrate made the following order:

“No application in respect of costs having been made before me on July 2, 1957, when judgment herein was delivered, the question of costs has never been considered and no order in respect thereof ever made.

“It follows therefore, in my view, that this court cannot, under s. 152 of the Civil Procedure Code, now entertain an application for an award or order of costs.

> "I have had an opportunity of referring to O. 28, r. 11 of the rules of the Supreme Court at pp. 465 and 466 of the Annual Practice for 1957 and to the cases cited thereunder and these confirm me in my view that this application must be and is hereby dismissed."

On November 29 the defendants filed with the High Court an application for revision under s. 115 of the Code of Civil Procedure asking that the order of the learned magistrate of August 30 should be set aside and that costs of the suit be awarded to the defendants. For one reason or another, for which neither side blames the other, the hearing of this application has been delayed until now.

Section 152 of the Code of Civil Procedure reads:

> "Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the court either of its own motion or on the application of any of the parties."

On p. 360 of the 8th Edition of Mulla's Code of Civil Procedure there is a note to that section headed "Accidental Omissions", in the body of which is said,

> "Thus where direction as to costs were inadvertently omitted the decree was set right by adding the directions."

I have perused the case cited there and other authorities to which I have been referred by learned counsel for the applicants, and in my opinion the circumstances of the instant case are somewhat different in that no order at all was made as to costs, nor was mention made of them (except in the plaint) by counsel or the magistrate (although both counsel for the defence were present when the judgment was read), nor, in contradistinction to the case of *Wilson v. Carter* (1), [1893] A.C. 638, can it be said what the manifest intention of the magistrate was. In the cases which I have seen there was at least some provision as to costs, and the corrections were to perfect them. The total omission in the instant case cannot I think be described as an error arising in the judgment from an accident slip or omission. It is not clear from the order of the learned magistrate whether he wilfully omitted to make any order as to costs because they were not verbally asked for by either party, or whether he merely forgot. They were prayed for in the plaint and the court should have made an order, preferably perhaps after asking whether either party wished to be heard thereon. If the order had not followed the general practice of awarding costs to the successful party, reasons should have been given. In a note to O. 28, r. 11, of the English R.S.C. (which rule is substantially similar to our s. 152), in the 1958 Edition of the Annual Practice, it is said,

> "The error or omission must be an error in expressing the manifest intention of the court; . . ."

In *Hulbert v. Thurston* (2), [1931] W.N. 17 where an appeal was rejected, Scrutton, L.J. said:

> "That rule (O. 28, r. 11) was intended for the correction of an order which, as drawn up, did not express that which was decided by the court. It was quite possible that an order in the terms now asked for might have been made if an application had been made at the time, but no such application was made."

In fact in the instant case the court decided nothing in respect of costs for the simple reason that it never considered the matter. Nor can it be presumed what would have been the decision of the court, for costs are in the discretion of the court in exercise of which a number of factors may be relevant including the behaviour of the parties. I would observe here that two of the defendants in support of the application of August 28 made an affidavit in which they said:

> "3 That this accidental error or omission was detected at the time of the hearing of the application for bill of costs on August 24, 1957."

It is quite clear from the record however that their advocates were present when the judgment was read on July 2 and must therefore have been aware of the position, but surprisingly failed to make any application at the time.

Taking the view I do, I cannot allow this application. It seems to me that the proper procedure for the defendants was to appeal against the failure of the magistrate to award them costs in his judgment. That such an appeal would lie would appear from a note to s. 35 in Mulla which refers *inter alia* to cases

> "where there has been no real exercise of discretion in making the order as to costs."

It is obvious in the instant case that there has been no exercise of discretion.

Although no application has been made to this court to exercise its powers of revision under s. 10 of the Subordinate Courts Ordinance, Cap. 3, in respect of the failure of the magistrate to award costs to the applicants in his judgment, the court may of its own motion do so. Section 115 of the Code of Civil Procedure provides for revision only in cases where no appeal lies and so is not available to remedy the omission in the judgment. Mr. Kesaria for the respondent has submitted that it cannot either be used to review the decision of the learned magistrate of August 28, as it was not a "case . . . decided". He has not quoted authority for this, and in the absence thereof I am not prepared to say that this application was incompetent. Section 10 of Cap. 3 is not so limited to non-appealable matters, although where an appeal lies this court might well be less inclined to take the matter in revision. I do not think that in the circumstances of this case it should take the matter in revision. The applicants were represented by counsel, who, as I have said, made no application to the magistrate when they heard the judgment delivered. They had a right of appeal, but pursued what was in my opinion the wrong course. They still had time to appeal against the judgment after the magistrate refused their application, but instead they waited a full ninety days more before taking any further action, or nearly five months after judgment. No time limit is provided in s. 10 of Cap. 3, but laches is a matter which, I think, one is entitled to take into consideration.

I dismiss the application with costs to the respondent.

Application dismissed.

For the applicants:
NP Patel and *CG Patel*
CG Patel, Dar-es-Salaam

For the respondent:
RC Kesaria
RC Kesaria, Dar-es-Salaam

Bolton v Salim Khambi
[1958] 1 EA 360 (HCT)

Division: HM High Court for Tanganyika at Dar-Es-Salaam

Date of judgment: 23 June 1958

Case Number: 107/1957

Before: Crawshaw J

Sourced by: LawAfrica

[1] Fatal accident – Plaintiff suing as administrator and dependant – Grant of administration in England but none in Tanganyika – Validity of claim – Law Reform (*Fatal Accidents and Miscellaneous Provisions*) *Ordinance* (*Cap.* 360), *s.* 4(1), *s.* 6 *and s.* 9 (1) (*T.*).

Editor's Summary

The plaintiff's son was killed in a motor accident in Tanganyika. The plaintiff, who lived in England, was there granted letters of administration to his son's estate, and subsequently without having the grant resealed in Tanganyika, commenced proceedings there for damages under Parts II and III of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance. In the plaint the plaintiff claimed as administrator and as representing the dependants, and stated that the suit was brought on behalf of the plaintiff and his wife, as father and mother of the deceased, for damages in respect of injuries to the deceased and his death caused by the negligence of the defendant or his servants. The damages sought were for the dependants of the deceased, as well as for the estate. When the action came on for hearing the defendant's advocate submitted that the plaint should be rejected on the grounds that the plaintiff was incompetent to sue as administrator, since the grant had not been resealed and that a person cannot sue in two capacities, e.g., as dependant under Part II and as administrator under Part III. The plaintiff's advocate then asked leave to withdraw the claim made under Part III.

Held –

(i) a grant of administration in England does not authorize the administrator to sue as such in Tanganyika.

(ii) there is nothing in the Ordinance to prevent a person pursuing claims under Parts II and III in the same suit and in different capacities.

(iii) the plaintiff was suing in two different capacities, but under Part II he was suing as a dependant and not as administrator.

Preliminary objection overruled. Leave given to amend plaint.

Case referred to in judgment:

(1) *Finnegan v. Cementation Co. Ltd*., [1953] 1 All E.R. 1130.

(2) *Ingall v. Moran*, [1944] 1 All E.R. 97.

(3) *Kumar C. K. Roy v. P. K. and S. K. Dasi* (1910), 38 I.A. 7.

(4) *Sethna v. Hemingway* (1914), 38 Bom. 618.

(5) *Panayotis Nicolaus Catravas v. Khanubai Mohamed Ali Harji Bhanji*, [1957] E.A. 234 (C.A.)

(6) *Yelland v. Powell Duffryn Associated Collieries Limited*, [1941] 1 All E.R. 278; [1941] 1 K.B. 154.

(7) *Davies v. Powell Duffryn Associated Collieries Limited*, [1942] A.C. 601; (1942) 1 All E.R. 657.

(8) *Rose v. Ford*, [1937] 3 All E.R. 359; [1937] A.C. 852.

(9) *Stebbings v. Holst & Co. Ltd*., [1953] 1 All E.R. 925.

(10) *Hilton v. Sutton Steam Laundry*, [1945] 2 All E.R. 425.

Judgment

Crawshaw J: 1. This is a preliminary point in a suit by the plaintiff for damages under both Part II and Part III of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance, Cap. 360.

Section 4 (1), Part II of the Ordinance reads as follows–

> "4(1). Every action brought under the provisions of this Part shall be for the benefit of the dependants of the person whose death has been so caused, and shall be brought either by and in the name of the executor or administrator of the person deceased or by and in the name or names of all or any of the dependants (if more than one) of the person deceased,"

and Section 9 (1), Part III, excluding the proviso, and the material part of s. 9 (5) reads as follows–

> "9(1). Subject to the provisions of this section on the death of any person after the commencement of this Ordinance all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate:
>
> "(5). The rights conferred by this Part for the benefit of the estate of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by Part II . . ."

Section 1 (1) and s. 1 (5) of the English Law Reform (Miscellaneous Provisions) Act, 1934, is similar to our s. 9 (1) and s. 9 (5), whilst provisions having, for the purposes of this suit, substantially the same effect as our s. 4 (1) are to be found in the English Fatal Accidents Acts, 1846 to 1908.

2. The plaintiff, as father of Derek M. Bolton, who was killed in a motor car accident in 1956, has I understand, obtained letters of administration to the deceased's estate in England, but the grant has not yet been resealed in this Territory, or had not when these proceedings were last before me. Mr. Dodd, for the plaintiff, has asked leave to withdraw that part of his claim which comes under Part III, that is the damages asked for in item (iii) of the prayer to the plaint.

3. I have, with respect, found it a little difficult to follow some of Mr. Lockhart-Smith's arguments in this preliminary objection in which he maintains that the plaint should be wholly rejected. It is not difficult to follow his submission that the plaintiff is in fact suing under both parts of the Ordinance as administrator, and that as the letters of administration had not been resealed he was as incompetent to do so under Part II as he was under Part III. I understood him also to submit that claims under Part II and III could not be separated, because damages awarded in one part must take cognizance of those awarded in the other part, and that as the claim under Part III cannot be pursued as the plaintiff has no representation in Tanganyika to the estate of the deceased, the claim under Part II is incompetent whether the plaintiff is held to be suing as administrator or as dependant. He further objects that a person cannot sue in two different capacities–under Part III as administrator and under Part II as dependant. I may have misunderstood him, and that he meant the plaintiff must elect his capacity when suing under Part II.

4. There is no doubt that representation in England is not representation in Tanganyika and does not permit the administrator to institute proceedings here. An authority in point is the case of *Finnegan v. Cementation Co. Ltd.* (1), [1953] 1 All E.R. 1130, cited to me by Counsel, in which a widow who had obtained letters of administration in Ireland but not in England commenced proceedings in England under the Fatal Accidents Acts, in the title and statement of claim of which she described herself as "widow and administratrix" but in the endorsement to the writ claimed as "administratrix . . . on behalf of the dependants". She was held to be suing as administratrix and as such was unable to do so in

England. Nor, on the English authorities, will a grant made subsequent to the commencement of a suit relate back so as to validate the suit, for the suit is incurably a nullity from the beginning, on the ground that the plaintiff has no cause of action vested in him at that date (*Ingall v. Moran* (2), [1944] 1 All E.R. 97). Mr. Dodd has, however, cited to me two Indian cases, *Kumar C. K. Roy v. P. K. and S. K. Dasi* (3) (1910), 38 I.A. 7 and *Sethna v. Hemingway* (4) (1914), 38 Bom. 618, in which he submits a different view was taken, anyway on the law as it is in India and as it is applied to this Territory under the Indian Probate and Administration Act and Succession Act respectively. In view, however, of the withdrawal of that part of the claim which is made under Part III it is not necessary for me to come to a finding on this. Had it been necessary, consideration would have had to have been given to the principles applied in the case of *Panayotis Nicolaus Catravas v. Khanubai Mohamed Ali Harji Bhanji* (5), [1957] E.A. 234 (C.A.), in which it was held that in certain circumstances an action could be taken against the person appointed executor in a will although that person had not obtained probate.

5. I can see no reason why, if claims are made under Parts II and III they should be inseparable. One is for the benefit of dependants and the other for the benefit of the deceased's estate. As I see it they could be filed separately and by different parties. Admittedly an executor or administrator can sue in the one capacity under both parts, but it would be in respect of different interest although the beneficiaries might be the same. There is authority (in particular *Yelland v. Powell Duffryn Associated Collieries Limited* (6), [1941] 1 K.B. 154), for saying that although s. 9 (5) of Cap. 360 specifically makes the rights under Parts II and III additional to each other, if a dependant is also a beneficiary under the Estate of the deceased damages awarded under Part II would properly have to take into consideration damages under Part III, a decision which was followed by the House of Lords in *Davies v. Powell Duffryn Associated Collieries Limited* (7), [1942] A.C. 601. Lord Wright in *Rose v. Ford* (8), [1937] A.C. 825, said

> "I think in practice no duplication of damages need occur. I think the jury would be properly directed to take into account either that they were at the same time giving damages under Lord Campbell's Act as they did here, or that such damages might be or had been given"

and at page 295 of Clerk and Lindsell on Torts (10th Edn.), it is said–

> "The tribunal which is assessing the damages under the Act of 1934 must take into account the fact that damages under the Fatal Accidents Acts have been or may be given, for although the two claims are independent, and may accrue for the benefit of different persons, nevertheless if the provision for dependants is made good by awards under the Fatal Accidents Acts, the loss consequent on the shortening of life is to be deemed to be pro tanto reduced."

To that extent claims under the two parts might be said to be inseparable, but that does not mean that the remedies cannot be pursued separately or by persons in different capacities, and this view is supported in the two quotations above.

6. Nor can I see that there is anything wrong in a person suing in a dua capacity in the same suit. At page 293 of Clerk and Lindsell it is said,

> "In many cases the claims under these Acts (i.e. the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act), are tried at the same time and very often the claimants are the same in both cases."

The case of *Stebbings v. Holst & Co. Ltd.* (9), [1953] 1 All E.R. 925, is an example. Mr. Lockhart-Smith has said that this may be because the point has not before

been raised. I think the answer is that the tort which has to be proved by a plaintiff, whether suing as administrator or dependant, is based on precisely the same facts, and plurality of action would be unjustified. As Singleton, J., said in the *Finnegan* case (1),

> ". . . it matters not to the defendants in which capacity the plaintiff sues",

and he went on to say in effect that had it not been for the defendants being put in a worse position,

> "no unjustice would be done if this were regarded as an action by the widow and the question of administration were not considered."

The change of capacity was not there permitted for the period of one year (as it then was) after the deceased's death within which a suit under the Fatal Accidents Acts had to be brought had expired by the time the question came before the court (though the suit itself had been commenced within time), and to have allowed the amendment would have been to deprive the dependants of the benefit of the statutory limitation. Otherwise it would seem that the learned judge would have seen no objection to the suit being continued by the plaintiff as widow. The question of limitation does not arise in the instant case. In view of the possible inter-relation of damages between the two parts, I should have thought that in fact it would actually be desirable that claims under both parts should be heard together, irrespective of the capacity in which the claimants sued.

7. I agree that if the plaintiff is suing as administrator on behalf of the dependants under Part II then he has no more capacity to do so than as administrator on behalf of the estate under Part III, and under English Law the suit would have to be dismissed (*Hilton v. Sutton Steam Laundry* (10), [1945] 2 All E.R. 425). Again I do not have to come to a finding whether the position would be the same here, because for the following reasons I find he was not suing under Part II as administrator. In the title to the suit he is described merely by name. In paragraph 1 of the plaint he is stated to be the "father and administrator of the estate of the deceased". Paragraph 3 and para. 9 read as follows–

"(3). The plaintiff claims under the provisions of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance, 1955, as administrator of the estate of the deceased and as representing the dependants of the deceased for damages in respect of injuries to the deceased and his death caused by the negligence of the defendant or his servants, as more particularly averred in para. 5 and para. 7 hereof."

"(9). This suit is brought on behalf of the plaintiff himself as the father of the deceased and on behalf of Norah Bolton, the plaintiff's wife and the mother of the deceased."

The prayer asks for damages for dependants as well as the estate. The plaint could certainly have been more clearly and precisely worded, but for all that I think the only interpretation which can be put on it is that the plaintiff is suing in two different capacities. In the title there is nothing indicative of capacity. In para. 3 the important words are

> "The plaintiff claims . . . as administrator of the estate of the deceased and as representing the dependants . . ."

It seems to me that the grammatical meaning of this is that he is claiming in two different representative capacities, (*a*) as administrator of the estate and (*b*) in a personal capacity as representing the dependants. Paragraph 9 of the plaint is somewhat vague and not very helpful. It makes no mention of the

estate nor, specifically, of dependants, and one is left to conjecture that it is an attempt to set out who the dependants are. The *Stebbings* case (9) has much in common with the instant case. The plaintiff there was the widow of the deceased and one of the dependants. In the title to the writ she was described as "widow and administratrix" which were regarded by the court as merely describing her personal status and not her capacity. The material part of the endorsement reads–

> "The plaintiff's claim is for damages under the Fatal Accident Acts and the Law Reform (Miscellaneous Provisions) Act, 1934, as widow and administratrix of the estate of Alfred Stebbings, deceased . . ."

The defendants contended that this should have been construed as a declaration that the plaintiff was suing simply as administratrix in relation to both causes of action and that the words "as widow" should be disregarded as they were in conjunction with the words "the administratrix". Donovan, J., observed

> "If any words ought to be disregarded it is these latter words, for the plaintiff was not administratrix at the time".

It seems to me that in para. 3 of the instant plaint, the dual capacity of the plaintiff is more clearly shown than in the *Stebbings* case (9), especially when read with para. 1 and para.9. If there is any uncertainty it is rather, in view of the wording of para.9, whether the plaintiff was in fact purporting to sue as administrator on behalf of the estate, although I think the position would have been saved by the use of the word "and" after the words, "as administrator of the estate of the deceased". Paragraph 3 does not specifically say that the plaintiff is "representing the dependants" as a dependant himself although I think this must follow, but no exception I think has been taken to this by the defence which is, I suppose, satisfied with the particulars it has received under s. 6 of Cap. 360. I should however be prepared to grant leave to amend the plaint to make the position clear, a procedure which the learned judge in the *Stebbings* case (9) was prepared to follow had he not been satisfied that the endorsement sufficiently showed the capacity in which the plaintiff sued. In this connection he referred to the Rules of the Supreme Court, O.3 r. 4(1) which is substantially the same as our O. 7 r. 9(2) which reads–

> "9 (2). Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is sued."

Other relevant provisions affecting particulars to be given by a plaintiff are s. 6 of Cap. 360, which, *inter alia*, requires the plaintiff to deliver "full particulars of the person or persons for whom and on whose behalf" the action is brought, and O. 7 r. 4, which provides that in a representative suit the plaint shall show that the plaintiff has an interest in the subject matter of the suit, and O.7 r. 8, which reads–

> "8. Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds they shall be stated as far as can be separately and distinctly."

The preliminary objection is overruled, and the appropriate amendments to the plaint may be made.

Preliminary objection overruled. Leave given to amend plaint.

For the plaintiff:
HG Dodd
Dodd & Co, Dar-es-Salaam

For the defendant:
WJ Lockhart-Smith
WJ Lockhart-Smith, Dar-es-Salaam

R v Ismail Haji
[1958] 1 EA 365 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	21 July 1958
Case Number:	24/1958
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Street traffic – Commercial vehicle carrying unauthorised passengers – Particulars of offence – Omission of material averment – The Traffic Ordinance, 1951, *s.* 98 *and s.* 99 (*U.*).

Editor's Summary

This case was brought before the High Court on revision. The accused had been convicted by a magistrate on his plea of guilty of two offences under the Traffic Ordinance, 1951. The first count was for carrying unauthorised passengers on a commercial vehicle and the second count alleged that the accused had used a commercial vehicle on a road without a valid certificate of insurance contrary to s. 98 (1) and s. 102 of the Traffic Ordinance, 1951. The particulars of this count stated the accused being the owner of the vehicle "did permit it to be used on the road by carrying thereon three unauthorised passengers when not covered by a certificate of insurance to cover such persons for third party risks." No objection was taken at the trial to this count. The magistrate did not impose any disqualification under s. 98 (2) of the Ordinance nor did he record any special reasons for failing to do so.

Held –

(i) the second count was defective; the reference to s. 102 of the Traffic Ordinance was irrelevant and having regard to s. 99, the particulars should have stated that the passengers were carried for hire or reward, but since no objection had been taken to the count at the trail the court would apply s. 347 of the Criminal Procedure Code and vary the conviction.

(ii) contravention of s. 98 of the Ordinance involves an accused in disqualification from holding or obtaining a licence unless the court for special reasons otherwise orders, and since no reasons had been given by the accused he would be disqualified for twelve months.

Order accordingly.

No cases referred to in judgment

Judgment

Sir Audley McKisack CJ: In this case the accused was charged on two counts and pleaded guilty to both. The first was a count for carrying unauthorised passengers on a commercial vehicle, contra s. 77 of

the Traffic Ordinance, 1951. The second count was expressed as follows–

> "Using a commercial vehicle on a road without a valid certificate of insurance, contra s. 98 (1) and s. 102 of the Traffic Ordinance, 1951.
>
> "At the same time, date and place the above-named accused person being the owner of the above said vehicle, did permit it to be used on the road by carrying thereon three unauthorised passengers when not covered by a certificate of insurance to cover such persons for third party risks."

Of the two sections cited in this count, one of them, s. 102, appears wholly irrelevant; it provides that certain conditions in insurance policies limiting liability shall be of no effect. The other section cited, number 98, was correctly cited; it creates the offence of using or permitting the use of a vehicle on a road without a policy of insurance complying with the requirements of the Ordinance.

Section 99 of the Ordinance sets out the requirements in respect of insurance policies. It is expressly provided therein that (among other things) the policy is not required to cover non-paying passengers, but only passengers carried for hire or reward. The particulars of the second count in the present case do not, however, state that the three passengers were carried for hire or reward. They merely state that they were "unauthorised" passengers. Having regard to the first count (which was for carrying unauthorised passengers) I think the expression "unauthorised passengers" in the second count is to be construed in the same sense, i.e., as persons other than those permitted by s. 77 to be carried on a commercial vehicle (viz., the driver, the owner, and not more than three agents, servants or employees of the owner travelling free of charge in the course of their employment). It follows that, for the purposes of the second count, an "unauthorised" person is not necessarily a passenger carried for hire or reward, since he could be a person (other than an agent, servant or employee of the owner) who has been given a free lift, or a person who was an agent, servant or employee travelling free of charge but not in the course of his employment. The second should, therefore, have expressly stated that the passengers in question were carried for hire or reward.

No objection, however, was taken at the trial, and I do not consider that this defect in the second count is such that the conviction should be quashed, having regard to s. 347 of the Criminal Procedure Code. It suffices for me to vary the conviction to a contravention of s. 98 alone instead of s. 98 (1) and s. 102.

I hope, however, that police officers and magistrates will bear in mind what I have said when drawing charges for contravening s. 98 of the Traffic Ordinance, 1951.

A contravention of s. 98 involves, by virtue of sub-s. (2), disqualification for holding or obtaining a driving permit for a minimum period of twelve months unless the court for special reasons thinks fit to order otherwise. In the present case the court has neither imposed disqualification nor recorded special reasons. And this despite a note recorded by the magistrate that

> "the accused has no driving licence and has no reasons to justify why he should be disqualified (sic) from obtaining one for twelve months".

At the hearing of these revisional proceedings the accused had nothing to say on this point.

I order that he be disqualified for obtaining a driving permit for a period of twelve months from the date of conviction. What that date is does not appear from the record. According to the magistrate's note the proceedings began on "19.1.58", but this is clearly a slip since the offence was, according to the charge and to the particulars on the case file, committed on March 18, 1958. I direct the magistrate to enter the date of the conviction on the record and to notify the appropriate authorities of the date for the purpose of recording the disqualification. It should be noted that judgments are required to be dated as well as signed; see s. 169 (1) Criminal Procedure Code.

Order accordingly.

For the Crown:
HSS Few (Crown Counsel, Uganda)
The Attorney-General, Uganda

Accused in person.

Diwan Singh Kalsi v The Commissioner of Lands
[1958] 1 EA 367 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	11 July 1958
Case Number:	9/1957
Before:	Sir Kenneth O'Connor P, Briggs V-P and Sir Owen Corrie Ag JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Forbes, J

[1] Landlord and tenant – Crown grant of land on condition that building erected by specified time – No building commenced within a specified time – Subsequent approval of building plans on behalf of grantor – Action by grantor for forfeiture and re-entry – Whether approval of plans amounted to waiver of breach of condition – Crown Lands Ordinance (*Cap.* 155), *s.* 3, *s.* 5, *s.* 7, *s.* 83, *s.* 86 (*K.*) – *Registration of Titles Ordinance* (*Cap.* 160), *Sched. I, Form B* (*K.*) – *Kenya Colony Order in Council,* 1921, *art.* 4.

Editor's Summary

The appellant obtained a grant of land at Nairobi for the term of ninety-nine years from 1951, subject *inter alia* to certain special conditions providing for the erection of a building thereon within two years, the plans of which were to be approved before the building was constructed. The grant was in a form required by the Registration of Titles Ordinance, and was a unilateral document in which the stipulations are called "special conditions" and not "covenants". No building had been commenced within the two years, nor had the plans been prepared or passed. The plans, however, were submitted in 1955. Meanwhile the Commissioner of Lands gave notice in the *Gazette* that the appellant had failed to comply with the building condition, and notice was given under s. 83 of the Crown Lands Ordinance that the Commissioner intended within one month from service of notice to commence proceedings for recovery of the land and forfeiture. Despite the notice the building plans were, in April 1955, approved on behalf of the Commissioner, whereupon a contract was made by the appellant for construction of the building, and the foundations were laid. A year after the plans were approved, the Commissioner commenced proceedings and obtained a decree for forfeiture and re-entry. At the trial it was not argued that the Commissioner had waived the forfeiture by approval of the plans, but it was sought to do so on appeal. For the Commissioner it was argued that neither the Commissioner nor his staff had power to waive a forfeiture.

Held –

(i) since the question of waiver involved a substantial point of law, and no further evidence could have been adduced which would affect the decision thereon, it was expedient and in the interests of justice that the Appeal Court should entertain the plea of waiver. *Stool of Abinabina v. Chief Kojo,* [1953] A.C. 207 followed.

(ii) as a result of the breach of the building condition the grant was voidable at the option of the grantor, who must, in order to take advantage of the breach, do some unequivocal act notified to the lessee, indicating his intention to avail himself of the option given to him; the Commissioner could have re-entered or served on the appellant a plaint claiming ejectment, which would have been sufficient election to determine the grant, but before re-entry and before commencing proceedings, the agent of the Commissioner had approved the building plans; since the agent of the Commissioner so acted, with knowledge that there had been no compliance with the building condition, this amounted to an unequivocal act, from which, assuming the Commissioner had power to waive a forfeiture, an intention to waive the forfeiture would be presumed.

(iii) the Commissioner had power to waive a forfeiture under s. 5 of the Crown Lands Ordinance, and accordingly the appellant's contention that the Commissioner had waived the forfeiture must succeed.

Appeal allowed.

Case referred to in judgment:

(1) *The Commissioner of Lands v. Sheikh Mohamed Bashir*, [1958] E.A. 45, (C.A.).

(2) *Connecticut Fire Insurance Co. v. Kavanagh*, [1892] A.C. 473.

(3) *Stool of Abinabina v. Chief Kojo*, [1953] A.C. 207.

(4) *Elliott v. Boynton*, [1924] 1 Ch. 236.

(5) *Matthews v. Smallwood*, [1910] 1 Ch. 777.

(6) *Davenport v. R.* (1877), 3 App. Cas. 115.

(7) *Bevan v. Barnett* (1897), 13 T.L.R. 310.

(8) *Oak Property Co. Ltd. v. Chapman*, [1947] K.B. 886; [1947] 2 All E.R. 1.

(9) *Fuller's Theatre & Vaudeville Co. Ltd. v. Rofe*, [1923] A.C. 435.

(10) *Creery v. Summersell & Flowerdew & Co. Ltd.*, [1949] Ch. 751.

(11) *Doe d. Rankin v. Brindley*, 110 E.R. 387.

(12) *Stephens v. Junior Army & Navy Stores Ltd.*, [1914] 2 Ch. 516.

(13) *Jacob v. Down*, [1900] 2 Ch. 156.

July 11. The following judgments were read:

Judgment

Sir Kenneth O'Connor P: The Special Commissioner and Acting Commissioner of Lands (the respondent to this appeal) sued in the Supreme Court of Kenya for forfeiture of a Grant dated August 3, 1951, in favour of the appellant, for breach of a special condition requiring the appellant to build within a time limited in the condition. The respondent recovered judgment in the Supreme Court on November 30, 1956, and, on January 23, 1957, a decree was signed by which it was ordered that the appellant's lease be forfeited and that the respondent be at liberty to re-enter upon the land demised to the appellant and that the appellant should pay to the respondent the taxed costs of the suit. Against this judgment and decree the appellant appeals to this court.

The following are the relevant facts:

By a Grant dated August 3, 1951, the Governor, acting by the then Acting Commissioner of Lands, granted to the appellant a small piece of land in Nairobi for a term of ninety-nine years from May 1, 1951, subject to the payment of the annual rent reserved and to the provisions and conditions of the Crown Lands Ordinance (Chapter 155) (excepting Part XII thereof) and the Registration of Titles Ordinance (Chapter 160) and also to the special conditions thereunder written. The first of the special

conditions was:

> "1. The grantee shall erect and complete on the said land for use and occupation within two years of the date of the commencement of the term hereby granted a building of approved design on proper foundations constructed of stone burnt brick or concrete with roofing of tiles or such other permanent materials as may be approved by the Commissioner of Lands and shall maintain the same including the external paintwork in good and substantial tenantable repair and condition during the continuance of the term of the Grant."

This Grant was in the form set out in Form B. in the First Schedule to the Registration of Titles Ordinance (Cap. 160). It is, in form, an unilateral

document and the stipulations contained in it are termed “special conditions” and not “covenants”. It has recently been held by this court in *The Commissioner of Lands v. Sheikh Mohamed Bashir* (1), [1958] E.A. 45 (C.A.) that a document in this form, though termed a grant, is, in law a lease, and that a building stipulation in this form is, under the Crown Lands Ordinance, a condition, breach of which confers a right of re-entry upon the grantor, and is not merely a covenant, breach of which (unless there is an express proviso for re-entry) merely confers a right to recover damages. It was further held in *Bashir’s* case (1) that s. 83 of the Crown Lands Ordinance which is expressed to apply to breaches of lessee’s covenants, did not apply to breaches of conditions and that the court had no power under that section to relieve against breach of a building stipulation in a Crown grant in the present form.

The second of the special conditions in the Grant stipulated that no building should be erected on the land unless plans, drawings etc. should previously have been approved by the local authority

> “and by the Commissioner of Lands or such other person as he may appoint.”

Such plans were required to be submitted in triplicate to the local authority within three months of the date of commencement of the term of the Grant.

On May 1, 1953, the time expired within which the building should have been completed in accordance with the building condition in the Grant. At that date no building had been commenced; neither had plans been prepared or passed. The appellant in evidence advanced reasons for this delay which the learned judge in the court below did not consider to be sufficient grounds for granting relief under s. 83 of the Crown Lands Ordinance. At that date *Bashir’s* case (1) had not been decided and counsel and the learned trial judge all assumed that the building stipulation in the Grant was a covenant, that s. 83 of the Crown Lands Ordinance applied to it, and that the court had power under that section to grant relief against forfeiture for breach of the building stipulation. Having regard to the decision in *Bashir’s* case (1) it is not now necessary for us to consider whether the reasons advanced by the appellant for his delay constituted valid reasons for granting relief under s. 83, as we are bound by *Bashir’s* case (1) and, if that case was rightly decided, the court of trial had no power to relieve under that section against a forfeiture for breach of a building condition.

The further history of the matter is as follows:

Some time in 1954 the appellant instructed an architect to prepare plans. The plans were ready in 1955 and were submitted. On January 28, 1955, a notice was published in the *Gazette* (General Notice No. 209) over the signature of the Special Commissioner and Acting Commissioner of Lands to the effect that the appellant had failed to perform the building condition in the Grant within the stipulated time. Notice was given under s. 83 of the Crown Lands Ordinance that the Commissioner intended, within one month from the service of the notice, to commence an action in the Supreme Court for the recovery of the land and for a declaration that the lease be forfeited. This was before the decision in *Bashir’s* case (1) and it was thought that s. 83 of the Crown Lands Ordinance applied. The importance of the notice for purposes of this appeal is that it shows conclusively that, by January 28, 1955, if not before, the respondent had knowledge of the breach of the building condition in the Grant.

On April 13, 1955, notwithstanding the issue of the above-mentioned notice, building plans were approved on behalf of the Commissioner of Lands. A plan was produced and exhibited at the Trial (exhibit A) which bears upon it a stamp and signature “Approved. Fred V. Preston 13/4/55 for Commissioner of Lands”. Mr. Preston, who gave evidence, is a land assistant in the land

office. He said that he had approved the plans on April 13, 1955. He gave as his reason for so doing that they complied with the requirements of the lease and he could not, therefore, refuse approval. Clearly, they had not complied with the requirements of the Grant as regards time. Presumably, Mr. Preston meant that they represented the type of building which was called for by the building condition; but mere compliance with technical requirements does not compel the Commissioner or his representative to approve building plans which are submitted out of time. Mr. Preston or the Commissioner would have been quite justified in refusing to approve the plans, had he so wished. There is no suggestion that Mr. Preston was not the agent of the Commissioner to approve building plans or that he was acting outside the scope of his authority in approving them on behalf of the Commissioner. He had the actual building condition before him and must be assumed to have had knowledge of all its requirements. The substantial point raised in this appeal is whether the approval of building plans long after the time for building had expired did or did not amount to a waiver of the forfeiture for breach of the building condition in the Grant.

Having got his plans approved, the appellant let a contract for the building, and foundations were laid. On April 23, 1956, that is to say over a year after the approval of the plans, and over fifteen months after the issue of the *Gazetted* notice referred to above, a plaint was filed by the Commissioner claiming forfeiture of the Grant and an order for re-entry on the land. The appellant then suspended building operations.

As already mentioned, the substantial ground of appeal is that the learned trial judge erred in not holding that, on April 13, 1955, the respondent, by his approval of the building plans, waived the forfeiture arising from breach of the condition requiring erection of a building within two years from May 1, 1951. The learned judge can hardly be blamed for not deciding this point, since it was never raised in the court below. The first question, therefore, which we have to decide is whether it is open to the appellant to raise a plea of waiver now for the first time in the Court of Appeal. In *Connecticut Fire Insurance Co. v. Kavanagh* (2), [1892] A.C. 473 (P.C.) Lord Watson, delivering the judgment of the board said at p. 480:

> "When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interest of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below. But their lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea."

In *Stool of Abinabina v. Chief Kojo* (3), [1953] A.C. 207 (P.C.) at p. 215, their lordships said:

> "Neither of these points was taken in the West African courts. They could not, of course, have been taken before Jackson, J., since they emerged only from his judgment. They could have been taken before the West African Court of Appeal, but their lordships consider that as they involve substantial points of law, substantive or procedural, and it is plain that no further evidence could have been adduced which would affect the decision of them, the appellants should be allowed to raise them before this board."

This is not a court of last resort; but I think that the principles enunciated in the above-mentioned passages apply. The facts in the present case are either admitted or proved beyond controversy: a substantial point of law is involved: and it seems plain that no further evidence could have been adduced which would affect the decision of it. In the circumstances, I think that it is not only competent, but expedient in the interests of justice, that this court should now entertain the plea of waiver. All facts relevant to this issue had been pleaded.

The effect of the breach of the building condition in the Grant was that the Grant was voidable at the option of the grantor who must, in order to take advantage of the breach, do some unequivocal act notified to the lessee, indicating his intention to avail himself of the option given to him. The Commissioner of Lands could have re-entered: or the service of a plaint claming ejectment would have been a sufficient election to determine the Grant: *Elliott v. Boynton* (4), [1924] 1 Ch. 236; and see *Bashir's* case (1) where the authorities are reviewed. But, before re-entry and before the issue of the plaint in the suit, the agent of the Commissioner of Lands (both the agent and the principal having full knowledge of the breach of the building condition) had approved building plans. Did this amount to waiver of the forfeiture?

In *Matthews v. Smallwood* (5), [1910] 1 Ch. 777 at p. 786 Parker, J., said:

> "Waiver of a right of re-entry can only occur where the lessor, with knowledge of the facts upon which his right to re-enter arises, does some unequivocal act recognising the continued existence of the lease. It is not enough that he should do the act which recognises, or appears to recognise, the continued existence of the lease, unless, at the time when the act is done, he has knowledge of the facts under which, or from which, his right of entry arose. Therefore we get the principle that, though an act of waiver operates with regard to all known breaches, it does not operate with regard to breaches which were unknown to the lessor at the time when the act took place. It is also, I think, reasonably clear upon the cases that whether the act, coupled with the knowledge, constitutes a waiver is a question which the law decides, and therefore it is not open to a lessor who has knowledge of the breach to say 'I will treat the tenancy as existing, and I will receive the rent, or I will take advantage of my power as landlord to distrain; but I tell you that all I shall do will be without prejudice to my right to re-enter, which I intend to reserve'. This is a position which he is not entitled to take up. If, knowing of the breach, he does distrain, or does receive the rent, then by law he waives the breach, and nothing which he can say by way of protest against the law will avail him anything."

It seems that a waiver of a lessor's right to re-enter may arise from the doing by the lessor, with knowledge of the facts upon which his right to re-enter arises, of some unequivocal act recognising the continued existence of the lease, notwithstanding that the lessor's actual intention may not be to effectuate a waiver. Once the unequivocal act is done, with knowledge, the law presumes an intention to waive the forfeiture: *Matthews v. Smallwood* (5); *Davenport v. R.* (6) (1877), 3 App. Cas. 115, 131, 132; *Bevan v. Barnett* (7) (1897), 13 T.L.R. 310. Different considerations apply where the tenancy is a statutory tenancy: *Oak Property Co. Ltd. v. Chapman* (8), [1947] 1 K.B. 886, 898, 899. *Matthews v. Smallwood* (5) was approved by the Privy Council in *Fuller's Theatre & Vaudeville Co. Ltd. v. Rofe* (9), [1923] A.C. 435, 443. There are dicta of Harman, J., in *Creery v. Summersell* (10), [1949] 1 Ch. 751, which indicate that the actual, and not the presumed, intention is the governing consideration. That was a case of a lawyer's clerk who sent off a routine demand for rent without instructions and without knowledge of the forfeiture, though his principal was aware of it. In the present case, Mr. Preston had the building

condition before him and must have had knowledge that it had not been complied with within the time stipulated. I think that *Creery v. Summersell* (10) is distinguishable on the facts. But, if there is a conflict between *Creery v. Summersell* (10) and *Matthews v. Smallwood* (5), which, as already mentioned, has been approved by the Privy Council in *Fuller's Theatre v. Rofe* (9), I am bound to follow *Matthews v. Smallwood* (5). The learned author of Woodfall On Landlord And Tenant (25th Edn.) at p. 997 note (*q*) says of *Creery v. Summersell* (10):

> "This was an exceptional case on special facts and does not affect the general principle that the law will, where the lessor or his duly authorised agent has with knowledge done some unequivocal act, presume an intention to waive the forfeiture, whatever the lessor's actual intention may be."

I think, on the authorities, that this comment is justified. In my opinion, the approval by Mr. Preston on behalf of the Commissioner of Lands of the appellant's building plans, "because they complied with the requirements of the lease", with knowledge of the breach of the building condition, can only be described as an unequivocal act recognising the continued existence of the tenancy, and since Mr. Preston's approval must have been given with knowledge that the building had not been completed within the time stipulated and the *Gazetted* notice shows that the Commissioner had this knowledge, this amounted to a waiver of the forfeiture for breach of that condition. I am assuming, for the moment, that the Commissioner had power to waive forfeitures, a question which will presently be discussed.

I think that the evidence would have supported a finding that there was, on April 13, 1955, when the plans were approved, not only a presumed intention to allow the appellant to build; but that this was the actual intention, provided that the appellant then showed reasonable diligence. No other explanation has been advanced for the failure of the respondent to commence the suit until a period of over fifteen months had elapsed from the date of the notice saying that it would be commenced within a month, and over twelve months from the date of the approval of the plans. There is, however, no finding of fact on this point. But, if I am correct in holding that, whatever was the actual intention, the law presumes, from the approval of the building plans an intention to waive the forfeiture, no such finding is necessary.

Mr. Gledhill, for the respondent, relied on *Doe d. Rankin v. Brindlev* (11), 110 E.R. 387. That was a case of a repairing covenant and was decided on special facts. I do not think that it assists the respondent.

Mr. Gledhill further argued that neither Mr. Preston nor the Commissioner of Lands had power to waive a forfeiture: only the Governor had this power. Mr. Gledhill based his argument on the provisions of paragraph (ii) and (iii) of s. 3 and the proviso to s. 7 of the Crown Lands Ordinance. These provisions, so far as material, read:

> "3. The Governor . . . may–
>
> > "(i) wholly or partially remit, except where otherwise provided, all or any of the covenants, agreements or conditions contained in any lease . . . where, owing to special circumstances, compliance therewith would be impossible or great hardship would be inflicted upon the . . . lessee;
> >
> > "(iii) extend, except as otherwise provided, the time to the . . . lessee . . . for performing the conditions contained in any . . . lease liable to revocation . . . for such period, and upon such terms and conditions as he may think fit . . .
>
> "7. The Commissioner may, subject to any general or special directions from the Governor, execute for and on behalf of the Governor . . . any . . .

> lease of or for the occupation of Crown lands, and do any act or thing, exercise any power . . . which may be done, exercised . . . by the Governor under this Ordinance:
>
> "Provided, however, that nothing in this section shall be deemed to authorise the Commissioner to exercise any of the powers conferred upon the Governor by s. 3 . . . of this Ordinance."

Mr. Gledhill argued that, as only the Governor can remit the performance of a condition in a lease or extend the time for performing it, neither the Commissioner of Lands (who is prohibited by the proviso to s. 7 from exercising those powers) nor Mr. Preston had power expressly to waive performance of the building condition; and, if they could not have waived performance of the condition expressly, they cannot be deemed to have waived its performance impliedly: an intention to do something that they had no power to do cannot be presumed.

It will be observed that s. 3 (ii) deals with remission of a covenant or condition where, owing to special circumstances, compliance with it would be impossible or cause great hardship: in such circumstances performance of the condition may be excused by the Governor, and only by the Governor. There was no question in the present case of remitting the building condition on the ground that compliance with it would be impossible or would inflict hardship upon the appellant. On this narrow ground paragraph (ii) of s. 3 would not apply. But, in truth, I do not think that either paragraph (ii) or paragraph (iii) of section 3 has any application to a waiver effectuated by operation of law by reason of receipt of rent or other unequivocal act presumed to show an intention to treat a tenancy as subsisting. Those paragraphs empower the Governor to remit covenants, conditions, etc., or to extend time for their performance. *Prima facie* the operation of this is prospective. Nothing is said about remitting the consequences of breaches of covenant or condition already committed. Waiver of forfeitures is not mentioned in s. 3 either expressly or by necessary intendment. Where the Ordinance intends to deal with waiver, it uses the word waiver, as in s. 86 which reads:

> "86. The acceptance by or on behalf of the Crown of any purchase money or part thereof or of any rent or other payment under any lease or licence shall not be held to operate as a waiver by the Crown of any forfeiture accruing by reason of the breach of any covenant or condition annexed to any sale, lease or licence of or respecting Crown land whether the sale, lease or licence be under this Ordinance or under any other Ordinance relating to the disposal of Crown land."

There is no reason for construing the words "acceptance by or on behalf of the Crown" as meaning "acceptance by the Governor by or on behalf of the Crown". People do not normally pay their rents for Crown lands to the Governor personally, but to the land office. If forfeitures could only be waived by the Governor acting personally, it would seem to be quite unnecessary to enact a provision that receipt of rent on behalf of the Crown (which must mean receipt by the land office) should not be held to operate as a waiver of a forfeiture. Section 86 seems to indicate that the legislature considered that, unless this was negative by express statutory provision, receipt of rent by some official in the land office acting on behalf of the Crown would operate as a waiver of a forfeiture notwithstanding the existence of s. 3. The legislature, by s. 86, negatived the operation of the ordinary law of waiver by acceptance of rent; but said nothing to negative the operation of the ordinary law regarding waiver of forfeitures by other unequivocal acts indicating an intention to regard the tenancy as subsisting. I think that the expressio unius maxim must apply and that this omission must be deemed to be deliberate and to

express the intention of the legislature. In my view, s. 3 has nothing to do with waiver of forfeitures for breaches of condition effected by operation of law as the result of the doing, by or on behalf of the Crown, with knowledge of the breach, of an unequivocal act recognising the continued existence of the tenancy. That is regulated by the common law and the doctrines of equity as applied by art. 4 of the Kenya Colony Order in Council, 1921. The only provision in the Ordinance dealing with waiver of forfeitures for breach of covenant or condition is s. 86 and s. 86 is confined to waivers arising by reason of receipt of rent.

In my opinion, s. 5 of the Crown Lands Ordinance applies to this case and either the Commissioner, or Mr. Preston (acting on behalf of the Commissioner, with authority to approve building plans and acting within the scope of his authority) could waive a forfeiture for breach of the building condition. This Mr. Preston did, by approving, with knowledge of the facts, the appellant's building plans out of time. I think that the appellant's contention as to waiver must succeed.

An express covenant or condition requiring a lessee or grantee to build within a certain time can only be broken once. Failure to build within that time is not a continuing breach. This position is not affected by the presence of a repairing covenant, when the buildings to be kept in repair have not been erected: *Stephens v. Junior Army & Navy Stores* (12), [1914] 2 Ch. 516 (C.A.) disapproving dicta to the contrary by Stirling, J., in *Jacob v. Down* (13), [1900] 2 Ch. 156. The respondent's right to re-enter for breach of the building condition has been waived once and for all. But that would not affect his right to claim damages for the breach in another action, if so advised. *Stephens v. Junior Army & Navy Stores* (12).

As the appellant has succeeded on the issue of waiver of the forfeiture, it is unnecessary to deal with the other points raised in his memorandum of appeal.

I would allow the appeal and set aside the judgment and decree appealed from. The appellant should have his costs both here and below to be taxed.

It may not be out of place to draw attention to some unsatisfactory features of the law relating to Crown Lands, which have been revealed in recent decisions. I understand that *Bashir's* case (1) is the subject of an appeal to the Privy Council. Should that case and this prove to have been rightly decided, it may be that the authorities will consider amending the Crown Lands Ordinance in various respects and, in particular, so as to deal with the subject of waiver of, and relief against, forfeiture for breach of condition. It seems to have been the intention, before the coming into operation of the Registration of Titles Ordinance when town lands were demised by leases under the Crown Lands Ordinance containing lessee's covenants, that the court should have power to relieve against forfeiture for breaches of covenant, and s. 83 of the Crown Lands Ordinance so provides. Now that town lands are demised by grants upon conditions under the Registration of Titles Ordinance, s. 83 no longer applies and the courts cannot grant relief, at least against breaches of building conditions, and possibly cannot relieve against breaches of other, quite minor, conditions. It would seem that there should be power to grant relief against forfeiture for breach of at least some of the conditions normally inserted in Grants of Crown Land. It may be that the authorities will consider that the time has come to rectify these matters by legislation.

Briggs V-P: I concur.

Sir Owen Corrie Ag JA: I also concur.

Appeal allowed.

For the appellant:
I Lean
Shapley, Barret, Allin & Co, Nairobi

For the respondent:
J Gledhill
Gledhill & Oulton, Nairobi

Riddlesbarger and another v Robson and others
[1958] 1 EA 375 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	16 July 1958
Case Number:	20/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Connell, J

[1] Practice – Service – Libel action brought in Kenya alleging publication elsewhere – Service in Kenya on foreign company and foreigner – Company's managing director served whilst in Kenya on company's business – Foreigner served whilst in transit through Kenya – Validity of service – Whether Supreme Court has jurisdiction over foreigners in respect of torts not arising within Kenya – Kenya Colony Order in Council, 1921*, art.* 4 *– British Settlements Act,* 1887*, s.* 2 *– Civil Procedure Ordinance* (*Cap.* 5)*, s.* 12*, s.* 13*, s.* 14*, s.* 15 *and s.* 81 (*K.*) *– Companies Ordinance* (*Cap.* 288)*, s.* 327 (*K.*) *– Civil Procedure* (*Revised*) *Rules,* 1948*, O.XVIII, r.* 2 *and O.XXVIII r.* 2 (*K.*).

Editor's Summary

The appellants and respondents were all financially interested in the P. company, which had been incorporated and carried on business in Kenya. The respondents, all of whom were former directors of the P. company, brought an action alleging libel by the appellants, contained in two letters written by the first appellant on behalf of the second appellant, to persons in the United States. The first appellant was a foreigner resident in Tanganyika, where the second appellant, a company incorporated in Tangier, had a place of business. The first appellant, as a director of the second appellant, habitually visited Kenya on the affairs of the P. company, in which the second appellant had a substantial investment, and the managing director of the second appellant, when the action was begun, had been living for some months in Kenya, and had been concerned on behalf of the second appellant in the affairs of the P. company, but the second appellant had not complied with s. 327 of the Companies Ordinance. Service of the plaint claiming damages for libel was effected on the first appellant at Eastleigh Airport, Nairobi, whilst he was in transit through Kenya, and upon the second appellant by serving the managing director thereof at

Nairobi. The appellants entered appearance, under protest, and moved for service to be set aside, on the grounds that the wrong alleged was not done in Kenya, and that neither appellant was ordinarily resident or domiciled there, and had not submitted to or become amenable to the jurisdiction of the Supreme Court of Kenya for the purposes of the alleged wrong. In reply to an affidavit of the managing director of the second appellant, which had set out the facts relative to service upon both appellants, one H., an advocate and partner of the first respondent, swore an affidavit which purported to show that both appellants were engaged in business in Kenya and that the second appellant had a postal address and banking account at Nairobi, and two additional affidavits were filed for the respondents by attornies at law, practising in the United States, which were to the effect that the alleged libels would be wrongful and actionable in the states of New York and California. On the hearing of the motion to set aside service, it was argued that the appellants were strangers and were not carrying on business within the jurisdiction, and that the Supreme Court had no jurisdiction over strangers, and in any event, that jurisdiction was limited by s. 15 of the Civil Procedure Ordinance. The judge rejected these submissions, held that both appellants had been properly served and dismissed the motion, whereupon an appeal was brought on the same grounds.

Held –

(i) the Kenya Colony Order in Council, 1921, confers jurisdiction not only over matters, but also over persons who are within the Colony, including strangers and foreigners.

(ii) s. 15 of the Civil Procedure Ordinance applies only to subordinate courts.

(iii) the principles of the Common Law are applicable to an action of this nature by virtue of art. 4 of the Order in Council, and accordingly and action will lie in Kenya for a libel published abroad if the libel was wrongful and actionable both in Kenya and the country of publication. *Machado v. Fontes*, [1897] 2 Q.B. 231 and *Carrick v. Hancock* (1895), 12 T.L.R. 59 adopted.

(iv) since the first appellant had been served whilst voluntarily within the Colony, and there was the uncontradicted evidence of an affidavit that the second appellant had been carrying on business in the Colony, the appellants were properly served.

Appeal dismissed.

Case referred to in judgment:

(1) *Velji Manji v. Arjan Bechar* (1933), 15 K.L.R. 92.

(2) *Machado v. Fontes*, [1897] 2 Q.B. 231.

(3) *Commissioner of Stamps, Straits Settlements v. Oei Tjong Swan*, [1933] A.C. 378.

(4) *Carrick v. Hancock* (1895), 12 T.L.R. 59.

July 16. The following judgments were read by direction of the court:

Judgment

Forbes JA: This is an appeal against an order of the Supreme Court of Kenya dismissing an application to set aside the summons, plaint and subsequent proceedings in an action for damages for alleged libel.

The libel complained of is alleged to have been written and published by the appellant Riddlesbarger on behalf of the appellant company, and arises out of the affairs of a company called Phoenix Productions Limited (which I shall refer to as Phoenix) incorporated in Kenya to carry on business there as motion picture producers. The three respondents, who are the plaintiffs in the action, were at all material times directors of Phoenix. The appellant Riddlesbarger is described in the plaint as a financier and company director and a director and/or shareholder of the appellant company, ordinarily residing at Oldeani, Moshi, Tanganyika Territory. The appellant company is described as a limited liability company incorporated in Tangier and carrying on business *inter alia* at Moshi, Tanganyika Territory, and at Nairobi as financiers. It is alleged, in para. 6 of the plaint, that the appellant Riddlesbarger and the appellant company were at all material times financially interested in Phoenix; that the appellant company having from time to time made advances to Phoenix for the purposes of its business and being also at all material times a creditor of and shareholder in Phoenix, the appellant Riddlesbarger as a director and/or shareholder of the defendant company, habitually and actively from July 1955 to August 1957 concerned himself with the business affairs and projects of Phoenix and acted for and represented himself as authorised to act for the appellant company in its business relations with Phoenix. The words

complained of are alleged to be contained in two letters written by the appellant Riddlesbarger on behalf of the appellant company to persons in the United States of America. The publications alleged took place, in the case of one letter, in the State of California, and in the case of the other letter, in the State of New York. There is no allegation in the plaint as to where the letters were written.

The manner in which service on the appellants was effected is stated in the affidavit of Robert Charles Kohser, which is set out below. The appellants entered appearances under protest, and then applied by way of motion for the setting aside of the proceedings, the grounds being (*a*) that the wrong alleged was not done within the Colony; (*b*) that neither of the appellants was ordinarily resident or domiciled in the Colony; and (*c*) that neither of the appellants had otherwise submitted to the jurisdiction of the Supreme Court of Kenya or become amenable thereto for the purposes of the wrong complained of in the action. This application was supported by the affidavit of Robert Charles Kohser, who describes himself as a company director, of Room 309, New Stanley, Nairobi. Kohser states as follows in the affidavit:

> "1. I am a director and a shareholder of and in the second defendant company above-named, and am duly authorised to make this affidavit on behalf of both the defendants above-named.
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> "2. The tort of libel, and the publication thereof, alleged in this suit, were committed according to the plaint wholly outside the Colony of Kenya, namely in America, and the damage said to flow therefrom is alleged partly to have arisen in the Colony.
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> "3. Neither of the defendants above-named is ordinarily resident or domiciled within the Colony.
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> "4. The summons herein was served upon the first defendant at the Eastleigh Airport, on August 28, 1957, between 6.30 and 7.00 p.m. when he was in transit upon a six weeks' vacation to Beirut from Moshi, Tanganyika Territory, where he ordinarily resides. I was in the building when service was effected, although I did not see the actual act of service, and the summons was shown to me by the first defendant above-named shortly thereafter.
>
> "5. The summons upon the second defendant company was effected, by serving the same upon me on behalf of the said company, on August 29, 1957, between 3 and 4 p.m. in the foyer of the New Stanley Hotel, Nairobi.
>
> "6. The second defendant company above-named has no registered office in the Colony, nor does it have any place in the Colony, where it carries on business, nor has it delivered to the Registrar of Companies in the Colony, any names or addresses of any persons resident in the Colony authorised to accept on its behalf service of any process or notices.
>
> "7. The said second defendant company abovenamed, I am advised by my advocate and verily I believe, does not itself submit, as a corporation ordinarily resident and comiciled in Tangier, as a foreign company, to the jurisdiction of this court by my mere presence in the Colony, and my being an officer thereof.
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> "8. I am an American citizen, temporarily residing in the Colony, and am the holder of a visitors pass under the Immigration Control Regulations of the Colony."

An affidavit by John Philip Gladstone Harris was filed in reply, in which Harris states:

> "1. I am an advocate of Her Majesty's Supreme Court of Kenya and a partner in the firm of Robson, Harris & Co., Advocates, of Lullington House, Nairobi, of which firm the plaintiff Robson in this suit is senior partner.
>
> "2. I am well acquainted with the defendant Riddlesbarger and with the defendant company, and from December 29, 1955, until on or about March 6, 1957, I was a director of Phoenix Productions Limited, which

is referred to in the plaint filed in this suit and is a company incorporated in Kenya and for some time past carrying on business there.

"3. I have read what purports to be a copy of the affidavit of Robert Charles Kohser sworn at Nairobi on September 5, 1957, and filed herein, and with reference to para. 4 thereof it is within my personal knowledge that the defendant Riddlesbarger has been in Nairobi and has transacted business there personally and as a director of the defendant company since the beginning of 1957 on at least the following occasions, namely: March 4, 5, 9 and 12, and April 18, 19 and 24, and June 20, 1957 and at meetings at Nairobi of the directors of Phoenix Productions Limited held on April 18 and 19, 1957, the said Riddlesbarger has represented himself and the said Robert Charles Kohser as acting for and representing the defendant company.

"4. In answer to para. 6 and para. 7 of the said affidavit of Robert Charles Kohser, I say that the said Robert Charles Kohser, having arrived in Nairobi early in March, 1957, has been normally resident in Nairobi from that time until the date hereof, and to the best of my knowledge, information and belief has been engaged as managing director on the business of the defendant company at Nairobi since March 1957, which has included participation in the affairs of the said Phoenix Productions Limited, a company in which the defendant company has invested the sum of £80,000 or thereabouts.

"5. The sources of my said knowledge, information and belief are the following:

(*a*) I am informed by the plaintiff Perkins and verily believe that on March 16, 1957, the said Robert Charles Kohser at Nairobi wrote to the plaintiff Perkins a letter, a copy of which is annexed hereto and for the purpose of identification marked 'JPGH-1', in which the said Robert Charles Kohser used the words 'I am writing this letter on the authority of the Board of Farrab Inc., and as managing Director', and that the said Robert Charles Kohser delivered such letter in person to the plaintiff Perkins at the dwelling house of the plaintiff Perkins at Karen.

(*b*) Negotiations in which I participated took place at Nairobi between March 15 and April 13, 1957, by and on behalf of the plaintiffs on the one hand and by and on behalf of the defendant Riddlesbarger and the defendant company on the other hand. I am informed by the plaintiff Breakston and by my junior partner in the said firm of Robson, Harris & Co., namely Alan William Robson, and verily believe that at a meeting held at my said firm's office on March 15, 1957, the said Robert Charles Kohser was present representing the defendant company. On March 19, 1957, I was with the plaintiff Robson present at a meeting at the office of Messrs. Hamilton, Harrison & Mathews, Advocates, with Frank Ben Derwent Moger, a partner in the said last mentioned firm, when the said Moger discussed on behalf of the defendant company, which his said firm then represented, certain disputes between the defendant company and the plaintiffs in this suit, and it was made clear to me at that meeting by the said Moger that his said firm was only instructed by the defendant company and on its behalf by the said Robert Charles Kohser. I have also read certain subsequent correspondence exchanged between my said firm and Messrs. Hamilton, Harrison & Mathews representing the defendant company which formed part of such negotiations, and from all the

forgoing I say that the said Robert Charles Kohser, as managing director of the defendant company, was concerned in such negotiations at Nairobi on behalf of the defendant company.

(*c*) It is within my personal knowledge that the defendant company has for some months past conducted correspondence with other persons, both in Nairobi and overseas, and in particular with the official receiver in bankruptcy, and one George G. Hoff, the legal adviser of and employed by Paramount International Films, Inc., of New York, United States of America, in which the defendant company has requested that replies to its letters be addressed to the defendant company at Post Office Box No. 8658, Nairobi.

(*d*) By an affidavit sworn the 3rd day of June, 1957, and filed in Her Majesty's Supreme Court of Kenya at Nairobi in Winding-up Cause No. 24 of 1957 entitled 'In the matter of Phoenix Productions Limited', a copy of which I have read, the said Robert Charles Kohser describes himself as 'of Nairobi in the Colony of Kenya' and in para. 1 of the said affidavit he refers to himself as a director and shareholder of the defendant company and in para. 31 of the said affidavit with reference to the affairs of the said Phoenix Productions Limited the said Robert Charles Kohser depones as follows:

'31. No objects of the company have been violated by the FARRAB group, who have come at the helm of affairs by election, unanimous consent, and without dissension on the part of the Breakston group.

'Further such administration as has been conducted by the FARRAB group is strictly in accord with statutory requirements.'

(*e*) Since the arrival of the said Robert Charles Kohser at Nairobi in March, 1957, he has resided at the New Stanley Hotel there, at which hotel it is within my knowledge that the defendant Riddlesbarger has also stayed from time to time from 1955 to 1957 on the occasion of his visits to Nairobi.

(*f*) I am also aware that the defendant company has had during the year 1957 banking accounts both at the National Bank of India Limited, Government Road, Nairobi, and at the Standard Bank of South Africa Limited, Delamere Avenue, Nairobi, but I am unable to state for how long such accounts have been maintained at the said banks."

Two further affidavits, made by licensed attorneys-at-law practising respectively in the State of New York and in the State of California, were filed by the respondents. These affidavits are to the effect that the alleged libels, if published in either of those states and if shown to be malicious and untrue, would be wrongful and actionable as defamatory in those states.

No further affidavit was filed in reply to Harris' affidavit, nor was any application made to cross-examine Harris, as could have been done under O.XVIII r. 2 of the Civil Procedure (Revised) Rules, 1948.

The learned judge in the court below, in dismissing the application, held that both the appellants had been properly served and were amenable to the jurisdiction of the Supreme Court. So far as the appellant Riddlesbarger is concerned, the learned judge followed the decision of the Supreme Court of Kenya in *Velji Manji v. Arjan Bechar* (1) (1933), 15 K.L.R. 92, to the effect that in an action in personam, provided the defendant is within the territory, for however short a time, the court has jurisdiction. As regards the appellant company, the learned judge dealt with the matter as follows:

"O.XXVIII r. 2 prescribes that subject to any statutory provision regulating service of process, where the suit is against a Corporation the summons may be served (*a*) on the secretary or any director or other principal officer of the Corporation or (*b*) by leaving the summons or sending at or [sic] to the registered office or place where the corporation carries on business. O.XXVIII must I think be read with s. 19 Civil Procedure Code; s. 327 of the Companies Ordinance, relied on by Mr. Khanna does not assist the problem, it is not comprehensive as to how a foreign corporation can be validly served. It is not contested that R. C. Kohser is managing director of the defendant corporation, that the defendant corporation during 1957 kept banking accounts at two banks in Nairobi, that Kohser resided in the New Stanley Hotel since March, 1957, that the defendant corporation requested replies to its letters be addressed to P.O. Box 8658, Nairobi. Nor is it contested (see para. 3 of Mr. Harris' affidavit) that defendant Riddlesbarger has in Nairobi transacted business there personally and as director of the defendant corporation since the beginning of 1957 on eight separate days between March and June; the last are weighty allegations and I think of even greater moment than the allegations in para. 4 and para. 5 of Mr. Harris' affidavit. The allegations are not denied; Mr. Kohser in fact in his affidavit merely takes up the position that neither defendant is ordinarily resident or domiciled in the Colony and that the defendant corporation has no registered office in the Colony, nor does it have a place where it carries on business. Mr. Salter has referred to the notes to s. 20 Indian Civil Procedure Code, which is similar to our s. 15; at p. 118 and p. 119 Mulla (12th Edn.) it is said that the phrase 'carries on business' means 'having an interest in a business at that place, a voice in what is done, a share in the gain or loss and some control if not over the actual method of working at any rate upon the existence of the business.'

"I have examined carefully the English cases referred to by Mr. Khanna and Mr. Salter. In *Dunlop v. A. G. Cudell & Co*., [1902] 1 K.B. at p. 346 Collins, M.R. states: 'It has been held in a number of cases beginning with *Newby v. Van Oppen* ending with the case of *La Bourgoyne* that the true test in such cases is whether the foreign corporation is conducting its own business at some fixed place within the jurisdiction, that being the only way in which a corporation can reside in this country. It can only so reside through its agent, not being a concrete entity itself; but if it so resides by its agent, it must be considered for this purpose as itself residing within the jurisdiction.' Mr. Khanna strongly relied on *Deverall's* case, [1954] 3 A.E.R. 389; the facts there were different and the procedure somewhat different but one of the questions was whether the American corporation sought to be served had an established place of business in the United Kingdom. At p. 395 Jenkins, L.J., states 'whether the place at which service is sought to be effected is an existing is an existing place of business for that purpose must, no doubt, depend on the facts of any particular case. There might for instance be an oversea company which had traded at a particular place and had contracted and otherwise carried on business by correspondence on notepaper bearing the address of that place, or had allowed its name to appear in a telephone directory or in some other form of directory as carrying on business at that address. In such a case as that, where a company has held itself out as carrying on business at a given address, it may well be, that if it has done nothing in the way of giving notice to the contrary to persons dealing with it, any such person, for the purpose of service, might be entitled to assume that the place thus held out by the company as the place of business established by it was still such a

> place of business even although the company had ceased actually to carry on business there.'
>
> "There is evidence on this latter aspect of holding out vide the allegations in Mr. Harris' affidavit; in my view there is sufficient *prima facie* evidence to establish that Farrab Incorporated has resided and carried on business and held itself out as carrying on business through two of its directors in Nairobi. I hold therefore . . . that the service on R. C. Kohser was a good service on and behalf of Farrab Incorporated."

As to the first ground set out in the Notice of Motion, i.e. that the wrong alleged was not done within the Colony, the learned judge held that if the appellants were in fact properly served with the summons in Kenya, then:

> "in conformity with the substance of the Common Law of England (see para. 4 (2) Kenya Colony Order in Council June 27, 1921) proved to be applicable in Kenya, the suit as laid would lie in Kenya."

He relied on *Machado v. Fontes* (2), [1897] 2 Q.B. 231

> "which reiterated the principle that an action for libel would lie in England for a libel published aboard, provided the libel was wrongful and actionable in the foreign country as well as in England."

As already mentioned, affidavits were filed to the effect that the words published, if malicious and untrue, were wrongful and actionable by the laws of the States of California and New York, where publication is alleged to have taken place; and the learned judge held that, *prima facie*, the words complained of were capable of being construed to have a libellous meaning and would be actionable if published in Kenya.

The grounds of appeal stated in the memorandum of appeal are as follows:

"1. The learned judge was in error in holding, as to either defendant, that they were–

(*a*) domiciled; or,

(*b*) ordinarily resident; or,

(*c*) carrying on business, (without finding as a fact what particular trade? or occupation? or vocation? or any fixed place? from which it operated) within the jurisdiction.

"2. The learned judge was further in error in holding, as to either defendant, that they had–

(*a*) submitted; or

(*b*) had otherwise become amenable to the jurisdiction; or

(*c*) had become liable to be served with process of the Kenya courts; in respect of a wrong, no essential or other component ingredient whereof constituting the cause of action thereof–other than damage (which was not of the essence of the cause of action)–

(i) had been alleged; or

(ii) shown by affidavit or other satisfactory evidence;

to have been done, within the jurisdiction.

"3. The learned judge was also in error in not appreciating that the respondent–

(*a*) could not have been effectively stopped in prosecuting concurrent writs both in America and in Kenya, or recovering double damages in both jurisdictions, particularly;

(*b*) as both factually and forensically, where the wrong as here was wholly and exclusively cognisable to the American courts, having been done, wholly and exclusively (if at all) outside the Colony, or any part within the Commonwealth."

Before this court Mr. Khanna for the appellants argued that the Supreme Court of Kenya is a creature of statute and can only exercise the jurisdiction conferred upon it by statute; that it is created by art. 4 of the Kenya Colony Order in Council, 1921 (hereinafter referred to as the Order in Council), and that upon a proper construction of the wording of that article no jurisdiction is conferred over strangers, even though within the Colony, in respect of matters not arising within the Colony; that it would require an Act of Parliament to confer such extra-territorial jurisdiction; that even if such jurisdiction could be conferred by Order in Council, jurisdiction over foreigners in respect of matters arising wholly outside the jurisdiction could not be inferred without compelling words, and that art. 4 of the Order in Council has no such compelling words; that in any case the local legislature can limit the jurisdiction of the Supreme Court and that the local legislature has done so by the enactment of s. 15 of the Civil Procedure Ordinance (hereinafter referred to as the Ordinance), which applies to the Supreme Court as well as to subordinate courts; that s. 15 must be construed strictly upon its own wording; that therefore the English case relied on by the learned judge in the court below do not afford any guidance; and that upon a proper construction either of s. 15 or of art. 4, neither appellant was amenable to the jurisdiction of the Supreme Court of Kenya.

The question whether or not s. 15 of the Ordinance applies to the Supreme Court as well as to subordinate courts does not appear to have been argued in the court below, but it is clearly a matter of paramount importance in considering the extent of the jurisdiction of the Supreme Court. I accept that s. 15, if it applies to the Supreme Court, would have to be construed upon its own wording (*Commissioner of Stamps, Straits Settlements v. Oei Tjong Swan* (3), [1933] A.C. 378) and that unless, as argued by Mr. Salter for the respondents, the section could not be held to be exhaustive, the English cases would have little relevance.

Paragraph (1) and para. (2) of art. 4 of the Order in Council read as follows:

> "4.(1) There shall be a court of record styled His Majesty's Supreme Court of Kenya (in this order referred to as "the Supreme Court") with full jurisdiction, civil and criminal, over all persons and over all matters in the Colony.
>
> "(2) Subject to the other provisions of this order, such civil and criminal jurisdiction shall, so far as circumstances admit, be exercised in conformity with the Civil Procedure and Penal Codes of India and the other Indian Acts which are in force in the Colony at the date of the commencement of this order and subject thereto and so far as the same shall not extend or apply shall be exercised in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the twelfth day of August, 1897, and with the powers vested in and accordingly to the procedure and practice observed by and before courts of justice and justices of the peace in England according to their respective jurisdiction and authorities at that date save in so far as the Civil Procedure and Penal Codes of India and the other Indian Acts in force as aforesaid and the said common law doctrines of equity and the statutes of general application and the said powers, procedure and practice may at any time before the commencement of this order have been or hereafter may be modified, amended or replaced by other provision in lieu thereof by or under the authority of any Order of His Majesty in Council, or by any Ordinance or Ordinances for the time being in force in the Colony:
>
> "Provided always that the said common law doctrines of equity and the statutes of general application shall be in force in the Colony so far only

> as the circumstances of the Colony and its inhabitants permit and subject to such qualifications as local circumstances render necessary."

It is clear that, as contended by Mr. Khanna, the local legislature has power to restrict the jurisdiction of the Supreme Court to limits narrower than those prescribed by the Order in Council. The question is whether, by the enactment of s. 15 of the Ordinance, it has in fact done so. Section 15 (omitting the explanations and illustrations) reads as follows:

> "15. Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction–
>
> (*a*) the defendant or each of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or
>
> (*b*) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or
>
> (*c*) the cause of action, wholly or in part, arises.

Section 2 of the Ordinance defines "court" as meaning "any civil court other than Muslim subordinate courts". There is no express provision in s. 15 limiting the meaning of "court" in that section to subordinate courts. Mr. Khanna drew attention to the fact that the Indian Civil Procedure Code (hereinafter referred to as the Indian Code) contains express provision (s. 120), not repeated in the Ordinance, excluding the application of s. 20 of the Indian Code (which corresponds with s. 15 of the Ordinance) to the High Court; and he argued that in the absence of such exclusion s. 15 must apply to the Supreme Court as well as to subordinate courts.

I am not prepared to draw any conclusion from the fact of the omission from the Ordinance of a section on the lines of s. 120 of the Indian Code, although the Ordinance appears to be based on the Indian Code. The Ordinance is to be construed upon its own terms, and not upon any conjecture as to the intention of the draftsman in selecting some and rejecting other provisions of his presumed model–*Commissioner of Stamps, Straits Settlements v. Oei Tjong Swan* (3).

In the first place it is to be noted that the Ordinance purports to be "An Ordinance to make provision for Procedure in Civil Courts". It is true that certain provisions of the Ordinance do affect the jurisdiction of the Supreme Court. But, in view of the jurisdiction expressly conferred on the Supreme Court by art. 4 of the Order in Council, I am of opinion that the Ordinance is not to be construed as restricting that jurisdiction unless such intention clearly appears. Now s. 15 follows three sections which, of necessity, relate to subordinate courts only, although in each of them there is no express restriction of the meaning of the word "court". Section 12 provides in effect that, subject to the pecuniary and other limitations prescribed by any law, suits relating to immovable property

> "shall be instituted in the court within the local limits of whose jurisdiction the property is situate";

and "property" is defined in an "Explanation" to the section to mean property situate in the Colony. Accordingly, as the Supreme Court has jurisdiction throughout the Colony, "court" in the section can only refer to a subordinate court. Section 13 relates to suits respecting immovable property situate within

the jurisdiction of different courts, and again "courts" in the context must refer to subordinate courts. Section 14 relates to suits for wrong done to the person or to movable property and provides that

> "if the wrong was done within the local limits of the jurisdiction of one court and the defendant resides, or carries on business, or personally works for gain within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of the said courts."

Since the Ordinance applies only to courts in the territory, and "suit" by definition in s. 2 means civil proceedings commenced in any manner prescribed by rules made by the rules committee, i.e. under s. 81 of the Ordinance, the word "court" in this section also can only refer to a subordinate court.

It is interesting to note that s. 120 of the Indian Code excludes the application to the High Court of s. 16 and s. 17 of the Code (which correspond with s. 12 and s. 13 of the Ordinance) as well as s. 20 (corresponding with s. 15 of the Ordinance). However, the application of s. 19 of the Indian Code (which corresponds with s. 14 of the Ordinance) to the High Court is not excluded by s. 120, and the section does apply to the High Court in India. It is clear that without the express exclusion contained in s. 120, s. 16 and s. 17 of the Code (as well as s. 20) could and would have applied to the High Courts in India. The situation in Kenya, however, is entirely different since there is only one Supreme Court with jurisdiction throughout the Colony, and, at least as regards s. 12 and s. 13, there is no necessity for any express exclusion on the lines of s. 120 of the Code since, from their context, the sections cannot have any application to the Supreme Court. Similarly, s. 14 from its context can have no application to the Supreme Court in Kenya, although there is no express exclusion and although it does apply to the High Courts in India. So far as these sections are concerned, the draftsman of the Ordinance may very reasonably have concluded that provision on the lines of s. 120 of the Indian Code was unnecessary, and may have regarded such provision as unnecessary in the case of s. 15 also. The fact that in India there is more than one High Court, while in Kenya there is but one Supreme Court, may well explain the absence from the Ordinance of a section on the lines of s. 120, and illustrates the danger of drawing a conclusion from the fact of a draftsman having selected some and rejected other provisions of his presumed model.

It remains to consider whether s. 15 of the Ordinance must, as in the case of the preceding three sections, from its context apply to subordinate courts only. I am clearly of opinion that it must. The section starts with the words "subject to the limitations aforesaid". The "limitations aforesaid" are the "pecuniary and other limitations prescribed by law" mentioned in s. 12. By this reference, therefore, s. 15 is grouped with s. 12, a section which, as I have already shown, relates only to subordinate courts. Then s. 15 requires that

> "every suit shall be instituted in a court within the local limits of whose jurisdiction"

etc. As I have already indicated in relation to s. 14, "suit" can only mean a civil proceeding instituted under and in accordance with the Ordinance and the rules thereunder, i.e. a local suit, and "court" can only mean a civil court within the territory. It appears to me that the reference to the local limits of a court must be a reference to the local limits within the Colony of subordinate courts–not to the limits of the Supreme Court which are co-incident with the limits of the Colony itself. This is borne out by the "illustrations" given in s. 15, all of which obviously relate to subordinate courts. Having regard to the terms of the section and the context of its grouping with the preceding sections, I have no doubt that s. 15 is intended to be, and is, only a procedural

section regulating the distribution of business as between subordinate courts within the territory.

The only authority cited in which the application of s. 15 was considered was *Velji Manji v. Arjan Bechar* (1). The learned judge in that case said:

> "It is argued for the appellant that these provisions" (i.e. s. 15 of the Ordinance) "refer only to the distribution of business between the local courts of the Colony, i.e. to the domestic jurisdiction of the Colony's several courts. I cannot agree with this contention . . . "

The learned judge gives no reasons for this view, and, for the reasons I have given, I am unable to agree with him.

As I have mentioned, Mr. Khanna argued that upon a proper construction of art. 4 of the Order in Council no jurisdiction over foreigners is conferred upon the Supreme Court. He did also suggest, as I understood it, that such jurisdiction could only be conferred by Act of Parliament, and that the British Settlements Act, 1887, did not enable such jurisdiction to be conferred by Order in Council; but I think he finally conceded that such jurisdiction could be conferred by Order in Council under the British Settlements Act, 1887. The Order in Council is expressed to be made "in exercise of the powers conferred by the British Settlements Act, 1887". The Act provides *inter alia* in s. 2 that Her Majesty in Council may

> "constitute such courts and officers, and make such provisions and regulations for the proceedings in the said courts and for the administration of justice, as may appear to Her Majesty in Council to be necessary for the peace, order and good government of Her Majesty's subjects and others within any British settlement."

I accept the proposition that the Supreme Court can only exercise such jurisdiction as may be conferred upon it, but clearly the British Settlements Act, 1887, not only enables jurisdiction to be conferred by Order in Council but expressly provides that such jurisdiction may extend to others besides Her Majesty's subjects within a British settlement. In my opinion the extent of the jurisdiction conferred upon the Supreme Court of Kenya depends upon the construction of art. 4 of the Order in Council. If upon a proper construction art. 4 purports to confer jurisdiction over foreigners in the Colony as well as over Her Majesty's subjects, I see no reason to hold that such extended jurisdiction would be ultra vires.

Article 4 confers upon the Supreme Court jurisdiction "over all persons and over all matters in the Colony", and such jurisdiction is to be exercised

> "in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on August 12, 1897, and with the powers vested in . . . courts of justice . . . in England according to their respective jurisdiction and authorities at that date . . ."

The Indian Code has been replaced in the Colony by the Civil Procedure Ordinance and Rules, so that the references in art. 4 to the Indian Code are no longer of any effect; and I have already expressed the view that the jurisdiction conferred by art. 4 (so far as such jurisdiction is material to this appeal) has not been modified by the Ordinance. Under the proviso to art. 4 the common law is only to be in force in the Colony

> "so far as the circumstances of the Colony and its inhabitants permit and subject to such qualifications as local circumstances render necessary";

but this restriction in my opinion has no application in the present case. Mr. Khanna argued that the words "over all persons and over all matters in the Colony" should be read conjunctively, but I cannot accept this argument. The repetition of the word "over" clearly indicates that the phrase is intended

to be construed disjunctively. In my opinion the article clearly purports to confer jurisdiction, not only over matters arising in the Colony, but also over persons who are within the Colony, to the same extent that the High Court in England has, under the common law, jurisdiction over persons in England. The words in their ordinary meaning cover foreigners within the Colony, and I see no reason to construe them as applicable only to British subjects.

It may be noted that the wording of the Letters Patent conferring jurisdiction on a High Court in India is entirely different, e.g. by s. 12 of Letters Patent of 1865 the High Court of Calcutta was empowered to receive, try and determine suits of every description

> "(1) if the cause of action shall have arisen either wholly, or in case the leave of the court shall have been first obtained, in part, within the local limits of the Ordinary Original Jurisdiction of the said High Court; (2) or if the defendant at the time of the commencement of the suit shall dwell or carry on business or personally work for gain within such limits."

In the instant case it was conceded by Mr. Salter that the cause of action did not arise in the Colony. He contended, however, on the authority of English cases, that the action would lie in the Colony, and that service had been properly effected on the defendant Riddlesbarger. He relied, as did the learned judge in the court below, on *Machado v. Fontes* (2), and on *Carrick v. Hancock* (4) (1895), 12 T.L.R. 59. In *Machado v. Fontes* (2) it was held that an action would lie in England in respect of an act committed outside the jurisdiction if the act is wrongful both in England and in the country where it was committed. And in *Carrick v. Hancock* (4) it was held that the jurisdiction of a court is based upon the principle of territorial dominion; that all persons within any territorial dominion owe their allegiance to its sovereign power and obedience to all its laws and to the lawful jurisdiction of its courts; that the duty of obedience is correlative to the protection given by a State to any person within its territory; that this relationship and its inherent rights depend upon the fact of the person being within its territory; and that temporary presence within the territory is sufficient to render a defendant amenable to the jurisdiction of its courts. I do not think Mr. Khanna seriously disputed that these two cases correctly state the law as it is in England; but he relied on his argument that the jurisdiction of the Supreme Court in Kenya is not co-extensive with the jurisdiction of the English High Court in England; and I think he also argued that the English rule was unreasonable and ought not to be held applicable in a Colony, at least not without express application. However, I have no doubt that the principles relied on in *Machado v. Fontes* (2) and *Carrick v. Hancock* (4) are principles of the common law of England, and are therefore applicable in the Colony under art. 4 of the Order in Council. The evidence before the learned judge indicated that the words complained of in the plaint would be wrongful and actionable not only in Kenya, but also in the States of the United States of America in which publication took place. I am therefore of opinion that the learned judge was correct in holding that the suit as laid would lie in Kenya if service on the defendants had been properly effected. So far as the defendant Riddlesbarger is concerned, service was effected when he was voluntarily within the Colony, and, on the principle stated in *Carrick v. Hancock* (4), I am of opinion that such service was valid service.

Mr. Salter did argue before this court that the evidence was in any case sufficient to establish that the defendant Riddlesbarger had been personally working for gain in the Colony within the meaning of s. 15 of the Ordinance. This may be so, but apparently the point was not taken in the court below, and, in the view I take of the matter, I do not find it necessary to consider it.

As regards the defendant company, the question whether the company is

amenable to the jurisdiction, and service of the summons was properly effected, is more difficult. A number of Indian cases were cited, but, as I have already said, I am of opinion that the law applicable in Kenya is the common law, and that it is therefore necessary to ascertain the state of the law in England. In Dicey's Conflict Of Laws (6th Edn.) at p. 173 the position as regards the jurisdiction of the High Court in England and service of the writ in actions in personam where the defendant is a corporation is stated to be as follows:

> "In this case also presence in England at the time of service of the writ is essential. This principle applies easily enough where the defendant is a natural person, since the question whether a man is at a given moment in England presents no special difficulty in its ascertainment, but when the defendant is a corporate body, some difficulty may arise in determining whether the corporation can be treated as residing or being present in England.
>
> "In the case of an English company registered under the Companies Act, 1948, or any other Act, no difficulty arises. Even if the company is formed to carry on business abroad, and its business is so exclusively conducted there that it is not liable to the British Income Tax Acts, nevertheless the company by virtue of its incorporation is present in England, and service of a writ can always be effected by leaving it at, or sending it by post to, the registered office of the company in England.
>
> "In the case of foreign corporations more difficulty may arise. The simplest case is that of a company incorporated outside Great Britain (including companies incorporated in Northern Ireland and Eire), which establishes a place of business in England, and as required by the Companies Act, 1948, s. 407 (1) (*c*) files with the Registrar of Companies the name of a person authorised to accept service of process on behalf of the company; in that case service can be effected as in the case of an English company. Moreover, under the Companies Act, 1948, s. 412, if the company fails to register the name of such a person, or he is dead or no longer resident in England or declines to accept process, or for any reason cannot be served, the writ can be left at or sent by post to any place of business established by the company in Great Britain. The ground of this rule is that establishment of business means submission to English jurisdiction, and a company has no right to evade it by withdrawing the name of a representative to accept process."

Section 327 and s. 331 of the Companies Ordinance (Cap. 288) correspond with s. 407 and s. 412 of the English Companies Act, 1948. However, there was, in fact, no compliance by the defendant company with s. 327 of the Companies Ordinance, and the matter therefore has to be considered on the basis whether or not the defendant company was carrying on business in Kenya. Dicey continues:

> "Apart, however, from cases such as this, a corporation can be treated as being present in England for the purpose of serving a writ upon it when the company carries on business in England. The question whether a corporation is carrying on business here is one of fact not always easy to determine. A foreign railway company, for example, may perform part of its business, say the selling of tickets, in London, without necessarily carrying on business there. The answer to the question whether it does or does not carry on business in England depends upon whether or not the agent who sells the tickets makes a contract for the foreign company, or merely sells the tickets as part of his own business. This is substantially a question as to the relation of the agent towards the foreign company. In order, further, that a foreign corporation may be treated as being in

> England, the requirements of Ord. IX, r. 8, as to the service of a writ in England on a corporate body, must be complied with."

I accept these passages from Dicey as a correct statement of the law in England based on the cases there cited. So far as service on a corporation in Kenya is concerned, the relevant provision is O. XXVIII, r. 2 of the Civil Procedure (Revised) Rules, 1948. Service was effected on Mr. Kohser, managing director of the defendant company, in accordance with this rule, and is valid service if the company was carrying on business in Kenya.

The question whether or not the defendant company was carrying on business in Kenya at the material time was one of fact for the learned judge upon the evidence before him. It appears to me that on the material in Harris' affidavit there was evidence upon which he could properly reach the conclusion that the defendant company was so carrying on business. In addition to the points made by the learned judge in his judgment, it is to be noted that the defendant company carries on business as financiers, and, as such, it appears to me that their financial transactions are on a somewhat different basis from casual investment transactions entered into by a company carrying on some other form of business. In the case of a finance company its principal business is the provision of finance, and the safeguarding of its investments would appear to be an essential part of its business. The defendant company had a very large financial interest in Phoenix, and the defendant company's agent for carrying on its business in the Colony in connection with Phoenix was not an independent agent employed for the purpose, but was the managing director of the defendant company itself. It has not been suggested that he was acting in the Colony otherwise than on behalf of the defendant company or that he had any reason for being in the Colony other than for the conduct of the company's affairs. It is also to be noted that, according to Harris' affidavit (para. 5 (*c*)), the defendant company requested replies to its letters to be addressed to a Post Office box number in Nairobi. In the circumstances of the Colony, where postal addresses normally take the form of a Post Office box number, this certainly appears to me to be *prima facie* evidence that the company had a place of business in the Colony. As I have already said, the appellants could have given evidence in contradiction or explanation of the facts stated in Harris' affidavit, or could have applied to cross-examine him. They did neither, and the learned judge therefore had before him only Harris' uncontradicted affidavit on which to decide whether or not the defendant company was carrying on business in the Colony. I am not prepared to say that the learned judge reached a wrong conclusion on the evidence before him.

I am accordingly of opinion that, on the facts before him, the learned judge correctly concluded that the defendants were amenable to the jurisdiction of the Supreme Court, and that the suit as laid would lie in Kenya. The fact that an action could also be brought in American courts does not preclude the plaintiffs bringing the action here.

I would accordingly dismiss the appeal with costs.

Sir Kenneth O'Connor P: I agree. The appeal is dismissed with costs.

Briggs V-P: I also agree.

Appeal dismissed.

For the appellants:
DN Khanna
DN & RN Khanna, Nairobi

For the respondents:
CW Salter QC and *FR Stephen*
Stephen & Roche, Nairobi

Corbett Limited v Floyd
[1958] 1 EA 389 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	4 July 1958
Case Number:	15/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Miles, J

[1] Statute – Amendment of Ordinance – Powers of colonial Governor – Amendment by regulation made under emergency powers – Amendment operating retrospectively – Whether Governor has power to legislate with retrospective effect – Emergency Powers Order in Council, 1939 *– Increase of Rent* (*Restriction*) *Ordinance,* 1949*, s.* 39 (*K.*) *– Emergency* (*Amendment of Laws*) (*No.* 13) *Regulations,* 1955*, Regulation* 2 (*c*) (*K.*) *– Interpretation and General Clauses Ordinance* (*Cap.* 1) (*K.*) *– Interpretation and General Provisions Ordinance,* 1956*, s.* 28 (*K.*).

Editor's Summary

The appellant, being dissatisfied with a decision of the Central Rent Control Board on a claim for rent, appealed to the Supreme Court, which affirmed the decision of the Board on different grounds, whereupon the appellant brought a further appeal on two points of law. The first of these was whether on the repeal of the Increase of Rent and Mortgage Interest (Restrictions) Ordinance, 1940, by s. 35 of the Increase of Rent (Restriction) Ordinance, 1949, all assessments of standard rent made under the 1940 Ordinance were nullified. The second question was whether s. 39 of the 1949 Ordinance, introduced in 1955, by way of amendment made by the Governor in purported exercise of powers conferred on him by s. 6 of the Emergency Powers Order in Council, 1939, as applied to the Colony in 1952, was a valid amendment of the 1949 Ordinance, or was ultra vires; on this question it was contended that s. 39 operated retrospectively, and that it was not permissible to legislate in this way, on the ground that the powers of legislation given to the Governor should be construed in a limited way so as to enable him to amend the law prospectively, but not retrospectively. It was also argued that if the Governor had power to legislate with retrospective effect, he could not do so with effect prior to the date on which the powers were conferred on him, i.e., in this case, 1952.

Held –

(i) as from October 20, 1952, when s. 6 of the Emergency Powers Order in Council, 1939, was applied to the Colony, the legislative powers of the Governor, for the purposes of s. 61 of the

Order in Council, were exactly co-extensive with those of the legislature of the Colony; a colonial legislature has undoubted powers in matters within its competence to legislate with retrospective effect, and the Governor had similar power.

(ii) in enacting the Increase of Rent (Restriction) Ordinance, 1949, the legislature had made a mistake, and the effect of s. 39 was to remedy that mistake; since the basis of the rule of construction against the retrospective operation of legislation is the presumed injustice it ordinarily effects, it could not be said that injustice arises from the subsequent correction of an accidental error or omission.

Appeal dismissed.

No cases referred to in judgment

Judgment

Briggs V-P: read the following judgment of the court: This was an appeal from an appellate judgment of the Supreme Court of Kenya, which affirmed a decision of the Central Rent Board on a claim for rent, though

on grounds different from those given by the Board. We dismissed the appeal with costs and now give our reasons.

It is not necessary to set out the facts, which appear clearly from the decision of the Board and the judgment of the Supreme Court, but the case turned on two points of law. The first question was whether, on the repeal of the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance, 1940, which we shall call "the 1940 Ordinance", by s. 35 of the Increase of Rent (Restriction) Ordinance, 1949, which we shall call "the 1949 Ordinance", all assessments of standard rent made under the 1940 Ordinance were nullified. The second question was whether s. 39 of the 1949 Ordinance, which was first introduced in 1955 as an amendment made by His Excellency the Governor by Regulation 2 (*c*) of the Emergency (Amendment of Laws, No. 13) Regulations, 1955, (1955 Proclamations Rules & Regulations, p. 807) in purported exercise of powers conferred on him by s. 6 of the Emergency Powers Order in Council, 1939, (1952 Proclamations, etc., p. 487), as applied to the Colony by Proclamation No. 38 of 1952, October 20, 1952, (1952 Proclamations, etc., p. 490) was a valid amendment of the 1949 Ordinance or was ultra vires and of no effect.

The first of these questions was answered by the Board in the negative, and on that view they were able to decide the application without answering the second question. On appeal the Supreme Court answered the first question in the affirmative, and was then obliged to consider the second question. The learned judge held that s. 39 was validly enacted and in force and that on this ground the order of the board was correct. The appellant in terms appealed to us only against that part of the judgment of the Supreme Court which held that s. 39 was in force, and asked us to say that it was ultra vires. If, however, the appellant had succeeded on this point, it would have been necessary for us to consider whether the substance of the decision should be supported on the grounds given by the board; but, since we agreed with the learned judge's views on the second question, it was not necessary to consider whether his decision or the board's on the first question was correct, and we express no opinion on that point.

Section 35 of the 1949 Ordinance reads:

> "The Increase of Rent and of Mortgage Interest (Restrictions) Ordinance, 1940 (which is hereby declared to have continued in full force and effect until the commencement of this Ordinance) is hereby repealed together with the Ordinances specified in the second schedule to this Ordinance." Section 39 of the 1949 Ordinance, as added in 1955, reads:
>
> "39. The continuity of the operation of the law relating to rent restriction shall not be deemed to have been affected by the substitution of this Ordinance for the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance, 1940 (as amended), and accordingly–
>
> (*a*) any reference in this Ordinance to 'the Board' shall, where the context so admits or requires, be construed as including a reference to the board established under the said Ordinance; and
>
> (*b*) every standard rent fixed or assessed under or by virtue of the provisions of the said Ordinance and subsisting at the date of the repeal thereof shall be deemed to be a standard rent fixed or assessed under or by virtue of the provisions of this Ordinance at the date of the commencement thereof, save that where the board established under this Ordinance has purported to assess any such standard rent such assessment shall be deemed to have been validly effected and to be of full force and effect."

It is at once apparent, and was common ground on the appeal, that s. 39 was intended to operate retrospectively, and, unless it did no more than declare the existing law, it must have operated to expunge existing rights and create new ones. Equally it was common ground that the legislating authority must have considered that it did not merely declare the existing law, but amended it, and that there was a deliberate intention to affect existing rights. The appellant submitted that to legislate in this way was not permissible.

Section 6 of the Order in Council, under which His Excellency, in making the amendment, purported to act, is as follows:

> "6.(1) The Governor may make such Regulations as appear to him to be necessary or expedient for securing the public safety, the defence of the territory, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community.
>
> "(2) Without prejudice to the generality of the powers conferred by the preceding sub-section, the Regulations may, so far as appears to the Governor to be necessary or expedient for any of the purposes mentioned in that sub-section–
>
> (*a*) make provisions for the detention of persons and the deportation and exclusion of persons from the territory;
>
> (*b*) authorise–
>
> (i) the taking of possession or control, on behalf of His Majesty, of any property or undertaking;
>
> (ii) the acquisition on behalf of His Majesty of any property other than land:
>
> (*c*) authorise the entering and search of any premises;
>
> (*d*) provide for amending any law, for suspending the operation of any law and for applying any law with or without modification;
>
> (*e*) provide for charging in respect of the grant or issue of any licence, permit, certificate or other document for the purposes of the Regulations, such fee as may be prescribed by or under the Regulations;
>
> (*f*) provide for payment of compensation and remuneration to persons affected by the Regulations;
>
> (*g*) provide for the apprehension, trial and punishment of persons offending against the Regulations;
>
> Provided that nothing in this section shall authorise the making of provisions for the trial of persons by military courts."

It was not disputed that housing is a "service essential to the life of the community" and that control of the relations between landlords and tenants might be within the provisions of sub-s. (1) of s. 6. We were of opinion also that the matter might be regarded from another point of view. If it had been generally supposed between 1949 and 1955 that the law was as s. 39 would make it, and if that opinion had for some reason–perhaps a decision of the court–suddenly changed, the result might well have been a spate of litigation before the board and in the Supreme Court which would have impaired gravely the efficient functioning of the board and the court, both "services essential to the life of the community". It is clear that the enactment of s. 39 was within the wording of s. 6 (1). Section 6 (2) (*d*) does no more than make clear that amendment of existing laws is permissible for the purposes set out in s. 6 (1).

Counsel for the appellant contended that, just as an ordinary provision of any statute should, if reasonably possible, be construed so as not to operate retrospectively, so the powers of legislation given to His Excellency should be construed in a limited sense as enabling him to amend the law prospectively, but not retrospectively. It is impossible to construe s. 39 as not retrospective in its effect; but if counsel is right it would be ultra vires and have no effect at all. No authority was cited to us for the proposition that delegated powers of legislation do not ordinarily include power to legislate retrospectively, but even assuming that in ordinary cases such a rule applies, we thought that in this case it could not apply.

The Emergency Powers (Defence) Act, 1939, was passed by the Imperial Parliament under the shadow of impending war. Its purpose may be gathered from its provisions, and was to ensure that in emergency, notwithstanding any inability of Parliament to legislate, or to legislate with the necessary speed, there should be available a legislating authority, whether in the United Kingdom or, if necessary, in each of many dependent territories, with power to take without delay every step by way of legislation which the needs of war might show to be requisite. How essential this was in the circumstances may be understood when one considers the situation which would have arisen if the bomb which destroyed the House of Commons had fallen during a crowded sitting. And there is nothing novel in taking so drastic a step to meet a grave emergency. No legislature has ever been more jealous of its powers than was the Roman Senate of early republican times; but on many occasions of emergency it decided that it was in the public interest that all its authority should for the time being be delegated to one man as dictator, who thereafter wielded, during the term of his appointment, powers no less absolute than those of an Asiatic monarch. If the Order in Council is considered in this light, it seems plain that its intention must have been to confer on the Governor of any territory brought within its terms, powers co-extensive with those of the legislature which he was if necessary to replace. It has never in twenty years been suggested that the Order in Council was itself ultra vires, and although since the end of the war measures taken under it have been criticised as dictatorial, undemocratic and destructive of liberty, it has never, so far as we are aware, been suggested that such measures were incompetent.

We were of opinion that as from the date of the Proclamation in 1952 the legislative powers of His Excellency for the purposes described in s. 6 (1) of the order were exactly co-extensive with those of the normal legislature of the Colony. Any attempt to circumscribe those powers by reference to special cannons of construction would, in our view, involve an erroneous conception of their nature and purposes. A colonial legislature has undoubted power in matters within its competence to legislate with retrospective effect. We thought that in this matter the Governor had similar powers. And we did not think that, in the special instance now before us, this view led to any surprising or anomalous conclusions. We considered that in enacting the 1949 Ordinance the legislature had made what in an individual would be bluntly described as a mistake, and that the effect of s. 39 was merely to remedy that mistake. Generally speaking, the vested rights destroyed by the new section were rights which the legislature never intended to create, and the new rights created by it were rights which, apart from accidental error, would have existed at all times. The basis of the rule of construction against retrospective effect of legislation is the presumed injustice which it would ordinarily effect; but no injustice arises from the subsequent correction of an accidental error or omission.

Mr. Kean for the appellant argued, as an alternative point, that if His Excellency had any power to legislate with retrospective effect he still could not do so with effect prior to the date of the present application of the Order in

Council in the Colony, i.e. 1952. In this connection it is of interest to note the provisions of s. 28 of the Interpretation and General Provisions Ordinance 1956. But no such provision appears in the Interpretation and General Clauses Ordinance (Cap. 1), which was in force in 1955 when s. 39 was enacted. We thought that Mr. Kean's argument must be rejected, and it also appeared that on the facts of this case his client's claim would probably have been defeated if s. 39 had had retrospective effect only to 1952. It was not, however, necessary to decide that issue.

Appeal dismissed.

For the appellant:
M Kean
Sirley & Kean, Nairobi

For the respondent:
WJ Parry
WJ Parry, Nairobi

The Attorney General for Kenya v Hayter
[1958] 1 EA 393 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	16 July 1958
Case Number:	47/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Goudie, Ag. J

[1] Limitation of action – Proceedings against Crown – Whether Crown is a "public officer" – Whether period of limitation is in claims arising out of tort six months or two years – Public Officers' Protection Ordinance (*Cap.* 63), *s.* 2 (*a*) (*K.*) – *Crown Proceedings Ordinance,* 1956, *s.* 3, *s.* 4 (1) *and* (4), *and s.* 26 (*K.*) – *Limitation Ordinance* (*Cap.* 11), *s.* 5 (2) (*K.*).

Editor's Summary

In an action commenced on September 23, 1957, by the respondent against the attorney-general under the Crown Proceedings Ordinance, 1956, alleging negligence in respect of injuries suffered by the respondent when he fell into an unlighted and unprotected excavation outside a police post at about 11 p.m., on September 24, 1955, the attorney-general admitted the excavation had been made on instructions of the officer in charge of the police post, but claimed that the suit was barred by the Public Officers'

Protection Ordinance. The question of limitation was taken as a preliminary point at the trial and it was held that the suit of the respondent was not statute barred. The respondent succeeded in the Supreme Court and the attorney-general appealed. At the hearing of the appeal the points argued were whether the Crown was a public officer entitled to rely upon the Public Officers' Protection Ordinance, and whether the period of limitation was six months under that Ordinance, or whether s. 5 of the Limitation Ordinance applied, in which case the period of limitation would be two years.

Held – the Crown is entitled to rely on the limitation prescribed by the Public Officers' Protection Ordinance to the same extent that the officer concerned could do so; the protection afforded by the Ordinance extends to public bodies as well as to individuals and whatever might be the position in an action arising out of contract in an action for damages arising from tort the period of limitation is six months and the claim was time barred.

Appeal allowed.

Case referred to in judgment:

(1) *Greenwell v. Howell*, [1900] 1 Q.B. 535.

(2) *Parker v. London County Council*, [1904] 2 K.B. 501.

(3) *Reeves v. Deane-Freeman*, [1952] 2 T.L.R. 361; [1953] 1 All E.R. 461.

(4) *The Danube II*, [1921] P. 183.

(5) *Benson v. Home Office*, [1949] 1 All E.R. 48.

(6) *Bradford Corporation v. Myers*, [1916] 1 A.C. 242.

Judgment

Forbes JA: read the following judgment of the court: This was an appeal by Her Majesty's attorney-general for Kenya against a decree of the Supreme Curt of Kenya whereby the appellant was ordered to pay to the respondent the sum of Shs. 2,007.10 in respect of special damages and Shs. 15,000/- in respect of general damages, together with interest thereon, and the costs of the suit. We allowed the appeal with party and party costs in this court and solicitor and client costs in the court below, and now give our reasons.

The suit was brought against the attorney-general under the Crown Proceedings Ordinance, 1956 (No. 47 of 1956) which came into force on December 18, 1956. The respondent's claim, which was filed on September 23, 1957, was against the appellant as representative of the Crown for damages for negligence in respect of injuries alleged to have been sustained by the respondent as the result of the negligence of the officer in charge in the Bahati police post and/or its servants or agents in permitting an unlighted and unprotected excavation to remain opposite the Bahati police post during the hours of darkness. The respondent alleged that he had suffered injuries as a result of falling into the excavation at about 11 p.m. on or about September 24, 1955.

It was admitted by the appellant that the excavation in question

> "had been excavated by members, servants or agents of the said Bahati police post upon the instructions of the officer in charge or other persons in authority in the said police post for the purpose of erecting a flag post without the compound of the said police post,"

the wording of this admission being a repetition of the words used in para. 5 of the plaint. The defendant, however, pleaded *inter alia* that the action was barred by the Public Officers' Protection Ordinance (Cap. 63). This question was argued as a preliminary issue at the trial, and the learned trial judge ruled that the action was not so barred. After hearing the respondent on this issue, we were of opinion that the appeal must succeed. It was therefore unnecessary to go into the other issues of law and fact argued at the trial and raised in the memorandum of appeal, and we did not do so. For the purposes of this judgment we assume that, apart from the question of limitation, the respondent did have a good cause of action against the appellant in respect of injuries suffered as a result of falling into the excavation.

The material provisions of the Public Officers' Protection Ordinance are as follows:

> "2. Where any action, prosecution or other proceeding is commenced against any person for any act done

in pursuance or execution or intended execution of any Ordinance or other law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Ordinance, duty or authority, the following provisions shall have effect–

(*a*) the action, prosecution or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect

> or default complained of, or in the case of a continuance of injury or damage, within three months next after the ceasing thereof."

Prior to the enactment of the Crown Proceedings Ordinance, 1956, the only remedy available to the respondent would have been by way of action against the officer concerned personally, and the period of limitation prescribed in the passage quoted would have applied. However, sub-s. (1) of s. 4 of the Crown Proceedings Ordinance, 1956, provides as follows:

> "4.(1) Subject to the provisions of this Ordinance, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject–
>
> (*a*) in respect of torts committed by its servants or agents;
>
> (*b*) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and
>
> (*c*) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property:
>
> "Provided that no proceedings shall lie against the Crown by virtue of para. (*a*) of this sub-section in respect of any act or omission of a servant or agent of the Crown, unless the act or omission would, apart from the provisions of this Ordinance, have given rise to a cause of action in tort against that servant or agent or his estate."

The respondent's contention was that the period of limitation applicable to proceedings against the Crown in respect of torts committed by its servants or agents was that prescribed by sub-s. (2) of s. 5 of the Limitation Ordinance (Cap. 11), i.e. two years, and not that provided by the Public Officers' Protection Ordinance.

However, sub-s. (4) of s. 4 of the Crown Proceedings Ordinance, 1956, provides:

> "(4) Any written law which negatives or limits the amount of the liability of any Government department or officer of the Crown in respect of any tort committed by that department or officer shall, in the case of proceedings against the Crown under this section in respect of a tort committed by that department or officer, apply in relation to the Crown as it would have applied in relation to that department or officer if the proceedings against the Crown had been proceedings against that department or officer."

And s. 26 of that Ordinance provides:

> "26. Nothing in this Ordinance shall prejudice the right of the Crown to rely upon any written law relating to the limitation of time for bringing proceedings against public authorities."

Mr. Salter for the respondent argued that the clear intention of the Crown Proceedings Ordinance, 1956, was to place the Crown in the same position as a private person as regards limitation of time, and that its provisions should be construed in the light of that intention; that the Crown Proceedings Ordinance is modelled on the English Crown Proceedings Act, 1947, and that the intention behind the Act (and therefore presumably behind the Ordinance, having regard to the obvious intention to follow the English legislation) is demonstrated by the repeal by the Law Reform (Limitation of Actions, etc.) Act, 1954, of the English Public Authorities' Protection Act, 1893, and s. 21 of the Limitation Act, 1939, which correspond with the Kenya Public Officers' Protection Ordinance; that as to sub-s. (4) of s. 4 of the Crown Proceedings

Ordinance, there is a difference between limitation as to time and limitation as to amount or limitation as to no liability at all; that s. 26 of the Ordinance deals with limitation as to time and not sub-s. (4) of s. 4; that limitation as to time does not, *prima facie*, negative liability, at least until time has expired, and will only apply if pleaded, and that "negative" in sub-s. (4) should be construed as meaning take away ab initio as, for example, by an Act of Indemnity: that therefore sub-s. (4) of s. 4 has no application; that as to s. 26, the section refers to limitation of time for bringing proceedings against public authorities, while the Public Officers' Protection Ordinance limits the time for proceedings against public officers; that in any case the onus was on the appellant to show that the Public Officers' Protection Ordinance could have been invoked by the officer concerned, and that it had not been shown that the neglect or default in question was a neglect or default in the execution of any public duty or authority.

We were unable to accept these arguments. We were of opinion that the fact of the repeal of the Public Authorities Protection Act, 1893, and s. 21 of the Limitation Act, 1939, in England could not have the remotest bearing on the construction to be placed on legislation in force in Kenya, but that such legislation must be construed upon its own express terms: and it seemed to us that the intention of the Crown Proceedings Ordinance (and, for that matter, of the Crown Proceedings Act, 1947, before the repeal in 1954 of the Public Authorities' Protection Act) was to place the Crown, in respect of liability for torts committed by its servants, in the same position as its servants were before the enactment of the Ordinance or Act.

We saw no reason to construe the words "negatives . . . the liability of any Government officer" as meaning the negativing of such liability ab initio. Mr. Salter's argument might have had some force in the case of a claim arising out of contract, but, in the case of a claim arising out of tort, liability does not arise unless and until the claimant obtains judgment. We were of opinion that a law limiting the time within which an action in tort could be brought clearly negatived liability upon the expiration of the time limit, and fell within the wording of sub-s. (4). The fact that the rules of pleading require that limitation must be expressly pleaded by a defendant if he wishes to rely on it appeared to us to be irrelevant. We were accordingly of opinion that under sub-s. (4) of s. 4 read by itself the Crown was entitled to rely on the limitation prescribed by the Public Officers' Protection Ordinance to the same extent that the officer concerned would have been entitled to rely on it had the action been brought against him personally.

We were further of the opinion that s. 26 of the Crown Proceedings Ordinance, 1956, was a declaratory section which could and should be read with sub-s. (4) of s. 4, and that it made clear beyond doubt the intention of the Ordinance that the Crown should enjoy the benefit of any limitation such as that contained in the Public Officers' Protection Ordinance. It is true the reference in s. 26 is to "public authorities." However, the wording of s. 2 of the Public Officers' Protection Ordinance is identical with that of s. 1 of the English Public Authorities' Protection Act, 1893, as originally enacted, and it has been repeatedly held that the protection given by s. 1 of the English Act extends both to public bodies and to individual officers–see *Greenwell v. Howell* (1), [1900] 1 Q.B. 535; *Parker v. London Country Council* (2), [1904] 2 K.B. 501; *Reeves v. Deane-Freeman* (3), [1952] 2 T.L.R. 361; and "person" by definition in s. 3 of the Interpretation and General Provisions Ordinance, 1956 (No. 38 of 1956)

> "includes any company or association or body of persons, corporate or unincorporated."

It is clear that the protection afforded by the Public Officers' Protection

Ordinance extends to public bodies as well as to individuals, and that, in any case, a public officer is a "public authority" (*Reeves v. Deane-Freeman* (3)).

We were also of the opinion that s. 26 of the Crown Proceedings Ordinance in itself conferred upon the Crown (or at least made it clear that the Crown was entitled to enjoy) the benefits of the Public Officers' Protection Ordinance. In *The Danube II* (4), [1921] P. 183 at p. 187 Lord Sterndale, M.R., said "it can, I think, hardly be denied that the Crown is a public authority." We were not made aware of any authority to the contrary, and we therefore accept that the Crown is a public authority. By virtue of that fact it is itself entitled to claim the protection afforded by s. 2 of the Public Officers' Protection Ordinance.

Mr. Salter referred to *Benson v. Home Office* (5), [1949] 1 All E.R. 48, but we were of opinion that that case had no relevance to the matter before us. The claim in that case was for damages for breach of contract and fell to be considered under s. 1 of the English Act, which corresponds with s. 3 of the Crown Proceedings Ordinance. The point at issue was whether that section was effective to give the plaintiff a cause of action against the Crown for damages for breach of contract which, but for that section, would, by the time the writ had been issued, have been statute-barred and unenforceable. The decision has no bearing on the question of the period of limitation applicable in actions against the Crown for damages arising from tort committed by a servant of the Crown.

Mr. Salter also argued that the act of the public officer complained of in this case was not an act done in the execution or intended execution of any public duty or authority, and he cited *Bradford Corporation v. Myers* (6), [1916] 1 A.C. 242. We felt entitled, however, to take judicial notice of the fact that flag-staffs are a normal adjunct of police posts in Kenya, and were of the opinion that the erection of a flag-staff at a police post was an act of public duty for the officer in charge of the post.

For these reasons we were of opinion that the Crown's contention was correct and that the action was barred by the provisions of the Public Officers' Protection Ordinance. We accordingly allowed the appeal and set aside the decree. The appellant was entitled to costs, which we awarded accordingly, and, in view of para. (*b*) of s. 2 of the Public Officers' Protection Ordinance, we awarded costs in the court below to be taxed as between solicitor and client. We did, however, suggest that, as the point at issue was a novel one, the Crown might perhaps consider that this was a case in which some indulgence might be exercised in the matter of costs.

Appeal allowed.

For the appellant:
HG Sherrin (Crown Counsel, Kenya)
The Attorney-General, Kenya

For the respondent:
CW Salter QC and *BRP Todd*
Lawrence Long & Todd, Nakuru

Bampamiyiki s/o Buhile v R
[1958] 1 EA 398 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	25 July 1958
Case Number:	77/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	Resident Magistrate at Mwanza (In Extended Jurisdiction)–Biron, Senior R.M

[1] Criminal law – Evidence – Trial within a trial – Admissibility of extra-judicial statement – Evidence called in absence of assessors – Statement held admissible – Whether court entitled to read to assessors evidence taken in their absence.

Editor's Summary

The appellant had been convicted of murder, from which he appealed. At his trial the admissibility of an extra-judicial statement made by him was disputed, and after hearing evidence called by both sides, in the absence of the assessors, the statement was held admissible. Later, when the case for the prosecution had been closed, the accused's advocate applied for the evidence given in the absence of the assessors to be read to them. Counsel for the Crown demurred, but the magistrate acceded to the application and the evidence was read.

Held – the course adopted of reading out the evidence of witnesses called at "a trial within a trial", and thereby treating that evidence as evidence at large in the case was wholly irregular; if it is intended in any case that such evidence should be available to the assessors the witnesses should be recalled and the procedure to be followed is explained in detail in *Kinyori s/o Karuditu v. R.* (1956), 23 E.A.C.A. 480. The irregularity could, however, be disregarded under s. 346 of the Criminal Procedure Code.

Appeal dismissed.

Case referred to:

(1) *Kinyori Karuditu v. R.* (1956), 23 E.A.C.A. 480.

Judgment

Briggs V-P: read the following judgment of the court: This was an appeal from a conviction of murder by a senior resident magistrate sitting in extended jurisdiction at Mwanza. The sentence of death was duly confirmed by the High Court of Tanganyika. We dismissed the appeal and now give our reasons on a single point arising thereon.

In the course of the prosecution case there was a "trial within a trial" in the absence of the assessors to determine the admissibility of an extra-judicial statement made by the appellant. Both sides called evidence and the court ruled that the statement was admissible. The assessors returned to court and the prosecution's evidence as to the statement was given again in their presence. The statement was duly

exhibited and read. After the close of the prosecution case the accused was put to his election, and the learned magistrate's note then reads:

> "Gossain: The accused will give evidence but before his evidence I apply for the evidence of the witnesses at the trial within a trial to be read out to the assessors.

> "Thornton: I do not consider it proper for such evidence to be read as the assessors should only be aware of evidence they have heard themselves.
>
> "Gossain: I am informed that it is the practice for such evidence to be read.
>
> "Court: I am not aware of any authority on the subject nor have I had experience of the practice, but if the learned Crown counsel's objection is to be carried to its logical conclusion, then strictly speaking the deposition of Daudi s/o Mbebe should be excluded. I therefore propose to accede to the request of learned counsel for the defence, and should either side or the assessors wish to have the witnesses or any of them recalled, the court will recall them.
>
> "All the evidence recorded in the absence of the assessors at the trial within a trial is read out."

The accused then gave evidence. We desire to make it clear that the course adopted of reading out the evidence of the witnesses called on the "trial within a trial" for the defence, and treating it as evidence at large in the case, was entirely irregular. Mr. Thornton was right to object to it, and if, as Mr. Gossain suggested, there is a practice of reading such evidence, the practice must cease. The learned magistrate remarked that he was not aware of any authority on the subject, but in fact recent authority exists in the case of *Kinyori Karuditu v. R.* (1) (1956), 23 E.A.C.A. 480. In that case this court explained in some detail the proper procedure to be followed in a trial within a trial and emphasised the necessity of recalling and re-examining witnesses before the assessors if it was intended that their evidence should be available to the assessors. The learned magistrate's reference to the deposition of Daudi is a non sequitur. It had been properly admitted in evidence before the assessors because Daudi was seriously ill in hospital and, therefore, not available to be called; but there was no reason why the defence witnesses should not be recalled. We were, however, of opinion that no prejudice whatever had been occasioned by the irregularity and that it could be disregarded under the provisions of s. 346 of the Criminal Procedure Code, since the evidence in question was directed, not to any issue arising directly on the charge, but only to the question whether the accused after his arrest was maltreated by the police. It is also material, though not conclusive, on the issue of prejudice, that the irregularity was committed at the express request of the defence.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:
GC Thornton (Crown Counsel, Tanganyika)
The Attorney-General, Tanganyika

Tzamburakis and another v Rodoussakis
[1958] 1 EA 400 (PC)

Division:	Privy Council
Date of judgment:	16 July 1958
Case Number:	5/1957
Before:	Lord Morton of Henryton, Lord Tucker and Mr LMD De Silva

Sourced by: LawAfrica

Appeal from: H.M. High Court of Tanganyika–Sir Herbert Cox, C.J

(Appeal from E.A.C.A. Civil Appeal No. 26 of 1956 on appeal from)

[1] Limitation of action – Appeal – Whether Appellate Court can decline to apply statute of limitation on ground of procedural defect – Indian Limitation Act, 1908, *s.* 3, *and First Schedule – Indian Code of Civil Procedure, s.* 2, *s.* 33, *s.* 96, *s.* 97, *and s.* 105.

Editor's Summary

By plaint dated 23rd July, 1952, the respondent sued the appellants, as administrative of one, Tzamburakis, for an account of monies due by the deceased to the respondent, for rent under a registered lease, commencing in 1946, and expiring in 1949, and her share of profits for three months of 1949. The deceased and the respondent had been co-owners as tenants-in-common of a large sisal estate. The appellants pleaded, *inter alia*, and took as a preliminary point that the claim was time-barred, but this was over-ruled, and when the case was heard on the merits, judgment was given for the respondent and an account was ordered. On appeal the appellants again raised the issue of limitation, but the Court of Appeal held that since there had been no appeal entered within time from the ruling on the preliminary point, the grounds of appeal which sought to bring this point before the court were incompetent. On further appeal the appellants claimed that the Court of Appeal was entitled to entertain an appeal on the question of limitation. If the Court sustained the first contention, the appellants also asked for a decision whether the respondent's claim was wholly or partly time-barred.

Held –

(i) in view of s. 3 of the Indian Limitation Act, 1908, which requires the dismissal of every suit instituted after the prescribed period of limitation, no procedural defect could relieve the Court of Appeal of its duty to give effect to the statute on an appeal from a judgment given to a plaintiff in respect of a time-barred cause of action. *Chanmalswami v. Gangadharappa* (1915), 39 Boom. 339 approved.

(ii) a claim for rent under a registered lease falls within art. 116 of the First Schedule to the Indian Limitation Act, 1908, and the relevant period of limitation is six years from July 23, 1952.

(iii) the decree of the High Court ordering that accounts be taken for the whole term of the lease was properly made, but the appellants should not be ordered to pay any sum received in respect of sisal more than thirty days prior to July 23, 1946, or any sums received for machinery or movables sold before that date.

(iv) the claim for a share of profits for three months in 1949 was time-barred under art. 106 of the First Schedule to the Indian Limitation Act, 1908.

Order that the order of the Court of Appeal ((1956), 23 E.A.C.A. 247) be set aside, and the decree of the High Court of Tanganyika be varied.

Case referred to in judgment:

(1) *Chanmalswami v. Gangadharappa* (1915), 39 Boom. 339.

(2) *Sidhanath Dhonddev v. Ganesh Govind* (1912), 37 Boom. 60.

(3) *Muhammad Kamil and Others v. Musammat Imtiaz Fatima and Others* (1908), 14 Cal. W.N. 59

(4) *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur* (1917), 44 Cal. 759.

Judgment

Lord Tucker: The appellants in this case are the administrative of one Nico Tzamburakis deceased and the respondent, who was not represented at the hearing of the appeal and who has not delivered a written case, is his sister. The deceased and the respondent were co-owners as tenants-in-common, having shares of 70 per cent. and 30 per cent. respectively, of a large sisal estate in Tanganyika.

The suit was brought in the High Court of Tanganyika by plaint dated July 23, 1952, by the respondent as plaintiff against the estate of the deceased represented by the present appellants claiming that the deceased had failed to account to her for monies payable by him to her in connection with this estate during the period from April 1, 1946, to July 1, 1949.

The appellants pleaded *inter alia* that the claim was barred by the provisions of the Indian Limitation Act, 1908, which together with the Indian Code of Civil Procedure had been applied to Tanganyika in 1920 by Order in Council. This question was tried as a preliminary issue on the pleadings by Mahon, J., who on December 3, 1954, delivered what is described in the record as "Judge's Ruling on Preliminary Issues" whereby he held that an amended plaint which had been filed on July 27, 1954, did not disclose a new cause of action and that the suit was not time-barred by the Indian Limitation Act.

The case accordingly preceded to trial on the merits and was heard by Cox, C.J., who on October 17, 1955, gave judgment in favour of the respondent and ordered an account to be taken. The terms thereof are embodied in a decree bearing the same date and are set out at p. 42, p. 43, p. 44 of the record in the present appeal.

It is important to observe that at the trial before the chief justice there was no dispute as to the liability of the deceased to account to the respondent. The defence was that he had rendered full and accurate accounts and that the respondent had received all monies to which she was entitled and that she and the deceased had signed a document on July 14, 1949, confirming the settlement of all accounts up to June 30, 1949, and acknowledging that nothing was then due by either of them to the other. As to this document the learned judge accepted the respondent's evidence and upheld her plea of non est. factum. The judge's decision with regard to this document is not now challenged.

At p. 33, para. 20, the learned judge said:

> "Apart from a technical defence which another judge of this court dismissed, the defence to the plaintiff's claim is that she has received everything due to her from the estate under the lease, and that she has received full and accurate accounts. I have already touched on the allegations that the plaintiff had not received her full share. As regards the accounts, it was proved quite clearly before me that proper accounts had never been rendered."

At p. 37, para. 31, he said:

> "It will, in my opinion, probably be an extremely difficult task for accurate accounts now to be made up because the documents are apparently either non-existent, carefully hidden or misplaced, but the fact remains that the plaintiff has not had proper accounts showing her share to which she was entitled under the lease."

It will be necessary later to refer to other passages in this judgment the relevance of which will be more readily appreciated in connection with the subsequent proceedings before the Court of Appeal for Eastern Africa. The

appellants in their appeal to the last named court challenged the ruling of Mahon, J., on the limitation issue and the decision of the chief justice as to the respondent's plea of non est. factum. Their grounds of appeal also alleged that the judgment was against the weight of evidence. The respondent contended that there was no right of appeal from the ruling of Mahon, J., which it was contended was a preliminary decree within the meaning of s. 97 of the Indian Code of Civil Procedure (the terms of which are set out later in this judgment). Neither party disputed the basis upon which the amount had been ordered to be taken if the Limitation Act did not apply. It may now be convenient before dealing with the proceedings on the appeal to refer in more detail to the transactions and arrangements between the respondent and the deceased in connection with this sisal estate of which they were tenants-in-common. From 1932 to April 1, 1946, the respondent and the deceased worked the estate in partnership at one time on a 50 per cent. basis, but the percentage varied from time to time and by 1946 the respondent was the registered owner of 30 per cent. undivided share of the estate. The deceased was the active manager and received a salary as such. There were disputes and differences between the parties as to their proper share of the profits and in order to put matters on a more definite basis the parties entered into a lease for 3 years from April 1, 1946, whereby the respondent, who was described as the landlord, demised to the deceased, who was described as the tenant, as to her share and interest the hereditaments described in the schedule thereto together with the sisal factory, machinery, trollies, railway lines and other chattels and effects then on the estate and forming part of the sisal estate as a running concern and paying therefor during the term a royalty of £3 per ton on all grades of sisal and tow produced from the whole estate, subject to a provision for increase or decrease depending on rises or falls in the price of sisal. The royalty was to be paid within 30 days of the sale of sisal.

On the termination of this lease on March 31, 1949, there followed a period of 3 months which has been referred to throughout as the interregnum period. As to this period the trial judge held on the evidence that the respondent was entitled to her share of the estate. At p. 36, para. 28; he said:

> "The plaintiff is obviously entitled to her share in the estate over that period, and it would appear that her share in the estate over that period would have to be ascertained on the basis of the relationship existing between her and her brother prior to entering into this first lease which became effective from April 1, 1946."

And when dealing with the form of the order he said on p. 39, para. 34:

> "As regards sub-para. (2) of para. 32 (referring to an earlier paragraph in his judgment wherein the plaintiff's prayer had been set out) the answer to that would appear to be ascertainable on the basis of the partnership which existed between the brother and sister prior to the 1st day of April, 1946, that is to say, on a 70 per cent. figure and a 30 per cent. figure basis, but not inclusive of any profits for the month of July, 1949, as the plaintiff had leased her share of the estate to her brother on July 14, 1949, for Shs. 18,000/-a month with effect from the 1st day of July, 1949, and was paid the rent for the month of July."

If the respondent is entitled to an account for this period and if her claim is not barred by the Limitation Act the basis upon which the chief justice ordered the account to be taken has never been challenged by either party and their lordships see no reason for rejecting the decision of the learned judge that the proper basis was that of a partnership subsisting from April 1, 1949, to July 1, 1949.

As from July 1, 1949, a second lease was entered into under which all rent has been paid and ultimately in October, 1949, the estate was sold and the

proceeds divided between the co-owners. No question arises in this appeal with regard to the second lease or the sale. The dispute is confined to the period of the first lease (April 1, 1946–March 31, 1949) and the interregnum period (April 1, 1949–July 1, 1949).

As to the first lease, which was registered, their lordships feel no doubt that the sum payable thereunder, although called a royalty and calculated on a royalty basis, was a sum which was at all times readily and easily ascertainable by calculation and amounted in law to a rent. The Court of Appeal so treated it.

The questions therefore now remaining to be dealt with are three in number.

1. Was the Court of Appeal entitled to entertain an appeal against the decision of Mahon, J., on the Limitation Act issue?
2. If so what is the proper period of limitation applicable to
 (*a*) the claim for an account of rent payable under the registered lease dated March 26, 1946, for the period April 1, 1946, to March 31, 1949; and
 (*b*) the claim for an account of the respondent's share of profits on a partnership basis for the period April 1, 1949, to July 1, 1949.

The leading judgment in the Court of Appeal for Eastern Africa was delivered by Briggs, J.A. With this judgment the other members of the court (Worley, P., and Sinclair, V.-P.) concurred.

It is now necessary to set out the relevant provisions of the Indian Code of Civil Procedure, viz., Sections 2 (2), 2 (14), 33, 96 (1), 97 and 105 (1), and of the Indian Limitation Act, 1908, viz, Section 3, and the First Schedule Nos. 89, 106, 110, 115, 116 and 120.

Indian Code of Civil Procedure–

> "Section 2 (2). 'Decree' means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final . . ."
>
> "Explanation. A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."
>
> "Section 2 (14). 'Order' means the formal expression of any decision of a Civil Court which is not a decree."
>
> "Section 33. The court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow."
>
> "Section 96 (1). Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorized to hear appeals from the decisions of such court."
>
> "Section 97. Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree."
>
> "Section 105 (1). Save as otherwise expressly provided, no appeal shall lie from any Order made by a court in the exercise of its original or appellate jurisdiction; but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the Memorandum of Appeal."

Indian Limitation Act, 1908–

"Section 3. Subject to the provisions contained in s. 4 to s. 25 (inclusive) every suit instituted, appeal preferred, and application made after the period of limitation prescribed therefore by the First Schedule shall be dismissed, although limitation has not been set out as a defence."

"FIRST SCHEDULE

	Description of Suit	*Period of Limitation*	*Time from which period begins to run*
89.	By a principal against his agent for movable property received by the latter and not accounted for.	3 years	When the account is, during the continuance of the agency, demanded and refused, or where no such demand is made, when the agency terminates.
106.	For an account and a share of the profits of a dissolved partnership.	3 years	The date of the dissolution.
110.	For arrears of rent.	3 years	When the arrears become due.
115.	For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for.	3 years	When the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases.
116.	For compensation for the breach of a contract in writing registered.	6 years	When the period of limitation would begin to run against a suit brought on a similar contract not registered.
120.	Suit for which no period of limitation is provided elsewhere in this Schedule.	6 years	When the right to sue accrues."

The Court of Appeal held that there having been no appeal entered within time from the decision of Mahon, J., which in their view was a preliminary decree within the meaning of s. 2 (2) and s. 97 of the Code of Civil Procedure, the grounds of appeal seeking to attack his decision were incompetent.

Their lordships do not agree. They prefer the decision of the Full Court Bench in Bombay in the case of *Chanmalswami v. Gangadharappa* (1) (1915), 39 Boom. 339 which overruled the case of *Sidhanath Dhonddev v. Ganesh Govind* (2) (1912), 37 Boom. 60 in which it had been held that decisions as to misjoinder, limitation and jurisdiction were preliminary decrees from which the unsuccessful parties must at once appeal by reason of s. 97 of the Code.

There is, however, another reason why their lordships are of opinion that the Court of Appeal should have dealt with the issue of limitation, viz., that s. 3 of the Indian Limitation Act, 1908, set out above, in terms requires the dismissal of every suit instituted after the prescribed period of limitation even though this defence is not pleaded.

In the case of *Muhammad Kamil and others v. Musammat Imtiaz Fatima and others* (3) (1908), 14

Cal. W.N. 59 on appeal to this Board, where a plea under s. 4 of the Limitation Act, 1877 (which corresponds with s. 3 of the Act 1908) had been abandoned by Counsel at one stage in the courts below, Lord Macnaghten at p. 63 observed during the course of argument “the abandonment

would not relieve the court from taking notice of it," and the board in its judgment said:

> "As to this question of limitation their Lordships are of opinion that it was properly dealt with in the courts below."

In the present case their lordships are of opinion that no procedural defect could relieve the Court of Appeal of its duty to give effect to the statute on an appeal from a judgment given in favour of a plaintiff in respect of a time-barred cause of action.

It is necessary therefore to consider whether on the basis upon which judgment was entered for the respondent at the trial her claim was in whole or in part time-barred.

It was contended by the appellants that the amended plaint disclosed a new cause of action and that for the purposes of the Limitation Act time should be calculated from this date, i.e., July 27, 1954. Their lordships having compared the original plaint with the amendment are satisfied that the latter discloses no new cause of action, but in any event, the amendment having been made by consent and approved by the court without the imposition of any condition with regard to limitation it follows that time must be calculated from the date of the original plaint, i.e. July 23, 1952.

As regards the claim for rent the relevant period of limitation depends upon whether the claim for payment under this lease, which was a contract in writing registered, falls within art. 116 of the First Schedule under which the period is six years, or art. 110 under which it is three years.

This question was settled by a Board of the Judicial Committee consisting of Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins in 1917 in the case of *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur* (4) (1917), 44 Cal.759. In a judgment delivered by Lord Sumner it was held that a claim for rent under a registered lease came within art. 116. In view of the unqualified words "arrears of rent" in art. 110 and the use of the word "compensation" in art. 116 it is perhaps desirable to set out at some length the passage in the judgment dealing with this matter.

After referring to the history of the limitation legislation culminating in the Acts of 1871 and 1877 the judgment proceeded:

> "Both these Acts draw, as the Act of 1859 had drawn, a broad distinction between unregistered and registered instruments much to the advantage of the latter. The question eventually arose whether a suit for rent on a registered contract in writing came under the longer or the shorter period. On one hand it has been contended that the provision as to rent is plain and unambiguous and ought to be applied, and that in any case 'compensation for the breach of acontract' points rather to a claim for unliquidated damages than to a claim for payment of a sum certain. On the other hand it has been pointed out that 'compensation' is used in the Indian Contract Act in a very wide sense, and that the omission from art. 116 of the words, which occur in art. 115, 'and not herein specially provided for' is critical. Article 116 is such a special provision, and is not limited, and therefore, especially in view of the distinction long established by these Acts in favour of registered instruments, it must prevail. There is a series of Indian decisions on the point, several of them in suits for rent, though most of them are in suits on bonds. They begin in 1880, and are to be found in all the Indian High Courts. In spite of some doubts once only was it held in 1903 [*Ram Narain v. Kanta Singh*] that in such a suit art. 110 and not art. 116 applied. Then in 1908, and in this state of the decisions, Act IX of 1908 replaced the Limitation Act of 1877 without altering the language or arrangement of the articles, and in 1913 in *Lal Chand v. Narayan* the High Court of Bombay held that, especially in view of this re-enactment, the current

> of decisions must be followed and *Ram Narain's* case must be disapproved. In the present case the High Court treated the matter as settled law in the same sense. . . .
>
> "However arguable the construction of Act XV of 1877 may have been when the matter was one of first impression, it certainly cannot be said that the construction for which the appellant argues, was ever clearly right. On the contrary their lordships accept the interpretation so often and so long put upon the Statute by the courts in India, and think that the decisions cannot now be disturbed."

This decision was given in 1917, three years before the Indian Limitation Act was applied to Tanganyika. It was binding on the Indian courts and settled once and for all a matter with regard to which there had been some conflict of opinion. Their lordships do not consider it would be proper at this date to refuse to follow a decision of this Board given in such circumstances, which must have been recognised as valid and binding when the Indian Limitation Act, 1908, was made applicable to Tanganyika.

They accordingly hold that art. 116 is applicable to the claim under the lease and that the relevant period of limitation is 6 years. Counsel for the appellants drew their lordships' attention to the fact that the decree of October 17, 1955, ordered an account to be taken of all sisal produced during the period covered by the first lease, namely from April 1, 1946, to March 31, 1949, and of the rent by way of royalty due to the respondent on such total production whereas the period of six years calculated from July 23, 1952, would go back to July 23, 1946, and any money payable between April 1, 1946, and July 23, 1946, would be time-barred. Their lordships are of opinion that the taking of an account covering the whole period of the lease was properly ordered, but they would point out that after the account has been taken the appellants should not be ordered to pay any sums received by the deceased in respect of sales of sisal made more than 30 days prior to July 23, 1946, or any sums received by him on sales of machinery or other movables before that date.

With regard to the claim in respect of the interregnum period (April 1, 1949, to July 1, 1949) their lordships have already signified their acceptance of the basis upon which the account was ordered by the chief justice. That basis has never been challenged by the respondent and the appellants are entitled to say that it is the only basis upon which this part of the claim can be dealt with. It follows therefore that as to this period the claim is time-barred under art. 106 of the First Schedule to the Indian Limitation Act 1908, and the appellants are entitled to the necessary consequential amendment of the decree drawn up pursuant to the judgment of the chief justice.

Their lordships will accordingly humbly advise Her Majesty that the appeal be allowed to the extent that the order of the Court of Appeal for Eastern Africa dated July, 18, 1956, be set aside and the decree of the High Court of Tanganyika dated October 17, 1955, be varied by striking out para. (2) thereof. The appellants, although successful only with regard to a small part of the period covered by the claim, have had to appeal to the Court of Appeal for Eastern Africa and thence to this Board in order to secure the appropriate variation of the order made against them and are consequently entitled to some measure of relief in respect of costs, which in all the circumstances their lordships consider will be met by ordering that the respondent do pay one quarter of the appellants' costs in the Court of Appeal for Eastern Africa and of this Appeal.

Order that the order of the Court of Appeal ((1956), 23 E.A.C.A. 247) *be set aside, and the decree of the High Court of Tanganyika be varied.*

For the appellants:
Sir Frank Soskice QC and *Mark Littmann*

Theodore Goddard & Co, London

The respondents did not appear and were not represented.

Mandavia v The Commissioner for Income Tax
[1958] 1 EA 407 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	16 July 1958
Case Number:	10/1958
Before:	Briggs V-P, Forbes JA and Sir Owen Corrie Ag JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Miles, J

[1] Income tax – Notice requiring return of income – Return furnished within time required – Subsequent objection that time allowed inadequate – Whether by furnishing return taxpayer waived objection – East African Income Tax (*Management*) *Act*, 1952, *s.* 59 (1).

[2] Income tax – Personal allowance claimed for insurance premium – No details of claim furnished – Whether refusal to allow deduction for premium justified.

[3] Income tax – Deduction claimed for bad debts – No proof of bad debts to satisfaction of Commissioner – Refusal of court to grant adjournment to enable accountant to give evidence – Whether refusal justified.

Editor's Summary

The appellant received a notice calling for a return of his income for 1951. Without then objecting to the time allowed him he furnished a return, and therein claimed an allowance for an insurance premium, but gave no details of the life policy in respect of which the premium was paid. The appellant also submitted accounts to the Commissioner and claimed a substantial allowance for bad debts. The Commissioner, in assessing the appellant, allowed no deduction for the premium in default of full information regarding the policy and declined to make the allowance claimed for bad debts unless the accounts were properly audited and certified. The appellant disputed the assessment made on him and instructed an accountant to examine his accounts. Meanwhile, when the hearing of an appeal against the assessment was imminent, an application was made by the appellant for the appeal to be taken out of the list, which was refused. The appellant then obtained an affidavit from the accountant stating that he would be in England for the next month, but that he had examined the accounts, and he exhibited his certificate thereon. When the hearing began the appellant produced this affidavit, and again asked for an adjournment. The application for adjournment was opposed by the Commissioner on the grounds that there had been procrastination and evasion by the taxpayer, and also on the ground that the accountant's evidence would not assist the appellant. The trial judge refused the adjournment on the first ground and gave judgment for the Commissioner, whereupon the appellant filed a further appeal. The grounds of this appeal were that the

notice calling for his return contravened s. 59(1) of the East African Income Tax (Management) Act, 1952, by allowing him insufficient time to make the return and accordingly the assessment was void, that the insurance premium should have been allowed, and that the appellant should have been allowed an adjournment to enable him to call the accountant to prove that the appellant was entitled to a large deduction for bad debts.

Held –

(i) since the appellant had furnished a return without having raised any objection to the notice when received, he had waived any alleged defect in the notice, and in any event, a defect in the notice would not invalidate an assessment otherwise validly made.

(ii) the onus was on the appellant to prove all facts showing that the assessment was excessive, and in the circumstances the claims were properly rejected.

(iii) in the circumstances it did not appear that the trial judge acted on an incorrect basis in refusing the adjournment on the first ground, and in any event, the adjournment would have been rightly refused on the second ground, since the certificate of the accountant did not even mention the question of bad debts, and it was clear that the accountant's evidence could not have assisted the appellant on the claim for an allowance for bad debts.

Appeal dismissed.

No cases referred to in judgment

Judgment

Briggs V-P: read the following judgment of the court: This was an appeal from a judgment and decree of the Supreme Court of Kenya given on appeal from an income tax assessment for the year of income 1951. We dismissed the appeal with costs and now give our reasons.

Three points were raised by the appellant, who appeared in person. The first was that the notice calling for the return of income on which the assessment was based contravened the provisions of s. 59 (1) of the East African Income Tax (Management) Act, 1952, by allowing an insufficient period for making the return, and that this rendered the assessment void. We were by no means satisfied that this was correct in fact, and were satisfied that in any event it was wrong in law. The appellant raised no objection to the notice, but furnished a return in accordance with its terms. We thought this must amount in law to a waiver of the alleged defect in the notice. Even if this were not the case, we saw no reason why a defect in the notice should invalidate an assessment otherwise validly made.

The third point was that the Commissioner had wrongfully refused to allow a deduction in respect of an insurance premium of £150. It appears that on the standard form of return, which requires particulars to be given of the insurance company concerned, the life assured, the capital sum payable on death and the premia paid during the year, the appellant merely inserted the figure "£150" and left the rest blank. He could at any time thereafter have given the necessary particulars, and the claim would probably have been allowed, but he did not do so. He did not even produce the policy or premium receipt on the hearing of the appeal to the Supreme Court, where the onus lay on him to prove all facts showing the assessment to be excessive. In the circumstances the Supreme Court could not do otherwise than reject the claim.

The second, and most substantial, ground of appeal was that the Supreme Court had erred in refusing to grant an adjournment necessary to enable the appellant to call as a witness a Mr. Ellert, an accountant, whose evidence was required to establish a claim by the appellant for a large deduction in respect of bad debts. The appellant had submitted his accounts to the Commissioner, and had been warned that they could not be accepted as correct as they stood, and that the authorities would not allow the deduction claimed unless the accounts were properly audited and certified. The appellant thereafter gave certain instructions to Mr. Ellert. An order was made on October 23, 1957, that the appeal to the Supreme Court should proceed on November 14 "if possible, in so far as the legal grounds of appeal are concerned". On November 11 the applicant asked that the appeal be taken out of the list. This was refused. On November 14 some legal argument took place and the case was set down for hearing in full with any evidence required on November 18. On that day the appellant again asked for an adjournment and produced an affidavit dated November 16 by Mr. Ellert saying that he had to go to England on November 17 and would be away a month. He also said that he had examined the appellant's accounts, and exhibited his

certificate thereon. The Crown opposed adjournment on two grounds, first, that there had been in this

matter a long history of procrastination and evasion, and secondly, that Mr. Ellert's oral evidence, if given, could not really assist the appellant. The learned judge refused the adjournment on the first ground. He seems to have thought that Mr. Ellert was only instructed on or after November 14, 1957. This may have been a mistake, but the appellant did not think fit to give evidence and there was nothing to show when Mr. Ellert was instructed. His certificate is not dated. In the circumstances we were not prepared to say that the learned judge acted on an incorrect basis.

In any event, we were of opinion that adjournment would have been rightly refused on the Crown's second ground. Mr. Ellert's certificate was, by a default which we hope was accidental, omitted from our records, but on referring to the original, we found that it stated that he had not audited the accounts at all. The comments made on the accounts were apparently the result of a merely superficial examination, and were themselves necessarily of a superficial character. The certificate did not even mention the question of bad debts. It was obvious that Mr. Ellert's attention had never been specifically directed to the question in issue, namely, whether the sums shown as bad debts in the accounts which the Commissioner queried really represented bad debts properly deductible. This was the only issue on which Mr. Ellert's evidence was required, and it was clear that his evidence could not, as matters stood, have assisted the appellant in any way. The adjournment was rightly refused and this ground of appeal also failed.

Appeal dismissed.

The appellant in person.

For the respondent:
HB Livingstone (Senior Assistant Legal Secretary, East Africa High Commission)
The Legal Secretary, East Africa High Commission

Mandavia v The Commissioner of Income Tax
[1958] 1 EA 410 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	16 July 1958
Case Number:	26/1958
Before:	Briggs V-P, Forbes JA and Sir Owen Corrie Ag JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Edmonds, J

[1] Jurisdiction – Income tax – Assessments confirmed or varied by court – Proceedings to recover tax found due by court in previous action – Preliminary objection to court's jurisdiction to try suit whilst further appeal against assessments still pending in Privy Council – Objection over-ruled – No appeal by taxpayer from ruling – Whether objection competent on subsequent appeal against decree for tax

claimed.

[2] Income tax – Assessments confirmed or varied by court – Subsequent action by Commissioner to recover tax found due by court – Whether when court has determined the assessment the Commissioner must issue new assessments comprising court's findings before suing for tax – East African Income Tax (*Management*) *Act,* 1952, *s.* 78 *and s.* 86.

[3] Income tax – Evidence of assessment – Assessment lists comprising copies of notices of assessment – Method of proving assessment – East African Income Tax (*Management*) *Act,* 1952, *s.* 73.

[4] Income tax – Evidence – Admissibility of documents – Notices signed by officer not proved as appointed for the purpose – Notice put in evidence by the Commissioner as his notice – Authority of officer to give notice taken as proved – East African Income Tax (*Management*) *Act,* 1952, *s.* 70, *s.* 78 (7) *and s.* 83 (1) (*b*).

[5] Income tax – Tax due secured by charge on property – Whether Commissioner precluded from suing for tax due instead of taking proceedings for foreclosure or sale – Indian Transfer of Property Act, 1882, *s.* 67.

[6] Income tax – Assessment determined in part and remitted in part for further consideration – Whether suit will lie for tax due under the part determined.

Editor's Summary

The respondent sued the appellant for income tax due on assessments for the years of assessment 1943–1951, and also for certain penalties arising therefrom. The assessments, as determined by the Supreme Court and on appeal by the Court of Appeal, were the subject of a pending appeal to the Privy Council. Preliminary objections to the jurisdiction of the Supreme Court to hear the suit were over-ruled and judgment for the sums claimed with costs was given in favour of the respondent. The appellant then appealed on numerous grounds, which included the ground that the Supreme Court had no jurisdiction to decide the appellant's liability under the assessments whilst an appeal against these was pending in the Privy Council. The other grounds of appeal are set out in detail in the judgment.

Held –

(i) the question of jurisdiction had been determined by the trial judge as a preliminary point, and this could have been embodied in a preliminary decree from which the appellant could have, but did not appeal; accordingly, it was outside the scope of the judgment and decree now appealed against, and incompetent as a ground of appeal. *Commissioner for Transport v. Kenya Co-operative Creameries Ltd.* (1954), 21 E.A.C.A. 70 followed.

(ii) where an assessment has been determined on appeal by a court a new assessment by the commissioner after such determination is not required as,

except where the decision of the court lays down a principle or method of assessment, the original assessment continues in force with such variations therein as the decision of the court requires.

(iii) an "assessment" in East Africa need not (as in England) be entered in an assessment book, but assessment lists, which may consist of copies of the notices of assessment, are required; file copies are the best evidence of assessments and certified copies of these are a proper method of proof where the file copies are in court in other proceedings.

(iv) an objection to a notice or demand note as insufficient to comply with s. 70 of the East African Income Tax (Management) Act, 1952, cannot be entertained where the Commissioner himself gives evidence that the notice or demand note was given by him under s. 78(7) or s. 83(1)(*b*) and he is not cross-examined on the point; in any event, if these objections had been valid the court would almost certainly disregard them under r. 76 and r. 77 of the East African Court of Appeal Rules, 1954.

(v) even if the tax is secured by charge and an action for foreclosure could be brought, the Commissioner is not precluded from bringing a personal action for the tax.

(vi) a suit for tax based on those parts of an assessment which had been determined by the court may be instituted even though the total liability to tax under the assessment as a whole had not been finally determined.

Appeal dismissed.

Case referred to:

(1) *Commissioner for Transport v. Kenya Co-operative Creameries Ltd.* (1954), 21 E.A.C.A. 70.

July 16. The following judgment was read by direction of the court:

Judgment

Briggs V-P: This was an appeal from a decree of the Supreme Court of Kenya. We dismissed the appeal with costs and now give our reasons.

The respondent sued the appellant for monies due for income tax for the years of assessment 1943 to 1951 inclusive on assessments as confirmed or varied by the Supreme Court or this court, and for certain penalties, the total claim being Shs. 97,554/- and costs. Judgment was given as prayed and the appellant appealed on a large number of grounds which were as follows,

> "1. The learned trial judge erred in low in holding that the provisions of s. 6 of the Civil Procedure Ordinance, Cap. 5 of the Laws of Kenya, were over-ridden and revoked by the provisions of sub-s. 11 of s. 78 of the East African Income Tax (Management) Act, 1952, by virtue of s. 28 of the East Africa (High Commission) Order in Council, 1947, and that the court had jurisdiction to proceed to try and decide the appellant's liability in the case before him, under the assessments, which were appealed against and varied by this Honourable Court in Civil Appeal No. 31 of 1956, and which assessments as varied, were and are, still, the subject-matter of a civil appeal, at present pending before Her Majesty in council as Privy Council Appeal No. 7 of 1957–in view of the fact that the validity of the said assessments was an issue pending for trial and decision by him and also by the Privy Council; and the learned trial judge should have stayed the hearing of the case before him.

"2. The learned trial judge erred in law and in fact in deciding the fourth and sixth issues in favour of the respondent, inasmuch as–

(*a*) the respondent's suit in question was indisputably brought not in accordance with the decision of the Supreme Court in its Civil Appeal No. 33 of 1954, which decision (superseded by the decision of this honourable court in its Civil Appeal No. 31 of 1956) was, in law, non-existent and inoperative at the time of filing of said suit.

(*b*) the respondent failed to prove or to produce at the trial of the case, any actual assessments as having been made either of the appellant's assessable income or of any tax payable thereunder, either subsequent to the said decision of the Supreme Court or at any time, as required by the provisions of East African Income Tax (Management) Act, 1952;

(*c*) certain documents in the case–said to be exhibit 1–were not properly proved, and in any case, they could not take the place of proof or production of the assessments referred to in (*b*) above;

(*d*) the originals of the documents, referred to as 'exhibition 1' in (*c*) above, were at the date of the endorsement thereon by the respondent and for a long time before then, in the court file of Civil Appeal No. 33 of 1954 of Supreme Court and such endorsement could not in law, turn those papers into secondary evidence of original official assessments in the assessments lists, records or books of the income tax department;

(*e*) the document named (in the case) as "exhibit 3" was neither legally proved nor bore the date deponed to by the respondent, and should not legally have been read or treated as evidence in the case;

(*f*) when the document referred to in the preceding sub-para (*e*) above, purported actually to have been signed by its signatory in his capacity as principal investigation officer, a substituted intention should not, in the absence of any testimony to that effect, have been attributed to him of having acted in a different capacity, for the purpose of this penal or tax case;

(*g*) the 'High Commission' *Gazette* referred to in the judgment appealed against, should not have been held to be a 'Local Government' *Gazette* within the meaning of s. 57 of the Indian Evidence Act as applied to Kenya, nor should the production of a copy of the said *Gazette*, as required by s. 45 of Cap. 1 of the Laws of the High Commission, 1951 Revised Edition, have been dispensed with, for the purpose of filling the gap in the evidence as to the additional position filled by the signatory to the aforesaid document, in the income tax department.

(*h*) the documents named (in the case) as 'exhibit 7' should not have been treated as legally proved, nor as signed or served in accordance with the requirements of s. 83 (1) (*b*) or s. 85 of the Act.

(*i*) the learned trial judge should have held that the notices from the respondent to the appellant as exhibited in the case or as produced by the respondent, did not conform to the requirements of s. 70 of the E.A. Income Tax (Management) Act, 1952.

"3. The learned trial judge should have held on the evidence adduced before him on the fifth issue regarding the deposit of title deeds and the deposit/payment of Shs. 100,000/- (referred to in para. 4 of the defence) coupled with their acceptance by the respondent and his retention thereof

that respondent's present action was incompetent and even misconceived and that the respondent should have brought a suit under s. 67 of the Transfer of Property Act as applicable to Kenya.

"4. The learned trial judge should have further held that the aforesaid suit of the respondent having been based on the decision of this honourable court in its Civil Appeal No. 31 of 1956–which decision was inconclusive as to the appellant's final liability to tax, there could not be any final assessment of the appellant's liability to tax as envisaged by the provisions of the East African Income Tax (Management) Act, 1952, and he should therefore have disallowed the respondent's claim, as being unenforceable at law.

"5. The learned trial judge should also have held that the letter dated October 19, 1956, from the principal investigation officer to the appellant had not been properly proved (though marked 'exhibit 5') and that in any case, it did not amount to a notice as envisaged by s. 70 of the E.A. Income Tax (Management) Act, 1952.

"6. That the judgment/decree appealed against is bad in law and against the weight of evidence adduced in the case."

On ground 1 we refused to hear the appellant at all. It was conceded that all matters comprised in this ground were heard and determined by the learned trial judge on preliminary objections raised by the appellant and were finally disposed of by the "Ruling" of December 23, 1957. For reasons which appear from the judgments of this court in *Commissioner for Transport v. Kenya Co-operative Creameries Ltd.* (1) (1954), 21 E.A.C.A. 70 at p. 72, p. 73 and p. 79, we were of opinion that the question of jurisdiction raised was decided by a judgment, and could properly have been embodied in a preliminary decree, since it "conclusively determined the rights of the parties" with regard to one at least of the matters in issue in the suit. It was not merely an interlocutory order which this court could have set aside under r. 78. No appeal was brought from it. Indeed, the appellant specifically said that he did not intend to appeal, which suggests that he realised at the time of hearing the decision that he could have done so. The matters then decided were outside the scope of the judgment and decree now under consideration and the ground of appeal was therefore incompetent.

Grounds 2 (*a*) and (*b*) may be dealt with together. The appellant's argument was that a suit for income tax may only be brought under s. 86 of the East African Income Tax (Management) Act. Under s. 78 (11), which governs the position where an appeal is brought to this court from a decision of the Supreme Court, "tax shall be assessed and collected in accordance with the decision of the judge". This requires that a new formal assessment shall be made by the Commissioner after the Supreme Court's judgment and in accordance therewith. The suit under s. 86 must be based on that assessment. We thought this submission was erroneous. Sub-s. (6) of s. 78 shows that in a case like this the action of the Supreme Court results in the original assessment continuing in force subject to variations made by the court. We were of opinion that a decision of this court (or of Her Majesty in council) had a similar effect, the original assessment surviving throughout as varied from time to time. On this construction, the words, "shall be assessed" in sub-s. (11) apply only to cases where the Supreme Court's the judgment does not give detailed figures, but lays down a principle or method of assessment. In such a case a new assessment should be made accordingly. Where, as in this case, the amount due is precisely stated by the Supreme Court, no new assessment is required. The purpose of sub-s. (11) is to ensure that no further delay in collection shall result from appeals beyond Supreme Court level. It does not purport to deal with the situation where such further appeal has already been decided.

That is left to commonsense. We agreed with the learned judge that the Crown's procedure in this case was in accordance with commonsense and entirely proper.

On grounds 2 (*c*) and (*d*) it was submitted that an "assessment" must in this country, as in England, be made by an entry in an assessment book, and a notice of assessment is not itself an assessment. We thought this argument was fully met by s. 73. Assessment books are not required, but assessment lists are. These "list", however, may, and we understand do, take the form of copies of the notices of assessment. It follows that the file copies are the best evidence of assessments, and certified copies thereof, as put in this case, are a proper method of proof where the file copies are in court in other proceedings.

On grounds 2 (*e*), (*f*) and (*g*) the submission was that the letter of January 10, 1956, which was exhibit 3, was not a sufficient notice under s. 78 (7), in view of the provisions of s. 70. It is signed by Mr. Martin as principal investigation officer and there was no reason to suppose that he was a person appointed by the Commissioner for the purpose. Reference to the High Commission *Gazette* could not remedy this, for various reasons. This highly technical objection might have had some success if the appellant had not insisted on the personal attendance of the Commissioner under s. 86 (2). As it was, the Commissioner gave evidence and himself put in exhibit 3, which was produced by the appellant, as his (the Commissioner's) notice to the appellant under s. 78 (7). The date is incorrectly given, but there is no doubt about the document referred to. In the absence of any cross-examination on the point, Mr. Martin's authority must be taken as proved, without recourse to the *Gazette*.

Ground 2 (*h*) concerns exhibit 7, two demand notes issued under s. 83 (1) (*b*) and relied on in support of the claim for penalties. These were signed respectively by Mr. Evans and another gentlemen whose signature is illegible. Again they were put in by the Commissioner personally, and it is impossible, in the absence of cross-examination, to hold that they are not his notices. They were produced by the appellant. Ground 2 (i) merely recapitulates earlier objections.

We think it proper to add that, even if any of the objections to the admissibility of these documents had been valid, we should almost certainly have had to disregard their irregular admission under the provisions of r. 76 and r. 77 of the rules of this court.

Ground 3 is based on a submission that the Indian Transfer of Property Act, as applied to Kenya, precludes the bringing of a personal action for debt, where the debt is secured by a charge and an action for foreclosure or sale could be brought. Section 66, s. 67, s. 84, s. 86, s. 88 and s. 100 were referred to. These do not in any way support the submission, and we think it is erroneous. If there were any substance in it, we should be obliged to consider whether the Commissioner, as an emanation of the Crown, is bound by the provisions of the Act.

Ground 4 rests on the fact that this court by its judgment referred to treated different parts of the original assessments in different ways. Certain parts of the assessments were confirmed and certain parts remitted for further consideration. The court clearly stated its intention that the Crown should at once collect tax in respect of the parts confirmed, and the decree now under appeal deals with those parts, and not with the parts remitted. If this court erred in dealing with the matter in the way described, it must be corrected in

other proceedings. We assumed that it did not err, and that the course suggested to, and adopted by, the Crown was proper.

Ground 5 failed for the reasons given as regards other exhibits.

We thought that all the technical objections raised against this decree fell to the ground on examination. No arguments were addressed to us on the merits.

Appeal dismissed.

The appellant in person.

For the respondent:
HB Livingstone (Senior Assistant Legal Secretary, East Africa High Commission)
The Legal Secretary, East Africa High Commission

Maryam Binti Abdulla Shirazi v Yona Muhuma Mnyamwezi
[1958] 1 EA 415 (CAZ)

Division:	Court of Appeal at Zanzibar
Date of judgment:	13 August 1958
Case Number:	32/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court for Zanzibar–Law, J

[1] Mohamedan law – Land – Gift of hut to take effect on death of donor – Donor and donee not Mohamedans at time of gift – Validity of gift in futuro – Transfer of Property Decree (*Cap.* 82), *s.* 110, *s.* 116 (*Z.*).

Editor's Summary

The respondent, a Christian, married the appellant's mother in 1941, when the appellant was four years old. Subsequently the respondent had the mother and the appellant converted to Christianity. In 1948 the respondent, out of affection for the appellant, bought a hut for Shs. 600/- and had the conveyance drawn and registered in her name, without the respondent being joined as a party thereto or signing it. In 1952, when seventeen years of age, the appellant left the hut in which the respondent and her mother were living and sent a letter to the respondent renouncing the Christian faith. After the appellant had married, the respondent sued in the magistrate's court for a declaration that the hut was his property, and for an order that his name be substituted in the registered conveyance for the name of the appellant. The magistrate dismissed the suit. On appeal, the High Court held that on the evidence the respondent wanted

the appellant to have the hut on his death, instead of sharing it with other co-heirs, reversed the decision of the magistrate and entered judgment for the respondent, mainly on the ground that at the time of the gift the parties were not Mohamedans, that accordingly s. 110 of the Transfer of Property Decree (Cap. 82) applied, and thereunder the transfer must be signed by the donor of the gift.

Held –

(i) in Zanzibar, where the subject matter of a gift is land or an interest in land, the law to be applied is the law of Zanzibar, that is to say, Mohamedan law. *Secretary of State for Foreign Affairs v. Charlesworth Pilling & Co.,* [1901] A.C. 373 followed.

(ii) the respondent had, in effect, reserved for himself a life interest in the property, and since under Mohamedan law the transaction was a plain case of a gift to take effect in futuro, the gift was invalid. *Haider bin Mohamed Elmandry and others v. Khadija binti Ali bin Salem* (1956), 23 E.A.C.A. 313 followed.

Appeal dismissed.

Case referred to in judgment:

(1) *Secretary of State for Foreign Affairs v. Charlesworth Pilling & Co.*, [1901] A.C. 373.

(2) *Haider bin Mohamed Elmandry and others v. Khadija binti Ali bin Salem* (1956), 23 E.A.C.A. 313.

August 13. The following judgments were read by direction of the Court:

Judgment

Forbes JA: This is an appeal against a judgment of the High Court of Zanzibar reversing a decision of the First Class Magistrates' Court, Zanzibar. The respondent in this appeal was the original plaintiff, and he sued for a declaration that a hut at Miembeni Mjimpya was his property, and for an order that the name of the appellant, the original defendant, which appears as the name of the purchaser in the registered deed of conveyance of the hut, be removed from the deed, and that the appellant's name be substituted therefor. The learned magistrate dismissed the suit with costs, but on appeal the High Court set aside the decision of the magistrate's court and entered judgment for the present respondent as prayed, except that no order for costs was made. With the leave of the court the appellant now appeals against that decision.

The facts of the case appear in the following extract from judgment of the learned magistrate, which was adopted by the learned judge:

> "The plaintiff, who is a Christian, married the defendant's mother in 1941. The defendant was then a child of four living with her mother. The mother was then a Muslim and the defendant, as a child, was being brought up in the Islamic faith. The plaintiff, after his marriage with the defendant's mother had both the mother and the defendant converted to Christianity. The defendant was still an infant at the date of the baptism and on being baptised was given the name of Martha binti Yona. The defendant lived with her mother and the plaintiff who regarded the defendant as his stepdaughter. In 1948 the plaintiff, out of love and affection for the defendant, bought the hut in question for a sum of shillings 600/-, paid out of his own pocket, and had the conveyance drawn out in the name of the defendant as purchaser. The defendant was still then an infant and both the conveyance and the hut remained in the possession of the plaintiff. In November, 1952, when she was about seventeen years of age, the defendant ceased living with the plaintiff and her mother and sent a letter to the plaintiff (exhibit B) informing him that she had renounced the Christian faith. She subsequently got married and is now living with her husband."

The question at issue is whether in the circumstances there was an effective gift of the house to the appellant. This question raises some difficult points of law, and it is unfortunate that neither this court nor the two lower courts had the advantage of hearing the case presented by counsel.

The learned judge of the High Court founded his decision primarily on the provisions of s. 110 of the Transfer of Property Decree (Cap. 82) on the assumption that Mohamedan law does not apply in this case since the parties are Christians. He says:

“Was there, as the learned magistrate found, a valid gift in the circumstances of this case? We are not concerned with persons subject to

> Mohamedan law, who are exempted from the provisions of Part VII of the Transfer of Property Decree (Cap. 82), but with Christians. In the case of a gift of immovable property, s. 110 of the Decree requires that the transfer be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. There is no such instrument in this case; the only document being the conveyance itself to which the donor was not a party at all."

It is true that at the material time the parties were both Christians. It is also claimed in the plaint that the respondent/plaintiff is a British subject. These facts, however, do not conclude the question as to what law governs the dispute. If the subject matter of the alleged gift is land or an interest in land the law to be applied is Zanzibar law, that is, Mohamedan law. *Secretary of State for Foreign Affairs v. Charlesworth, Pilling & Co*. (1), [1901] A.C. 373. The interest gifted or alleged to have been gifted in this case was "Hut No. 22/Nil (Excluding Land) situate at Miembeni Mjimpya." The learned magistrate did conclude that the respondent/plaintiff "must be deemed to have made a gift of the money, i.e. the purchase price" to the appellant/defendant, but that conclusion was not accepted by the learned judge, and I do not see that it can possibly be sustained. On the evidence there does not appear to be any question of a gift of the money to the appellant/defendant. The gift, if there was one, was a gift of the hut. There is no evidence to show whether or not the hut in question is attached to the land, but, in the absence of such evidence, it seems reasonable to assume that it is. Certainly it appears from the conveyance, (exhibit A), that it is subject to the Ground Rent Restriction Decree, 1940 (No. 14 of 1940), which treats the interest of the owner of a hut or house built upon another person's land as being an interest analogous to a leasehold interest in the land. In s. 2, "tenant" is defined as meaning

> "the owner or occupier of any house which has been or may hereafter be erected on the land of any landlord under an agreement expressed or implied for the payment of ground rent".

The Decree further restricts the right of the owner of the land to require the removal of the house (s. 8 et seq.). It seems apparent that the owner of this hut is a "tenant" within the meaning of s. 2 of the Ground Rent Restriction Decree, 1940. It would seem to follow that ownership of the hut must be treated as an interest in land and that the local law governing the incidents of land, i.e. Mohamedan law, is therefore the law applicable notwithstanding the fact that the parties at the material time were Christians. Section 116 of the Transfer of Property Decree provides that nothing in Part VII (which includes s. 110 on which the learned High Court judge relied) "shall be deemed to affect any rule of Mohamedan law." With respect, therefore, I am of opinion that the provisions of s. 110 of the Transfer of Property Decree (and also of s. 109, relating to the necessity for acceptance of a gift, on which the learned judge also relied) are not applicable. It is necessary to ascertain whether under the rules of Mohamedan law which relate to gifts of immovable property the transaction which is the subject of this case does or does not constitute a valid gift.

The essentials necessary to constitute a valid gift under Mohamedan law are set out in Mulla, Principles of Mohammedan Law, (13th Edn.) para. 149 et seq., and were considered by this Court in *Haider bin Mohamed Elmandry and others v. Khadija binti Ali bin Salem* (2) (1956), 23 E.A.C.A. 313. Some nice points could be argued here as to whether there was any acceptance of the alleged gift, or any delivery of possession, as required under Mohamedan law. However, I do not think it necessary to go into these matters. There is, in my opinion, one objection which is fatal to the validity of the alleged gift. This is, that the

respondent/plaintiff, in effect, reserved a life interest in the property for himself. The learned judge's finding of fact on this aspect of the transaction is as follows:

> "The appellant on the other hand claims that there was never an absolute gift. The conveyance was taken in the respondent's name because he wanted her to have the hut on his death, instead of sharing it with numerous other co-heirs. In other words, this was not a gift, but something in the nature of a testamentary disposition; and a testator is at liberty to alter his will at any time. The evidence supports the appellant's contention that this was intended to be a conditional gift, not to take effect till death, as he had remained in undisturbed possession to this day."

I see no reason to differ from the conclusion that this was intended to be a gift to take effect on the death of the respondent.

In *Haider bin Mohamed Elmandry v. Khadija binti Ali bin Salem* (2), Briggs, J.A. (as he then was) said at p. 315:

> "It is clear that a gift to take effect in futuro or on a contingency is bad. Mulla, paras. 162 and 163. . . .
>
> "Without quoting at length from these cases, I think it may be said with confidence that (1) the reservation in form of any interest similar to a life interest will invalidate the gift; (2) the reservation of any effective control over the corpus of the gift will similarly invalidate; but (3) the reservation of the annual fruits of the property, without control of the corpus, is permissible. It seems to me important to remember that the corpus of the gift in this case was not the house and land in a physical sense, but the 'freehold' interest of the registered proprietor thereof. That passed immediately and irrevocably on the transfer. The respondent had then complete and unrestricted control over the 'freehold', and could have transferred it at any time, subject to the lease after it was registered. I think the correct way to regard the lease is as being mere machinery to implement the right of the deceased to receive the net rents and profits. I think it does not matter that she was to collect them with her own hand. Her limited interest was not, I think, something retained, or rendering the transfer incomplete, but something agreed to be given, and given back to her, which was different in kind, though derived, from the absolutely transferred freehold. I admit that the distinction is fine; but Muslim law is full of fine distinctions, particularly where limited exceptions have been carved out of general rules. Often practical convenience demands that an exception be made, but tradition hedges it about with technical rules in jealous regard for the safety of the principle. These considerations satisfy me that the retention, in one sense, of possession of the property by the donor is not sufficient to invalidate the gift. For her possession under the lease was something different in kind from her previous possession as proprieties. She did not retain a part of what she purported to give, but gave the whole of her original interest and received back something essentially different."

However, in the instant case there is no question, as I see it, of the donor receiving back anything essentially different from the interest he is alleged to have given. On the learned judge's finding, with which I agree, this is a plain case of a gift to take effect in futuro, and, as such, it is not a valid gift under Mohamedan law.

For this reason I think the appeal must fail. The respondent has not incurred any costs since he was unrepresented, and therefore I do not think there should be any order as to costs on the appeal.

Sir Kenneth O'Connor P: I agree. The appeal is dismissed.

Briggs V-P: I agree.

Appeal dismissed.

The appellant in person.

The respondent in person.

R Allarakhia Janmohamed & Co v Jethalal Valabhdas & Co

[1958] 1 EA 419 (CAZ)

Division:	Court of Appeal at Zanzibar
Date of judgment:	13 August 1958
Case Number:	8/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court for Zanzibar–Windham, C.J

[1] Fraud – Sale of goods by broker – Misrepresentation to vendor as to market price – Sale of goods by vendor to broker at price lower than that already obtained by broker – Whether circumstances amount to fraud.

[2] Agent – Misrepresentation to principal as to market price of goods – Principal thereby induced to sell goods to agent at lower price – Whether principal entitled to damages for breach of duty by agent.

Editor's Summary

The appellants sued the respondents for damages for fraudulent misrepresentation. The appellants had engaged the respondent in 1953 as broker to sell on commission in Jakarta eleven tons of cloves then afloat. The respondent obtained an offer of £910 per ton on July 1, which the appellants refused. On July 4, the respondent sold the consignment through his own agent at Jakarta for £930 per ton, without disclosing this to the appellants, and on July 9, the respondent asked his agent to cable that the best price obtainable for the appellants' consignment was £830 per ton, which the agent did. On July 10, the respondent reported the receipt of this cable to the appellants, who then agreed to sell the consignment to the respondent at £830 per ton less commission. The respondent then cabled his agent again, requesting that the cable quoting £830 per ton be amended to £930 per ton. The appellants alleged that they were induced to sell by the representation of their own agent that the best market price was £830 per ton, and the trial judge so found, but he held that the appellants must also prove, and had not proved, not only that the statement was false but that, as the appellant had pleaded, the best market price was £930 at the material time. The appellants' claim was accordingly dismissed, whereupon they appealed.

Held –

(i) since the respondent had already sold the consignment at £930 per ton, his representation to the appellant that the best price for this consignment was £830 per ton was false and fraudulent.

(ii) the appellants were also entitled to succeed on the ground that the conduct of the respondent was in breach of the duty owed by the respondent as agent to his principals, the appellants.

Appeal allowed.

No cases referred to in judgment

August 13. The following judgments were read by direction of the court:

Judgment

Sir Kenneth O'Connor P: This is an appeal from a judgment of the learned chief justice of Zanzibar dismissing a claim by the appellants (the plaintiffs in the High Court) for damages for fraudulent misrepresentation whereby the appellants were induced to sell eleven tons of cloves to the respondents (defendants) at much less than the proper price.

I take the following statement of the facts from the judgment of the learned chief justice:

> "Briefly, the events which led up to the contract of sale of the eleven tons of cloves by the plaintiffs to the defendant on either July 9 or 10, 1953, were as follows. The plaintiffs on June 27, 1953, shipped the cloves on the s.s. 'Silindoeng'. About the end of June they approached the defendant, who also dealt in cloves and who had an agency in Indonesia, and the defendant agreed to sell them as broker, on a 2 per cent. commission basis, in Indonesia. On July 1, the defendant secured an offer of £910 per ton for cloves in Jakarta, Indonesia, from his agents there, but the plaintiffs refused this offer, since they hoped to get £960 per ton. The defendant in evidence, and through his counsel, has contended that this refusal by the plaintiff puts an end to the relation of principal and agent between the two parties; but the plaintiffs deny this, and I am satisfied on the evidence of Fidahussein and that afforded by the subsequent telegrams sent and received by the defendant that such was not the position, and that this relationship continued until the eventual sale of the cloves by the plaintiffs to the defendant on July 9 or 10. Which of those two dates was the true date of the sale I will consider presently. Meanwhile, on July 4, by exchange of telegram, the defendant, although the relationship of principal and agent between the parties still continued, sold these same eleven tons of cloves, through his own agent in Jakarta, for £930 per ton, the transaction clearly being in the nature of a 'bear' operation in anticipation of a falling market. He did not disclose this operation to the plaintiffs, although the relationship between them made it his duty to do so: *Dunne v. English* (1874), 18 Eq. 524. Eventually, on July 10, the following is the version of Fidahussein Rashid Allarakhia, the partner in the plaintiff firm who gave evidence as to what happened:
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> > 'I signed an invoice, exhibit (B) being a copy of it, dated July 10, 1953. Until that date, my eleven tons of cloves were as far as I know not yet sold. On July 10, I first saw defendant in the morning, when he told me the best price he could get in Indonesia was £830. He said he had received a code telegram to that effect from his agent in Indonesia. He did not show me the cable. He said he could not show it to me. He didn't tell me why. He told me the Indonesia market had gone down, and that he had sold my eleven tons of cloves at £830. This alarmed me. He asked me for the bill of lading, and for the invoice, exhibit (B). I gave them to him. I gave him the invoice on the strength of his representation that the price had gone down to £830 per ton, and I allowed him 2 per cent. commission on that figure.'
>
> "In short, Fidahussein's evidence is that the sale by him to the defendant for £830 per ton took place on July 10, and that he was induced to sell at that figure by the defendant's assurance that he had received a telegram from Indonesia to the effect that this was the best price that he could then get there. That telegram, which was not produced by the defendant at the earlier trial, has since been produced, and bears the date July 10, and was sent in reply to one from the defendant on the previous day, also produced now, asking for a reply stating that the best possible price was £830. It is the defendant's contention that the figure £830 in his telegram was a clerical error for £930, and that by further exchange of telegrams between him and his agent, dated July 10 and 11, this error was put right, as indeed these two later telegrams do purport to put it right. He has called his clerk to corroborate him on this point. All these four telegrams have been produced at the present trial only.

"The text of these four telegrams were as follows:

(*a*) Telegram from defendant to his agent, dated July 9–

'on receipt of this telegram for our purpose telegraph as follows referring to your telegram of 7th best possible £830 cif&c Semarang subject reply here today.'

The defendant admitted in evidence that the reference to 'your telegram of 7th' was to a fictitious telegram:

(*b*) Telegram from his agent in reply, dated July 10–

'Referring to your telegram of 7th–11 tons–afloat Silindoeng–best possible £830 cif and commission Semarang subject reply here today.'

(*c*) Telegram from defendant to his agent, dated July 10–

'Regret our yesterdays telegram mutilated by clerical error 9th word of the text should be £930–please telegraph as requested.'

(*d*) Telegram from his agent in reply, dated July 11–

'Referring to your telegram of 7th–11 tons afloat Silindoeng best possible £930 cif and commission Semarang subject to reply here today.' "

The learned chief justice then considered the evidence of the respondent whom he described as

"a shifty and dishonest witness who might well resort to any form of business trickery for a financial advantage."

The learned chief justice continued:

"I find then, that Fidahussein on July 10 agreed to sell the cloves to the defendant on the strength of the latter's statement to him that the best price then obtainable in Indonesia was £830 per ton."

Having considered whether the figure of £830 was a clerical error for £930, the learned chief justice found as follows:

"I am led to the conclusion, which is wholly consistent with my general impression of the defendant that the figure £830 was deliberately inserted so as to lead Fidahussein into thinking, on July 10, that this was the best price then obtainable in Indonesia, and that the second exchange of telegrams between the defendant and his agent, purporting to correct the figure from £830 to £930, was, to quote Fidahussein's own words in evidence,–'so as to safeguard himself, so that his Indonesia agent could not appropriate the difference of £100.'

"I find, accordingly, that the plaintiffs were induced to sell the cloves to the defendant for £830 per ton by the latter's statement to Fidahussein that this was the best price then obtainable in Indonesia. But in order to succeed in their action the plaintiffs must further prove that this statement was a false one and in particular must prove, as alleged in para. 9 of the plaint, that 'in actual fact, to the defendant's own knowledge and information, the best market price in Semarang was £930 per ton at the material time, e.g. on and after the 9th day of July, 1953.' On this point I have arrived at the conclusion, reluctantly in view of the palpably dishonest behaviour of the defendant, that the plaintiffs have failed to prove this necessary ingredient of their case with that degree of probability with which the elements of fraud in a civil action should be proved. The most that has been proved is that on July 4, some five or six days earlier, a price of £930

> per ton was obtainable, this being the price at which the defendant by forward contract himself sold the cloves on that date through his Indonesia agent. And it may well be that prices in Indonesia were falling considerably between July 4 and July 10."

In effect, what the learned chief justice held was that Vallabhdas had, on July 10, induced the appellants to sell their cloves for £830 a ton by the statement that the best price then obtainable in Indonesia was £830 a ton, and that this was a dishonest representation; but that the appellants could not succeed because they had pleaded

> "in actual fact, to the defendant's own knowledge and information, the best market price in Semarang was £930 a ton at the material time"

and had failed to establish that averment. With respect, I think that this was too narrow a view of the meaning of "market price" in the context in which that expression was used in the Plaint.

Paragraph 7, para. 8 and para. 9 of the Plaint read as follows:

> "7. The defendant, in order to induce the plaintiffs to sell the said cloves at £830 per ton made the following representation and statement to the plaintiffs: (*a*) That, on or after July 10, 1953, the best market price operative in Semarang was £830.
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> "8. The said representation was contained in the telegram dated July 9, 1953, referred to in para. (5) of the plaint, and the contents of the said telegram were verbally disclosed by the defendant to the plaintiffs for the purpose of inducing the plaintiffs to sell the said cloves at £830 per ton.
>
> "9. The representation was false and untrue in that the defendant made the representation to the effect that the best market price in Semarang with respect to cloves was £830 per ton; whereas, in actual fact, to the defendant's own knowledge and information, the best market price in Semarang was £930 per ton at the material time, e.g. on and after July 9, 1953."

The telegram of July 9, which is referred to in para. 8 above is in fact the telegram dated July 10, set out by the learned chief justice in para. (*b*) quoted above. It specifically identified the cloves as eleven tons afloat Silindoeng and stated the best possible price–clearly the best possible price at which those cloves could be sold. Vallabhdas admitted in evidence that these were the very cloves of the appellants. What, therefore, was the market price of the appellants' cloves in Semarang on July 10, according to that telegram? Market price ordinarily means the price obtainable by a willing seller from a willing buyer in the open market. But it may mean the price in a restricted market. There was no open market for the appellant's cloves on that date. The market for those cloves was then restricted to the purchaser from Vallabhdas unless he chose to sell and the price obtainable by the appellants as willing sellers from a willing buyer for these particular cloves on July 10, was the price at which Vallabhdas had already sold them for delivery on arrival in Semarang, that is to say £930 a ton. There may have been a market price for other cloves "ready" in Semarang on July 10, or to arrive at or about the time the appellants' cloves were due to arrive; but, as already stated, the appellants' cloves were not eligible to compete in that general market, since they had already been sold to a buyer and there was no evidence that that buyer wished to dispose of them on the general market. The general market price was to the respondents' knowledge irrelevant, though the appellants were unaware of this. If Vallabhdas had merely represented that the best price obtainable for cloves on the general market for cloves in Semarang was £830 per ton on July 10, this might or might not have been true; but what Vallabhdas represented to Fidahussein was that by reason of a fall in the open market price, the market price of this particular

consignment of the appellants' cloves in Semarang on July 10 was £830, and this was false and fraudulent. The background and context of the discussion make it clear that the "market price" in question was intended by both parties to mean the best price obtainable for these particular cloves. The averments in the plaint, though clumsy and somewhat confused, sufficiently aver this.

There is another ground upon which I think that the appellants are entitled to succeed. It was found by the learned chief justice, and admitted before us by counsel for the respondent, that the relationship of principal and agent continued as between the appellants and the respondents until the sale of the cloves by the appellants to the respondents on July 10. The following further facts were proved or admitted: The respondents were the appellants' agents to sell and they did sell the cloves for £930 a ton on July 4. That price the appellants as principals thereupon became entitled to have paid to them, less commission. Accordingly, the appellants were, on July 10, immediately before the sale to the respondents, entitled to £930 a ton less commission for their cloves. They were induced by the respondents to change their position as principals entitled to £930 a ton (less commission) for a position as vendors entitled to £830 per ton (less commission). This was effected by making known to the appellants the contents of a telegram from the respondents' agents in Semarang to the effect that the best possible price for the eleven tons of cloves then afloat on the "Silindoeng" was £830 c.i.f. and commission Semarang subject to reply that day. That telegram was bogus, in that it represented not what the best possible price for the appellants' cloves was; but what the respondents' agent in Semarang had been told by the respondents to say that it was. When the agents were told by the respondent next day to say that it was £930 a ton, they immediately said so. The respondents' action was dishonest. All these facts were pleaded and admitted or found and, in my view, they justified and established a claim for the relief mentioned in para. 14 of the plaint. The fact that the expressions "best market price" or "proper market price" were used instead of "best sale price" or "proper sale price" was immaterial. That relief may have been claimed primarily as damages for deceit, but it is claimed in sufficiently wide terms to allow the court to grant it as damages for breach of duty as an agent, and such breach of duty was alleged and proved. The respondents were not taken by surprise and they had an opportunity of controverting all the facts which the appellants pleaded and on which they relied.

I would allow the appeal with costs and set aside the judgment and decree in the court below. The appellants should have the relief claimed in sub-para. (*a*) to sub-para. (*d*) of para. 14 of the plaint and there should be a decree accordingly.

Briggs V-P: I agree.

Forbes JA: I also agree.

Appeal allowed.

For the appellants:
Bryan O'Donovan
Mukri & Sameja, Zanzibar

For the respondent:
PS Talati
Wiggins & Stephens, Zanzibar

Peters v Sunday Post Limited
[1958] 1 EA 424 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	8 August 1958
Case Number:	11/1957
Before:	Sir Kenneth O'Connor P, Briggs V-P and Sir Owen Corrie Ag JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Forbes, J

[1] Appeal – Jurisdiction – Questions of fact – Appreciation and evaluation of evidence – Principles on which appellate court acts.

Editor's Summary

The appellant sued the respondent for damages for wrongful dismissal. After serving the respondent for a trial period of six months in 1953, the appellant remained in the respondent's service for some months, during which there were discussions between the appellant and a representative of the respondent as to the appellant's further employment. The effect of these discussions was disputed, but the appellant claimed that he was then given a contract of employment for four years which was back-dated to the time the appellant joined the service of the respondent. At the trial the representative of the respondent admitted that in 1954 he had assured the Immigration Department that the appellant was employed on a four years' contract and had also written to a motor agent to the same effect, when the appellant was negotiating to purchase a new car on hire purchase terms. The trial judge found that no agreement was concluded between the parties and dismissed the action. On appeal it was contended that the trial judge had not appreciated the significance of the representations as to the appellant's employment on a four years' contract.

Held –

(i) whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide. *Watt v. Thomas*, [1947] 1 All E.R. 582; [1947] A.C. 484, applied.

(ii) as there was documentary and other evidence which either tended strongly to confirm the appellant's evidence or, alternatively, to show that the respondent's principal witness was unworthy of credit, the full significance of which the trial judge had apparently not appreciated, this was a case where the appellate court ought not to allow the conclusion reached by the trial

judge to stand.

Appeal allowed.

Case referred to:

(1) *Watt v. Thomas,* [1947] 1 All E.R. 582; [1947] A.C. 484.

August 8. The following judgments were read.

Judgment

Sir Kenneth O'Connor P: This is an appeal from a decision of a judge of the Supreme Court of Kenya dismissing a claim for damages for wrongful dismissal. The plaintiff in the suit (the present appellant) is a journalist. The defendant (the present respondent) is a company owning and managing a well-known Sunday newspaper published in Nairobi.

The appellant entered the employment of the respondent company on July 1, 1953, for a trial period of six months, from July to December inclusive, at a

salary of £45 a month for the first three months and £50 a month for the remainder of the period. He was informed that, at the end of the period, the directors would consider the question of a further contract for a longer period.

It appears from the evidence that there are two directors of the respondent company who have offices in the premises of the "Sunday Post", that is to say, Mr. Rathbone the Chairman of the Board of Directors and Miss Robinson, a director. The appellant's first letter of appointment was signed by Miss Robinson. He had been introduced by a Mr. Carver, then chief reporter on the "Sunday Post" who appears to have entered into negotiations with the appellant for a further agreement for service as hereinafter mentioned. Mr. Carver and the appellant shared the same room. Mr. Rathbone worked in an adjoining office.

About Christmas, 1953, the appellant was given to understand by Mr. Carver that Mr. Rathbone would be inclined to consider favourably engaging him on a four-year contract. Thereafter the appellant raised the matter on various occasions. In the mean time, although his first contract had expired, he continued to work for the respondent company at £50 a month. In April, 1954, prior to the departure on a three weeks' visit of Mr. Carver to Scandinavia, an interview took place with the object of settling the terms of the further employment of the appellant. The learned judge dealt with this interview as follows:

> ". . . The plaintiff stated that one day Mr. Carver called the plaintiff over to his desk and proceeded to discuss with him in detail the terms of a four-year contract, basing the discussion on a form of agreement which Mr. Carver had before him on the desk and on which Mr. Carver made notes of terms as they were agreed. The principal terms discussed were: duties, salary, notice of termination and home leave, and the plaintiff alleged that from time to time during the discussion Mr. Carver went to Mr. Rathbone, who was in an adjoining office, to obtain his approval or otherwise to terms sought by the plaintiff, and on his return conveyed Mr. Rathbone's approval to the plaintiff. The plaintiff claims that in this manner complete agreement was reached, and that in fact an agreement was concluded between himself and Mr. Carver, the latter acting with the approval of Mr. Rathbone, on behalf of the defendant company, though it was contemplated that a formal document embodying the terms of the agreement should be prepared and signed by the parties.
>
> "Mr. Carver agreed that a discussion on the general lines described by the plaintiff had taken place, and that he had consulted Mr. Rathbone during the course of the discussion on points that arose. He stated, however, that the discussion was in the nature of an exploratory discussion undertaken with a view to the consideration by the Directors of the question of an offer of a contract to the plaintiff, and that he was merely making a note of what the plaintiff wanted. He denied telling the plaintiff that Mr. Rathbone 'had accepted the conditions'. He agreed that the discussion resulted in terms agreed between the plaintiff and himself, but stated that the terms as a whole were not agreed by Mr. Rathbone, though apparently Mr. Rathbone did at least agree to the salary to be paid to the plaintiff in the immediate future.
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> "There was also disagreement between the plaintiff and Mr. Carver as to the actual terms agreed between them–or, as alleged by the plaintiff, agreed by Mr. Rathbone. In particular Mr. Carver denied that he agreed to six months notice for termination of the contract, stating that he was aware that Mr. Rathbone desired provision for a three month notice to be made in any contract entered into by any employee with the defendant company; and there was conflict as to whether the plaintiff was

to receive salary plus a bonus at the end of a year's satisfactory service, or whether £5 was to be retained out of salary each month by the defendant company and paid to the plaintiff in a lump sum at the end of the year.

"In the event no formal agreement was ever entered into between the parties, although the plaintiff alleges that he pressed for such an agreement on a number of occasions."

According to the respondent, the offer of a four year contract to the appellant was deferred because, following an illness which the appellant suffered about July or August, 1954, the appellant's standard of work deteriorated. In December, 1954, an incident took place in connection with a file on which copies of the "East African Standard" newspaper were supposed to be kept. Mr. Rathbone exhibited annoyance at being unable to find a particular copy of the "East African Standard" and blamed the appellant, whose duty he said it was to keep the file in order. Mr. Rathbone and Mr. Carver both stated that the appellant was given three months' notice. The notice was alleged to have been given orally by Mr. Rathbone. The appellant denied that he was given notice on that or any other occasion in December, 1954. On or about the March 1, 1955, the appellant was called to Mr. Rathbone's office and informed that his three months were up and that his services were no longer required. He was required to repay the balance of a loan which he had been given by the respondent to enable him to purchase a motor-car. He paid this by cheque on March 2 and, on March 3, he was given his salary for the month of March and Shs. 650/- in respect of two weeks' local leave and told to go.

The appellant claims that he had a four year contract and that under it he was entitled to Shs. 800/- for sums alleged to have been retained monthly pursuant to the agreement out of his agreed salary and to damages for wrongful dismissal as set out in para. 9 of the Plaint.

At the hearing, the following issues were framed:

"1. (*a*) Did the defendant company enter into a binding oral contract with the plaintiff to employ him on a four year contract?

"(*b*) If so, to what notice was the plaintiff entitled under such contract?

"2. Was the plaintiff's salary, at the time when the plaintiff left, £70 per month, of which £65 was paid and £5 was retained for his benefit, or was it £65 with the additional provision that a bonus at the rate of £5 per month would be paid, i.e. £60 at the end of and if the plaintiff completed twelve months of satisfactory service?

"3. Was the plaintiff guilty of wilful misconduct or not, and if so were the defendants by reason thereof, entitled to dismiss him instantly if they wanted to?

"4. (1) (*a*) Did the defendants on December 31, 1954, notify the plaintiff of their intention to dispense with his services or not?

"(*b*) If so, what notice, if any, did they give to the plaintiff?

"(*c*) If notice, did such notice given satisfy the plaintiff's entitlement or not; or

"(2) Was the plaintiff dismissed on March 3, 1955, without notice?

"5. In the light of 1, 2, 3 and 4, is the plaintiff entitled to any, and if so, what damages? The defendants admit the plaintiff was unable to get employment in March and after that was only able to get employment at the rate of £50 per month.

"6. Costs."

The learned judge dealt with the first of these issues as follows:

> "The first and most important issue, of course, is whether or not an agreement was actually concluded between the plaintiff and the defendant company in April, 1954.
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> "On the one hand the plaintiff alleges that complete accord was reached on all the terms, each term being referred to Mr. Rathbone by Mr. Carver, and Mr. Rathbone's approval being conveyed to the plaintiff by Mr. Carver; and that at the end Mr. Carver said that he hoped the plaintiff was now satisfied as he had the contract and it only remained to draw it up formally.
>
> "On the other hand, Mr. Carver said of the discussion: 'I regarded the contract as settled between Peters and I. I regarded it as necessary that the terms should be approved by Mr. Rathbone. I did not consider there had been approval of the contract as a whole.'
>
> "He did add 'I may not have made that entirely clear to Peters.'
>
> "For his part, Mr. Rathbone in evidence denied that he had agreed to any four year contract with the plaintiff. He stated that at the end of the plaintiff's six month probationary period he had decided that the plaintiff might carry on at £50 per month for the time being and that this decision was conveyed to the plaintiff by Mr. Carver. He agreed that later–he was vague as to the date–Mr. Carver had spoken to him again about wages for the plaintiff. He said he agreed to pay the plaintiff a bonus of £60–paid in three instalments–in respect of his first year's service, and further agreed that from the end of his first year's service the plaintiff should receive £65 per month and a bonus at the end of the second year's satisfactory service. This decision he stated was again conveyed to the plaintiff by Mr. Carver. As to the four year contract, he stated that there was a suggestion there should be a four year contract, but there was nothing definite; that he knew Carver was discussing the terms of such a contract with the plaintiff; that Carver did submit figures and the decision was 'carry on on the basis of that salary and we'll discuss an agreement later.'
>
> "It seems clear on the evidence, first, that there was no mutuality between Mr. Rathbone and the plaintiff, and, secondly, that Mr. Carver had no authority to act on his own account on behalf of the defendant company. The plaintiff himself stated that Mr. Carver referred all the terms of the alleged agreement to Mr. Rathbone for approval. Mr. Carver's function therefore at most appears to have been that of agent to discuss the terms and to convey Mr. Rathbone's views thereon to the plaintiff. Whether or not Mr. Rathbone himself had authority to contract on behalf of the defendant company is perhaps doubtful, but I incline to the view that he had. The question is whether Mr. Carver so represented Mr. Rathbone's views to the plaintiff as to lead the plaintiff to believe that Mr. Rathbone had agreed to the whole of the projected contract and, if so, whether the defendant company is thereby estopped from denying the existence of the contract.
>
> "On the evidence I have heard I am not satisfied that Carver gave the plaintiff to understand that the agreement had in fact been concluded, although it was to be embodied later in a formal document. A written agreement was certainly contemplated by both Carver and the plaintiff, and I incline to the view that it was understood by both parties that the contract would not be finally concluded until the formal document had been agreed and signed. The plaintiff may have believed, and may have had grounds for believing, that after his discussion with Mr. Carver the preparation of a formal agreement agreeable to both parties would present no difficulty, but that is not the same as reaching a concluded agreement.

> Putting it at its lowest, the plaintiff has failed to satisfy me that an oral agreement was finally concluded, or had the appearance of being finally concluded, between himself and Mr. Rathbone through the medium of Mr. Carver."

First, on the question of authority, I see no reason to disagree with the learned judge that Mr. Rathbone had actual authority to engage staff on behalf of the respondent company and to fix the terms of employment of a junior journalist. It would be an unusual circumstance if a chairman of the board of directors had not such authority. But even if Mr. Rathbone had not such actual authority, there can be no doubt that he was held out to the appellant as having such authority and the company would be bound by what he said and did. Moreover, from July, 1954, the appellant was paid at the rate of £65 a month which was the new rate (less retention money) agreed to by Mr. Rathbone, so that there is evidence, to this extent at least, of ratification by the company of Mr. Rathbone's arrangement with the appellant.

What was the authority of Mr. Carver? The appellant in his evidence said:

> "Rathbone told me to discuss the matter with Carver and he would let me know what the position was."

Mr. Rathbone in his evidence said:

> "All arrangements with Peters verbal and made through Carver. Peters permitted to expect verbal decisions to be conveyed to him by Carver."

It is clear that Carver was held out as having the authority of the respondent company to convey to the appellant the decisions of Mr. Rathbone on behalf of the company regarding his future employment with the company.

Both the appellant and Carver agree that on an afternoon in April, 1954, the appellant's future agreement for service with the respondent company was discussed for a considerable time–the appellant says from after lunch till four thirty or thereabouts; Carver says for one and a half to two hours–during which time Carver was noting the terms on a printed standard form of agreement (exhibit A) and was noting particulars of salary etc., on a paper (exhibit 5). The appellant said that Carver went in to see Rathbone in the latter's office several times and came back and told him that Rathbone agreed, or what Rathbone had said, and that finally everything was agreed. The appellant said:

> "Each item had been referred by Carver to Rathbone and Carver informed me Rathbone agreed. Carver said to me he hoped I was now satisfied as I had the contract and it only remained to draw it up formally. Contract was to be for four years from date of my joining company in July, 1953, i.e. terminating in June, 1957."

Carver said: "I went in to see Rathbone once or twice during discussion of contract". Carver then testified as to what Rathbone had agreed to and what he had not agreed to. But, in the circumstances of this case, it is unimportant to discover what Rathbone in fact agreed or what he did not agree, and the question of whether there was mutuality between Rathbone and the appellant is not really material. As the learned judge fully realized, the point is what did Carver, as agent of the company and held out as having authority to convey to the appellant the decisions of Rathbone on behalf of the company, represent to the appellant that Rathbone had agreed? By that the respondents are bound. Carver continued:

> "No agreement with Rathbone that contract should be for four years. By end of discussion I reached the point of finality of my undertaking to

> take a note of Peters' requirements and put them before Rathbone. I said to Peters: 'Well, that is settled as between you and I.' I think I added 'It now remains for these details to be approved and be incorporated into a contract'."

If all that Carver was doing was to take a note of the appellant's requirements to put before Rathbone, it seems odd that the discussion took an hour and a half to two hours in an effort to "get finality" and that Rathbone should already have been referred to more than once and have been given details of the discussion as it went along. Carver said in cross-examination:

> "We were both anxious to get finality. I gave Rathbone details of discussion. I did not tell Peters in every case that Rathbone had accepted conditions."

and at the end of his evidence, in answer to the court, he said:

> "I regarded the contract as settled between Peters and I. I regarded it as necessary that the terms should be approved by Rathbone. I did not consider there had been approval of the contract as a whole. I may not have made that entirely clear to Peters. Neither did I say to Peters 'That is your contract'."

As already mentioned, the learned judge found against the appellant on the issue whether the respondent company had entered into a binding oral contract to employ him for a four-year period. It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in *Watt v. Thomas* (1), [1947] A.C. 484.

Viscount Simon, L.C., said at p. 485:

> "My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first

> instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

Lord Thankerton said at p. 487:

> "I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus: I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

Lord Macmillan said at p. 491:

> "So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge, who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

As I have said, the important point in the present case is not what Mr. Rathbone in fact agreed, but what Mr. Carver represented to the appellant that Mr. Rathbone had agreed. The appellant swore that Carver told him that Rathbone had agreed to a four-year contract. Carver does not say expressly what he told the appellant regarding this point. This is the crucial point in the case and it was clearly most material for the learned judge to consider every piece of contemporary evidence which tended to show what Carver himself thought was the position regarding the appellant's contract or, at least, what he represented that position to be to other interested persons. For, if it were shown that Carver himself thought that a four-year contract had been given to the appellant, or was prepared to and did represent to others that that was so, then the balance of probabilities would weigh heavily in favour of his having made a similar representation to the appellant.

There are three important pieces of evidence which tend to support the thesis that Carver thought that the appellant had secured a four-year contract from the respondent company, or that, if he (Carver) was unsure of this, he was not above representing that that was the position.

It was alleged by Peters and not disputed by Carver that, in 1954, Carver had represented to the Immigration Department that the appellant had a four-year contract with the "Sunday Post". The appellant's evidence on the subject is at p. 36:

> "I pressed for contract to be faired and a copy given to me and also discussed with him again my immigration status. Carver offered to accompany me to immigration department in Nairobi with regard to obtaining for me a class G permit. We did go to immigration department–after Carver returned from leave–Carver spoke to European official and explained position to him in my presence and asked what would have to be done to get class G permit. Official said if I was employed by Sunday Post on long contract, Sunday Post would have to make formal application on my behalf for class G permit. Carver said to official I was employed on four-year contract and application would be submitted."

Carver's evidence is at p. 53:

> "Inclined to think visit to immigration office was before discussion of details of contract with Peters but would not dispute assertion that it was after that. Visit was to ascertain procedure necessary for Peters to become permanent resident. Cannot remember if I told immigration officer that Peters was on four-year contract but I accept that I discussed case on basis that Peters was on a four-year contract. I would not dispute that I told immigration officer that Peters was on a four-year contract."

The learned judge did not comment on this episode at all:

The second important piece of evidence is that in May, 1954, the appellant wished to buy a new car on hire-purchase terms. The motor firm asked him to produce a letter from his firm confirming that he was engaged on a four-year contract. Thereupon Carver composed and typed a letter (exhibit 3) as follows:

> "THE SUNDAY POST
>
> Reata Buildings, Reata Rd. Nairobi.
>
> 10th August, 1954.
>
> B. Flint Esq.
> Hughes Limited,
> Delamere Avenue,
> Nairobi.
>
> Dear Sir,
>
> We understand that you have asked our Mr. R. Peters for a reference.
>
> Mr. Peters is engaged by this company on a four year contract, of which he has completed one year, on a salary of £840 per annum.
>
> (sgnd) Derek Carver
> for SUNDAY POST. LTD."

With regard to this letter Mr. Rathbone said in evidence that a letter such as that was within Carver's accepted range of responsibilities. Carver's evidence in chief regarding this episode is:

> "Exhibit 3–Peters approached in August for letter to Hughes to help him to purchase new car. I knew usual for firm to be responsible for instalments in view of loan. I gave Peters the letter as I was satisfied Peters needed car and Hughes would not suffer loss."

and in cross examination he said:

> "Letter was not written in great hurry. I was assisting Peters to obtain car. I knew letter would be acted on by Hughes and company. I expected Peters to make use of letter. I would have expected Hughes and company would make a further check. Hughes and Rathbone were

> old friends. I knew when I wrote the letter that it was not quite accurate. I was purposely making an inaccurate statement with a view to misleading Hughes and Company. I was indulging in falsehood. At time I had no reason to think Peters would not get a contract. As I see it letter could have caused no one any loss. It would have enabled Peters to get car. Procedure has been for hire purchase agreement to be made in name of company."

The learned judge correctly held that no question of estoppel arose out of this letter, and that though it was evidence to support the claim that a four-year contract existed between the appellant and the respondent company, it was not conclusive. The learned judge said that he was not concerned with the ethics of issuing a letter containing an inaccurate statement to the motor firm with the intention that they should act on that statement, and he seems to have accepted Carver's explanation that, when he wrote the letter, he had no reason to think that the appellant would not get a four-year contract. The learned judge did not think that the letter added much to the case.

With respect, I do not think that the learned judge appreciated the significance of this letter combined with the visit to the immigration department, upon which, as I have said, he did not comment. The crucial question in the case was whether or not Carver represented to the appellant that Rathbone had agreed to give him a four-year contract. The appellant said that Carver had definitely made this representation: Carver said that he had not, though he added that he may not have made it entirely clear to the appellant that there had not been approval by Rathbone of the contract as a whole. Which witness was correct? The appellant's evidence was unshaken: whereas there was unimpeachable testimony, either admitted or established by written evidence, that Carver had within a short time after the April interview represented (*a*) to the immigration authorities and (*b*) to the motor firm, that the appellant had a four-year contract with the respondent company. This surely threw a flood of light upon the question at issue. If Carver, acting on behalf of the respondent company, was prepared to represent to the immigration authorities and to the motor-car firm that the appellant had a four-year contract, was it not extremely probable that the appellant was right when he said that Carver had made a similar representation to him, the appellant? Or, to put the matter in another way: The question of what representation was made by Carver to the appellant as to acceptance of the terms of the contract by Rathbone depended mainly upon the testimony of the appellant on the one hand and of Carver on the other. They were the two parties present at the relevant interview. The appellant's credit as a witness was unshaken in cross-examination, while Carver was forced to admit that he "was indulging in falsehood" on the very point of the appellant's contract, first to the immigration authorities and then to the motor car firm. Was Carver, who was proved to have made two false representations on this point, a witness whose testimony should have been accepted where it contradicted that of the appellant, particularly when the documentary evidence hereinafter to be mentioned pointed to the appellant's recollection being correct? With respect, I think that the learned judge did not fully appreciate the significance of these two pieces of evidence.

There is another significant piece of evidence which tends to throw light upon whether or not the appellant had a four-year contract. On June 2, 1954, a letter was written to the appellant by Mr. Rathbone as chairman, Sunday Post Ltd., stating that it was agreed that the sum of Shs. 2,000/- was lent to the appellant for the purpose of purchasing a motor car and that repayment of this amount was to be made in sixteen monthly instalments, as set out in the letter. That would mean that the appellant had sixteen months from June 30, 1954, in which to discharge his debt to the respondent company. As the appellant was not a permanent resident of Kenya and would, unless he

got other employment there, have to leave Kenya on ceasing to be employed by the company, this gives the impression that he was to be their employee for at least sixteen months. That seems much more consistent with a contract for a period of, or exceeding, sixteen months than a mere arrangement for employment month by month. Upon this the learned judge did not comment.

There was a conflict of evidence between the appellant and Carver on the question whether the appellant was, during his second year, to be paid at the rate of £70 a month of which £5 a month was to be retained by the respondent company and paid at the end of the year of service, or whether he was to be paid at the rate of £65 a month with a bonus of £60 payable only at the end of a year's satisfactory service. The appellant's evidence on this point is as follows:

> "I then said I felt I should get £70 a month in my second year. Carver put it to me that they would give me a rise of £10, i.e. £60 a month. I refused to accept that. Carver spoke to Rathbone again and came back and said Rathbone said an increment of £20 rather large. Carver said Rathbone suggested I should get £70 per month of which £5 would be retained and paid to me at the end of the year of completed service . . . Said I would have preferred payment of £70 a month. Eventually I decided to accept that and from end of July I was paid £65 per month in cash less the £5 in payment of the car loan–i.e. £60 net. This £70 per month was to be for one year. I was to receive further increment from July, 1955. I was then to receive a salary of £75 per month, £5 of which would be retained to be paid at end of year of service. In fourth year I was to receive £80 per month of which again £5 was to be retained to be paid at end of year. Fourth year would be from July, 1956, to July, 1957. That was arrangement arrived at between Carver and self which was then referred to Rathbone by Carver. Carver told me Rathbone had agreed. That ended discussion on salary."

Carver's evidence on this point is:

> "Question of salary–Peters told me what he wanted as from July, 1954. Think I referred this figure to Rathbone who said Peters appeared to want a lot. I came back and suggested to Peters he take a lower salary and bonus. Purely personal suggestion of mine. I regarded bonus as payment at end of year's satisfactory service. Exhibit A. I made these notes at time. Figures are those I discussed with Peters about salary and bonus."

Exhibit A shows at the top of the page, a salary of £65 with a bonus of £60 but below appears "1954–1955 £840". and, on August 10, 1954, we find Mr. Carver writing on behalf of the respondent company to the director of the motor car firm

> "Mr. Peters is engaged by this company on a four-year contract . . . on a salary of £840 per annum"

which would be equivalent to £70 per month.

The learned judge dealt with this matter as follows:

> "I think clearly the 'bonus' contemplated was not a 'boon or gift' over and above what was normally due as remuneration to the plaintiff, but was in fact to be a part of salary–something to which the plaintiff was to be entitled at the least upon the completion of twelve months' service, and payment of which would certainly be enforceable at that stage. The question is whether the plaintiff has an enforceable right to a proportion of the 'bonus' upon the earlier termination of his service. I have rather reluctantly come to the conclusion that he has not. If the plaintiff acquired

> a vested interest in the £5 on the completion of each month of service, I cannot see that there would be any object to be served by the retention of the money for payment at the end of the year. The only reasonable basis I can see for the arrangement was that the 'bonus' was to comprise an addition to salary which was to be payable upon the completion of a year's service, and I conclude that that must have been the intention of the parties in agreeing to the payment of the 'bonus' at the end of the year. It follows that the plaintiff would not be entitled to the 'bonus' or any proportion of it until he had completed the year's service–except perhaps in the case of his service being wrongfully terminated by the defendant company.
>
> "On the second issue, therefore, my finding is that the plaintiff's salary was £65 per month with the additional provision of a payment of £60 upon the completion of a year's service."

With respect, it is not difficult to think of objects to be served by the retention by the company of money for payment at the end of the year. Not only would the company have the use of the money for that period (for what that would be worth) but they would have some money of the employee in hand which could be applied in part payment of the loan which they had made to him for the purchase of a motor-car should his services be terminated before the loan was repaid, and to answer liabilities which they might incur on his behalf, for example, to the immigration authorities. With the greatest respect, I think that a conclusion based upon the thesis that there could be no advantage to the company in keeping back some of the employee's money is not based on sound reasoning.

The delay in embodying the terms of the appellant's contract in a formal document is explained by the fact that the draft of a standard contract of employment for the company's employees was being considered by the company's solicitors and was not completed in final form until the middle of 1955.

The learned judge has not based his conclusions on the demeanour of the witnesses: he has not said that he disbelieved the appellant, or that the appellant was unworthy of credit. I do not say that the learned judge has not noticed and considered the items of evidence telling in the appellant's favour mentioned above. But I think, with the greatest respect, that he has failed to appreciate their full significance, that he has, in the words of Lord MacMillan in *Watt v. Thomas* (1),

> "failed to appreciate the weight or bearing of circumstances admitted or proved."

To summaries: I think that the learned judge failed to appreciate the weight and bearing of the representation by Carver on behalf of the respondent company to the immigration authorities that Peters was on a four-year contract, which, coupled with Carver's similar representation to the motor-car firm, either tended strongly to confirm the appellant's evidence that Carver had made a similar representation to him or, alternatively, showed that Carver had indulged in deliberate falsehood on this very point on two occasions and was unworthy of credit when he denied having made a similar representation to the appellant. I think that the learned judge may also have failed to appreciate the bearing of the circumstance that the motor-car loan was made repayable by sixteen monthly instalments; and that he failed to appreciate that there could be advantages to the respondent company in retaining a small monthly quantum of the appellant's pay. In the circumstances, I think that this court, having exercised its jurisdiction to review the evidence, ought not to allow the conclusion reached by the learned judge to stand.

I would allow the appeal and, basing myself mainly upon the documentary evidence and the admissions of the respondent company's agent, Carver, upon which an appellate court is in as good a position to act as a court of first instance, I would decide the issues as follows:

Issue 1 (*a*)

The respondent company did enter into a binding oral contract to employ the appellant on a four-year contract.

(*b*) The learned judge made no finding on this point as, in view of his finding on issue 1 (*a*), it did not arise. There is a conflict of evidence. I think that I should be guided by the documentary evidence. Exhibit 5 (the draft contract) mentions three months' notice. Incidentally three months was the period of notice which according to the respondents was, in fact, given. I answer issue (*b*): "Three months' notice."

Issue 2.

The plaintiff's salary at the time the plaintiff left was £70 a month, of which £65 was paid and £5 was retained for his benefit.

Issue 3.

I agree with the learned judge that the plaintiff was not guilty of such misconduct as would justify instant dismissal.

Issue 4.

On this issue the learned judge has made a definite finding of fact and there is no reason to suppose that, on this issue, he has "failed to appreciate the weight or bearing of circumstances admitted or proved." I see no reason for disagreeing with his findings on this issue, except that the learned judge based the period of notice on what was reasonable notice in the circumstances and I base it on the period stated in exhibit 5 which I hold to be the contract period. I, therefore, answer that the respondent company did on December 3, 1954, give to the appellant three months' notice of its intention to dispense with his services, and that this notice did satisfy the appellant's entitlement. There is nothing in exhibit 5 requiring notice to be given in writing. This notice expired on March 2, 1955.)

I would set aside the decree of the Supreme Court and substitute a decree giving the plaintiff the following relief:

(1)	£5 a month retention money for period July, 1954, to March 2, 1955, inclusive	Shs. 807/-
(2)	Balance due for local leave (Shs. 1,050/-Shs. 650/-)	400/-
	Total:	Shs. 1,207/-

Under exhibit 5 there was no entitlement to long leave or passages until two years' service had been completed.

The appellant should have his costs of the appeal and half the costs of the trial to be taxed.

Briggs V-P: I agree with the judgment of the learned president and have nothing to add.

Sir Owen Corrie Ag JA: I also agree.

Appeal allowed.

For the appellant:
CW Salter QC and *SC Gautama*
Shah & Gautama, Nairobi

For the respondent:
MJE Morgan
Mervyn Morgan & Co, Nairobi

Ahmed Abdulkarim and another v Member for Lands and Mines and another

[1958] 1 EA 436 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	25 July 1958
Case Number:	16 and 18/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika–Lowe, J

[1] Limitation – Land – Tenants-in-common – Adverse possession – Whether Indian Limitation Act, 1908, *applies in Tanganyika.*

[2] Limitation – Land – Adverse possession – Tenants-in-common – How adverse possession established – When period of limitation commences – Land (*Law of Property and Conveyancing*) *Ordinance* (*Cap.* 114)*, s.* 2 (*T.*) *– Indian Acts* (*Application*) *Ordinance* (*Cap.* 2)*, s.* 2 (*T.*) *– Indian Limitation Act,* 1908*, s.* 3*, s.* 28*, and First Schedule, art.* 120 *and art.* 144 *– English Real Property Limitation Act,* 1833*, s.* 12.

Editor's Summary

These consolidated appeals arose from an application to the High Court by the Minister for Lands and Mines for the determination of conflicting claims to a plot of land which had been subdivided into three sub-plots. The Minister required the land for public purposes and was willing to compensate the parties entitled for acquiring the plot compulsorily. Four claimants pursued their claims before the High Court; of these, three were claimants to the three sub-plots, whilst the remaining claimant put forward a claim by inheritance to an undivided half share in the whole. It was established that the father of the fourth claimant had owned the whole plot, and on his death the fourth claimant and her grandfather became entitled to the plot as tenants-in-common in equal shares. The title of each of the other three claimants derived from the grandfather. Of these three, two being dissatisfied with the decision of the High Court appealed and claimed that by adverse possession each had acquired a title to the whole of the sub-plot claimed by him.

Held –

(i) the law of limitation applicable in Tanganyika is the Indian Limitation Act, 1908.

(ii) since there is no express provision in the Indian Limitation Act, 1908, regarding limitation as between tenants-in-common, the residuary art. 144 applies and therein the doctrine of adverse possession is expressly preserved.

(iii) before limitation can run, adverse possession must be established and between tenants-in-common there must be some overt act amounting to ouster before possession of a co-tenant becomes hostile. *Corea v. Appuhamy*, [1912] A.C. 230 at p. 236.

(iv) before possession can be adverse, there must be a denial of another's right by an open assertion of a hostile title, with notice thereof to the other, either express or inferred from notorious acts and circumstances, and the burden of proof rests upon the persons claiming title by adverse possession.

(v) in this case the evidence did not establish a title by adverse possession, and in any event, the statutory term of twelve years had not run.

Appeals dismissed.

Case referred to in judgment:

(1) *Corea v. Appuhamy*, [1912] A.C. 230.

(2) *Secretary of State for India v. Chelikani Rama Rao and Others* (1916), 43 I.A. 192.

July 25. The following judgments were read:

Judgment

Forbes JA: These two appeals, which were consolidated, are against a judgment and decree of the High Court of Tanganyika ordering that half the compensation payable upon the acquisition for public purposes of a certain plot known as Plot 78, Flur 1, should be paid to the respondent Fatuma binti Bakari. They arise out of an application by the Minister for Lands and Mines under s. 9 of the Land Acquisition Ordinance (Cap. 118), seeking determination by the court of conflicting claims made in respect of the plot known as Plot 78, Flur 1, which was required for public purposes.

At the date of the application Plot 78, Flur 1 (which I will refer to as Plot 78) had been subdivided into plots 78 (*a*), 78 (*b*) and 78 (*c*). Five persons originally made claims to the plot or portions of it, but only four pursued their claims before the High Court. These were the appellant Walimohamed Shivji (to whom I will refer as Ahmed), Saidi binti Awadh Saleh (to whom I will refer as Saidi), who has not appealed to this court against the decision of the High Court, and Fatuma binti Bakari (to whom I will refer as Fatuma), who is the principal respondent on each of the appeals.

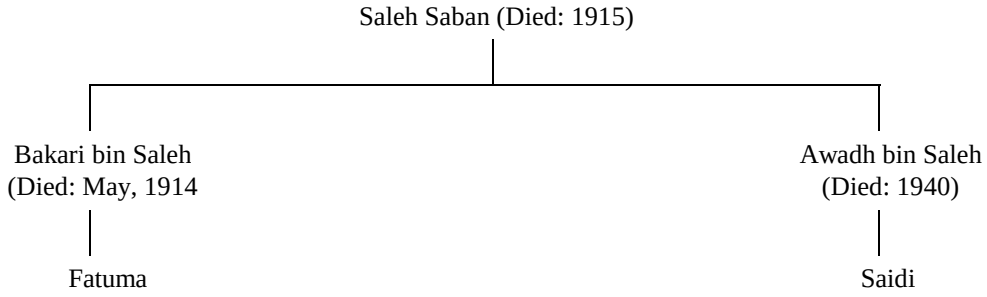
The appellant Walimohamed claimed ownership in fee simple of subdivision (*a*) of Plot 78; the appellant Ahmed claimed ownership in fee simple of subdivision (*b*) of Plot 78; and Saidi claimed ownership in fee simple of subdivision (*c*) of Plot 78. As between these three claimants there was no dispute. However, the respondent Fatuma claimed an interest in the whole of Plot 78 by right of inheritance from her father. The extent of Fatuma's claim is not very clear from her written statement of claim (at that time she was not represented by an advocate) but it does appear from para. 9 that she conceded that Saidi, who is her cousin, also had an interest in Plot 78. From her evidence it became clear that her claim was to an undivided half share of the whole of Plot 78. Her claim therefore was in conflict with the claims of each of the other three claimants.

The Minister for Lands and Mines at first refused to concede that Plot 78 was freehold land, whoever the rightful owner might be. However, when the hearing before the High Court commenced it was then conceded by the Minister, as the result of the production by Saidi, shortly before the hearing, of certain documents of title, that the tenure of the plot was freehold. Thereafter the Minister's only interest in the proceedings was as to the amount of compensation (if any) payable to Saidi in respect of Plot 78 (*c*), and as to costs. The three claimants other than Saidi had in their written statements of claim expressed their willingness to accept the amount of compensation offered by the Minister; and Saidi herself, when giving evidence at the hearing, stated that she would accept the compensation offered. In the event, therefore, no dispute arose as to the amount of compensation payable for Plot 78, though, in the case of Saidi, this only became clear when she gave her evidence.

The question of costs in the High Court, as to which the learned judge made no order, is raised in the appeals, and the Minister's interest as a respondent in the appeals is limited to this question of costs in the High Court.

As regards the dispute between Fatuma and the other three claimants, the first substantial issue which the High Court had to consider was whether the

freehold title to the property had originally vested in the father of Fatuma, or in her grandfather. Fatuma's family tree, so far as it is material to this case, is as follows:



It is not disputed that, after the death of Fatuma's grandfather, Plot 78 was occupied by her uncle, Awadh. Walimohamed's claim to Plot 78 (*a*) is based on a purported conveyance of the area comprised in subdivision (*a*) by Awadh to one Suleman bin Abdulla Habash on November 27, 1928; Walimohamed himself having purchased, or purported to purchase, subdivision (*a*) in May 1940, from the Administrator General as administrator of the estate of Suleman bin Abdulla Habash, who had died intestate in 1935. Subject to the question whether a title to Plot 78 (*a*) had been acquired by adverse possession, Walimohamed's title therefore depends on Awadh's title to the property. Similarly, Saidi, as successor to her father Awadh, purported to acquire both subdivision (*b*) and subdivision (*c*) of Plot 78 in November, 1941, by transfer from the Administrator General as administrator of the estate of Awadh. Saidi purported to sell the area comprised in subdivision (*b*) to Ahmed by conveyances dated respectively January, 1942, and January, 1947. Accordingly, subject to the question of adverse possession, Saidi's and Ahmed's claims, as well as Walimohamed's, depend upon Awadh's title to Plot 78.

Fatuma claimed that Plot 78 was purchased by her father, Bakari, in German times, and that she and her father lived on it until her father died in 1914; that on her father's death her grandfather, Saleh Saban, took over control of the plot and maintained her out of the proceeds; and that, upon her grandfather's death, her uncle Awadh took over the control of the property and continued to maintain her out of the proceeds. It is not disputed that, under the Mohammedan laws of inheritance which apply to Fatuma and her family, if Fatuma's claim that Plot 78 belonged to her father is correct, then, upon her father's death, she inherited a half interest in Plot 78, and her grandfather Saleh Saban inherited the other half interest. It is also agreed that, upon Saleh Saban's death, Awadh inherited the whole of Saleh Saban's interest in Plot 78. Accordingly, if Plot 78 had been owned by Bakari, as claimed by Fatuma, Awadh only inherited an undivided half interest in it: if, however, Plot 78 had been owned by Saleh Saban and not by Bakari, then Awadh inherited the whole interest in the plot, and Fatuma's claim must fail altogether.

The learned trial judge, upon a consideration of the documents produced in evidence, found that Fatuma's father, Bakari, had in fact been the owner of the whole of Plot 78, and that title to the plot must be traced from him. This finding was challenged on the appeals, but I do not propose to go into it in detail. The Katasterbuch entry, exhibit Q, records Bakari as the owner in 1912 of a plot which is undoubtedly identical with Plot 78. Section 15 of the Land Registration Ordinance (Cap. 334) provides that a Katasterbuch entry may be accepted as a good root of title for purposes of registration. The evidence of ownership provided by the Katasterbuch entry is supported by other contemporary documents. For the reasons given by the learned judge, I agree that these documents taken together are conclusive evidence that Plot 78 was owned by Bakari.

It follows that, on Bakari's death, Fatuma and her grandfather Saleh Saban became entitled to Plot 78 as tenants-in-common in equal shares, and, upon

the death of Saleh Saban, Awadh merely succeeded to Saleh Saban's undivided half share of the plot, and continued as co-owner of the plot with Fatuma. Subject to the question of acquisition of title by adverse possession, therefore, a purchaser from Awadh could only acquire a half interest in any portion of Plot 78 which Awadh purported to sell, and Saidi could only inherit from Awadh a half interest in the balance of Plot 78 remaining unsold at his death. A half interest in the whole of Plot 78 would belong to Fatuma as claimed by her.

It remains to consider whether either of the appellants acquired a title by adverse possession to the whole of the portions of Plot 78 claimed by them. The learned judge held that Fatuma had been co-owner with Walimohamed and Ahmed in their respective plots, and that it followed that adverse possession did not run against Fatuma, and that all claims to title by adverse possession failed. The correctness of this finding is the principal issue on the appeal.

The first matter for consideration is whether the law of limitation applicable is the Indian or the English law relating to limitation as between co-owners. Under s. 12 of the English Real Property Limitation Act, 1833 (3 & 4 Wm. IV, c. 27) the possession of joint tenants and tenants-in-common is separate, and if the person entitled to an undivided share in land is in exclusive possession of the whole land, the title of his companions to their undivided shares in the land will be extinguished by such possession for the statutory period of limitation (Halsbury's Laws of England (1st Edn.), Vol. 19 at p. 130). On the other hand, under the law of limitation as administered in India, the common law rule is applied that the possession of one co-owner is in law the possession of all co-owners, in the absence of ouster or something equivalent to ouster of the other co-owners. In Rustomji, Law of Limitation (5th Edn.), Vol. II at p. 1465 the difference and the reason for it are explained as follows:

> "Before s. 12 of the statute 3 and 4 Wm. IV, c. 27 was passed, it was a settled rule of English Law that the possession of one of several co-parceners, joint tenants or tenants-in-common was the possession of the others so as to prevent the statute of limitation from affecting them. The statute of Wm. IV abrogated that rule, but the Indian Limitation Act has no provision corresponding to s. 12 of the English Act 3 and 4 Wm. IV, and therefore the old rule (of the English Common Law) prevails in India and is of daily application in our courts . . . There is no special provision in India regarding the hostile possession of tenants-in-common. The reason is not far to seek. In India co-parcenary and joint enjoyment are normal, whereas in England they are exceptions. The Indian Legislature apparently considered that it would be dangerous to introduce the principle enunciated in the English statute 3 and 4 Wm. IV into this country, where managers and other members of the family are ordinarily in enjoyment of either the whole or portions of the property exclusively to avoid the disruption of the family and the partition of family properties."

The Indian Limitation Act, 1908, applies in Tanganyika by virtue of s. 2 of the Indian Acts (Application) Ordinance (Cap. 2). But Mr. Vellani, for the respondent Walimohamed, argued that, whereas there is no special provision in India regarding the hostile possession of tenants-in-common, there is special provision, namely s. 12 of the Real Property Limitation Act, 1833, in force in Tanganyika by reason of s. 2 of the Land (Law of Property and Conveyancing) Ordinance (Cap. 114). That section reads as follows:

> "2.(1) Subject to the provisions of this Ordinance, the law relating to real and personal property, mortgagor and mortgagee, landlord and tenant, and trust and trustees in force in England on the first day of January, 1922, shall apply to real and personal property, mortgages, leases and tenancies, and trusts and trustees in the Territory in like manner as it applies to real and personal property, mortgages, leases and

tenancies, and trusts and trustees in England, and the English law and practice of conveyancing in force in England on the day aforesaid shall be in force in the Territory.

"(2) Such English law and practice shall be in force so far only as the circumstances of the Territory and its inhabitants, and the limits of His Majesty's jurisdiction permit.

"(3) When such English law or practice is inconsistent with any provision contained in any Ordinance or other legislative act or Indian Act for the time being in force in the Territory, such last mentioned provision shall prevail."

Mr. Vellani argued that the Indian Law of Limitation does not take cognizance of anything other than an express trust; that the Indian Law of Limitation as administered as to other than express trusts was the common law of England; that there is no conflict between the Indian Act and the English statute law on the point; and that therefore by virtue of s. 2 of Cap. 114 the English law regarding the hostile possession of tenants-in-common applies in Tanganyika.

It may be doubted whether sub-s. (1) of s. 2 of the Land (Law of Property and Conveyancing) Ordinance would necessarily apply the English law of limitation, and, in particular, the Real Property Limitation Act, 1833, to the Territory. The Land (Law of Property and Conveyancing) Ordinance is intituled

"An Ordinance to apply the English Law of Property and Conveyancing to the Territory;"

while the Real Property Limitation Act, 1833, is

"An Act for the Limitation of Actions and Suits relating to Real Property, and for amplifying the Remedies for trying the Rights thereto."

However that may be, I think that the main and fatal objection to Mr. Vellani's argument is that the provision of the English Law of Limitation for which he contends is inconsistent with the provisions of the Indian Limitation Act, and that therefore under sub-s. (3) of s. 2 of the Land (Law of Property and Conveyancing) Ordinance the provisions of the Indian Limitation Act must prevail. The Indian Limitation Act, as I see it, purports to be a complete code for the limitation of suits. Section 3 provides, *inter alia*, that subject to the subsequent provisions of the Act

"every suit instituted . . . after the period of limitation prescribed therefor by the first schedule shall be dismissed . . ."

Article 120 of the Schedule contains a general residuary provision for the limitation of "suits for which no period of limitation is provided elsewhere in this Schedule." The Schedule is therefore exhaustive as regards suits. As regards suits for the possession of immovable property art. 144 of the Schedule makes residuary provision for the limitation of suits

"for possession of immovable property or any interest therein not hereby otherwise specially provided for."

This provision itself, therefore, is exhaustive as regards suits for possession of immovable property. This fact alone would, it seems to me, exclude the application to the Territory of the Real Property Limitation Act, 1833, which, as I have already indicated, is an Act for the limitation of actions and suits relating to real property.

Apart from this, however, it is to be noted that the period of limitation provided for in art. 144 of the Schedule to the Indian Limitation Act (which is the relevant Article in this appeal) runs from the time "the possession of the defendant becomes adverse to the plaintiff".

Section 28 of the Act provides:

> "At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."

As stated in Mitra, The Indian Limitation Act (10th Edn.) at p. 234:

> "This section does not apply unless there is someone in adverse possession of the property. Until someone is in adverse possession the owner of the property does not lose his right to the property merely because he happens not to be in possession of it for twelve years. Under this section his right is extinguished at the determination of the period limited by the Act to him for instituting a suit for possession of property; that period cannot be determined unless it has commenced to run, and the period will not commence to run until the owner is aware that someone else in possession is holding adversely to himself."

This is an entirely different conception from that embodied in the Real Property Limitation Act, 1833. The effect of that Act is stated in Halsburys Laws of England (1st Edn.), Vol. 19 at p. 105 as follows:

> "The Real Property Limitation Act, 1833, put an end to the doctrine of adverse possession in reference to questions arising under that Act, and, except in relation to landlord and tenant, mortgagors and mortgagees, advowsons, and trusts, the only question under the Statutes of Limitation in force with regard to land or rent is whether twelve years have elapsed since the claimant's right accrued, whatever be the nature of the possession of the present holder."

It is true that there is no express provision in the Indian Limitation Act regarding limitation as between tenants-in-common. It follows that the residuary Article, 144, applies as between tenants-in-common, and in that Article the doctrine of adverse possession is expressly preserved. That is clearly a provision inconsistent with s. 12 of the Real Property Limitation Act, 1833, and under sub-s. (3) of s. 2 of the Land (Law of Property and Conveyancing) Ordinance, the Indian provision must prevail. The doctrine of adverse possession was a doctrine of the English Common Law and the Indian courts have had recourse to the English Common Law for the purpose of determining what constitutes adverse possession. It seems to me that the position in this Territory in regard to limitation is precisely the same as in India and that, notwithstanding s. 2 of the Land (Law of Property and Conveyancing) Ordinance, the law of limitation applicable in Tanganyika is the law of limitation as administered in India.

It follows that, in this case, before the period of limitation can begin to run in favour of either of the appellants, possession adverse to Fatuma must be established, and it is well settled that, as between tenants-in-common, there must be some overt act amounting to ouster before possession of a co-tenant becomes hostile. *Corea v. Appuhamy* (1), [1912] A.C. 230 at P. 236. The learned judge appears to have held, relying on a passage in Mitra, The Indian Limitation Act, that there can never be adverse possession as between tenants-in-common. It is clear, however, that possession of a co-owner may be adverse, though, before it can be adverse, there must be a denial of the others' right by an open assertion of a hostile title on the part of the co-owner setting up adverse possession, and notice of the denial to the others must either have been given direct or be inferred from notorious acts and circumstances (Rustomji, supra, at p. 1466). It is necessary to consider, therefore, whether any denial of right or other act amounting to ouster occurred which would constitute the possession of the appellants or their predecessors in title adverse to Fatuma's title. And the burden of proving title by adverse possession rests upon the appellants respectively (*Secretary cf State for India v. Chelikani Rama Rao and Others* (2) (1916), 43 I.A. 192 at p. 196).

So far as possession by Fatuma's grandfather, Saleh Saban, and by her uncle Awadh, is concerned, I do not think any possible question of adverse possession can arise. There was some suggestion in the learned trial judge's judgment that Awadh might have been in the position of a trustee for Fatuma, but Mr. Fraser-Murray, who appeared for Fatuma on the appeal, conceded that this would not be the case, at least as far as Plot 78 itself is concerned. On the basis of co-ownership, however, it is clear that the possession both by Saleh Saban and by Awadh was possession on behalf of Fatuma. Certainly there is no evidence whatever of any act on the part of Saleh Saban or Awadh amounting to ouster.

It was contended by Mr. Vellani for Walimohamed that the purported conveyance to Suleman bin Abdulla Habash in 1928 was such an act of ouster in so far as Walimohamed's plot is concerned; that though there is no evidence of notice of denial of her right having been given to Fatuma, possession must have been open and notorious and that notice of denial is to be inferred from the fact of possession.

I am unable to accept this argument. It is to be remembered that Fatuma is a Mohamedan lady and would be unlikely to concern herself with the property so long as she thought that her uncle was managing it. The property at that time appears to have been a coconut plantation. There was evidence that Suleman bin Habash collected coconuts, but no evidence that he ever lived on the land. There could be many legitimate reasons other than ownership to explain his presence. I certainly do not think this evidence discloses any circumstances from which notice of denial of Fatuma's right can necessarily be inferred. On the contrary, I think the probabilities are that Fatuma was not aware of the purported sale. She herself denied knowledge, and it is significant that Saidi stated in evidence that she (Saidi) knew nothing about her father selling to Habash. Then, it is clear that, upon Awadh's death, Fatuma made a claim to the Administrator General in respect of her interest in the property. This claim was made in connection with the administration of Awadh's estate. This is perfectly consistent with Fatuma having relied upon Awadh to manage the property during his lifetime. It would be perfectly natural for her not to take any close interest in the property during his lifetime, but only to see reason to assert her claim upon his death. I am of opinion therefore that on the evidence it is quite impossible to infer any act on the part of Suleman bin Habash which could amount to ouster of Fatuma's title.

It appears to me that the first act which could possibly be held to amount to ouster in relation to the plot claimed by Walimohamed was the sale of the plot to Walimohamed by the Administrator General by public auction. That sale by auction, however, took place on March 27, 1940. It is agreed that the acquisition of the land by the Crown took effect on January 1, 1952 and that that is the material date for the purpose of calculating adverse possession. Therefore, even if the sale by public auction amounts to ouster of Fatuma's title, there has not been adverse possession by Walimohamed for the statutory period of twelve years.

I am accordingly of opinion that Walimohamed's appeal must fail.

As regards Ahmed and Saidi, the only act of ouster which has emerged in relation to their plots is the rejection by the Administrator General of the claim made by Fatuma in the administration of Awadh's estate. Since letters of administration in Awadh's estate were only granted in April, 1940, it follows that the statutory period of twelve years subsequent to that act cannot have run by January, 1952. Saidi herself has not appealed against the learned judge's finding. Ahmed's title derives from Saidi, and he is in no better position than she is. I am of opinion that his appeal must fail also.

As regards costs in the High Court, the learned judge made no order, but gave no reasons for not doing so. Before us Mr. Vellani for Walimohamed and Mr. Jhaveri for Ahmed argued that costs in the High Court should have been given against the Minister for Lands and Mines because the Minister had disputed their freehold title, and, though the freehold title was eventually conceded, this was only done at the last minute and they had had to come to court prepared to support that title.

For the Minister, Miss Sleigh argued, not only that he should not be called on to pay the costs of any other party, but that the other parties should be required to pay half his costs in the High Court on the basis that each had been only half successful in his claim.

Mr. Fraser-Murray did not claim any costs in the High Court for Fatuma.

I do not think that any of these claims for costs is to be accepted. The action of the Minister in not conceding the freehold title till just before the trial was not unreasonable since the document which established the quality of the title only then came to light, and, in fact, no additional costs were incurred by Walimohamed and Ahmed by reason of the delay in conceding that the title was freehold. The evidence necessary to support their freehold title was precisely the same as that upon which they relied to defeat Fatuma's claim. As regards the Minister's claim for costs, it was conceded that, once the freehold quality of the title had been accepted, his only interest apart from costs was in regard to a possible dispute as to the amount of compensation payable to Saidi. Apart from her action the Minister could have withdrawn from the proceedings. Saidi is not a party to the appeal, so no order can be made against her. And I see no reason why the Minister's costs should be required to be borne by the other parties. On the whole I consider that the most equitable course as to costs in the High Court was that adopted by the learned judge, and I would not interfere with it.

Costs of the appeal must, I think, follow the event, though, as regards the Minister, they should be limited to the only issue in which he was interested, that is to say, costs in the High Court.

I would accordingly dismiss the appeals with costs, such costs, in the case of the Minister, being limited as indicated.

Sir Kenneth O'Connor P: I agree. The appeal is dismissed with costs as proposed by the learned justice of appeal.

Briggs V-P: I also agree.

Appeals dismissed.

For the appellant in Appeal No. 16:
KL Jhaveri
Patel, Desai & Jhaveri, Dar-es-Salaam

For the first respondent:
Miss EK Sleigh
WD Fraser Murray
The Department of Lands & Surveys, Tanganyika
Fraser-Murray, Thornton & Co, Dar-es-Salaam

For the second respondent:

WD Fraser Murray
Miss EK Sleigh
Fraser-Murray, Thornton & Co, Dar-es-Salaam
The Department of Lands & Surveys, Tanganyika

For the appellant in Appeal No. 18:
RB Vellani and *Mrs BA Bhojani*
Vellani & Co, Dar-es-Salaam

Alamanzane Kakoza v R
[1958] 1 EA 444 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	22 September 1958
Case Number:	34/1958
Before:	Keatinge J
Sourced by:	LawAfrica

[1] Street traffic – Passengers carried in commercial vehicle for reward – Insurance excluding liability for risks of carriage of passengers for reward – Whether condition excluding such liability ineffective by virtue of the Traffic Ordinance, 1951, s. 102 (*U.*).

[2] Insurance – Motor vehicle – Passengers carried in commercial vehicle for reward – "Commercial Vehicle" insurance excluding cover for risks of carriage of passengers for reward – When owner liable to insure for such risks – Traffic Ordinance, 1951, *s.* 98 (1), *s.* 99 *and s.* 102 (*U.*).

Editor's Summary

The accused, a lorry driver, was convicted on his own plea of three traffic offences, of which one was for using a motor vehicle on a road without a valid certificate of insurance, contrary to s. 98 (1) and s. 102 of the Traffic Ordinance, 1951. The owner of the vehicle had a "Commercial Vehicle" policy of insurance, by which liability was excluded for use of the vehicle for the conveyance of passengers for hire or reward. When charged, the accused had admitted carrying three fare-paying passengers, each of whom had paid him Shs. 5/-. At the hearing in the High Court's revisional jurisdiction the advocate for the accused contended that the condition in the policy excluding liability in respect of carrying passengers for hire or reward was of no effect by virtue of s. 102 of the Traffic Ordinance.

Held –

(i) the construction sought to be put on the material portion of s. 102 of the Traffic Ordinance would render the remainder of that section and all of s. 110 superfluous and could not be sustained. *Gray v. Blackmore*, [1934] 1 K.B. 95; [1933] All E.R. Rep. 520 applied.

(ii) since, however, there was no evidence of habitual carriage of fare-paying passengers, there was no

obligation to insure the passengers. *Wyatt v. Guildhall Insurance Co. Ltd.*, [1937] 1 All E.R. 792 applied.

Appeal on one count allowed. Order of disqualification for twelve months set aside.

[**Editorial Note:** See also *Ramadhani Ali v. R.*, [1958] E.A. 344 (T.).]

Case referred to in judgment:

(1) *Bright v. Ashfold*, [1932] 2 K.B. 153.

(2) *Gray v. Blackmore*, [1934] 1 K.B. 95; [1933] All E.R. Rep. 520.

(3) *Wyatt v. Guildhall Insurance Co. Ltd*., [1937] 1 All E.R. 792.

(4) *McCarthy v. British Oak Insurance Co. Ltd*., [1938] 3 All E.R. 1.

(5) *Bonham v. Zurich General Accident & Liability Insurance Co. Ltd*., [1944] 2 All E.R. 573.

Judgment

Keatinge J: Accused was employed as the driver of a lorry. On March 6, 1958 he was convicted on his own plea of three offences against the Traffic Ordinance, 1951, viz.

(1) Carrying fare-paying passengers on a commercial vehicle without a stage carriage licence contra s. 85 (1) and s. 86 (1):

(2) Carrying unauthorised passengers contra s. 77 (1); and

(3) Using a motor vehicle on a road without a valid certificate of insurance contra s. 98 (1) and s. 102.

This court is only concerned with the third count. It would appear that after the trial had been concluded it was discovered that in fact the vehicle driven by accused had been insured by its owner, accused's employer. The policy is called Commercial Vehicle Policy and it contains several conditions. One of these conditions is

"The policy does not cover:

"(3) Use for the conveyance of passengers for hire or reward."

On count 1 accused admitted carrying three fare-paying passengers and, according to the record, these passengers paid Shs. 5/- each to accused. Mr. McMullin for the Crown contends that in view of the breach by accused of the above condition as to the use of the vehicle, the certificate of insurance is not valid.

Mr. Kiwanuka for petitioner/accused argues that this condition is of no effect by virtue of the provisions of s. 102 of the Traffic Ordinance, 1951. The material part of s. 102 reads:

> "Any condition in a policy of insurance providing that no liability shall arise under the policy, or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy, shall, as respects such liabilities as are required to be covered by a policy under s. 99 of this Ordinance, be of no effect:"

Mr. Kiwanuka submits that as a result of the comma after the word "policy" the section should be read:

> "Any condition in a policy of insurance providing that no liability shall arise under the policy, shall, as respects such liabilities as are required to be covered by a policy under s. 99 of this Ordinance (i.e. third party risks), be of no effect."

It may here be observed that if the above rendering of s. 102 is correct then the remainder of the section is quite superfluous and the provisions of s. 110 which deals further with avoidance of restrictions on the scope of policies are also superfluous.

Section 102 of the Traffic Ordinance, 1951, is to all intents and purposes the same as s. 38 of the Road Traffic Act, 1930, except that in our section there is a comma after the word "policy" whereas in s. 38 there is no comma after the word "policy" but there is a comma after the word "cease". In Halsbury's Statutes of England (2nd Edn.), Volume 24, it is stated at p. 608:

> "This section (s. 38) does not affect conditions precedent to the event referred to. Thus, a condition that the policy did not cover the use of a motor-cycle with a passenger unless a side-car was attached, did not offend against the section"

(*Bright v. Ashfold* (1), [1932] 2 K.B. 153). Mr. Kiwanuka's argument as to the interpretation of s. 102 is, I think, very clearly answered by Branson, J., in *Gray v. Blackmore* (2), [1934] 1 K.B. 95 where in the judgment at p. 106 he says:

> "The argument is that a provision in the policy that the car shall not be covered if it is being used for a certain purpose is rendered of no effect by this clause (s. 38). It is said that the clause must be read without a comma in it and, as I understand it, in the following way: 'Any condition (*a*) that no liability shall arise or (*b*) that any liability so arising shall cease in the event, etc., shall be of no effect'. Now, it seems to me that that is an

> impossible construction to put upon this clause, whether you put a comma after 'cease' or not. This section seems to me to be perfectly clearly expressed as it stands and to provide that any condition in the policy providing that no liability shall arise under it in the event of some specific thing being done or omitted to be done after the event giving rise to a claim under the policy, shall be of no effect; in other words, the words 'in the event of some specific thing being done, etc.' apply equally to the words 'that no liability shall arise . . .' as they do to the words 'that any liability so arising shall cease'." And later at p. 107 of the judgment:
>
> "I see nothing in the statute which prevents an underwriter and an assured from agreeing to a policy with any conditions that they choose; but if the assured takes the car upon the road in breach of those conditions he cannot thereby throw a greater obligation upon the underwriter."

I would respectfully agree and in my opinion our s. 102 has exactly the same meaning as s. 38 of the Road Traffic Act, 1930. It follows that, as regards the present case, I find that the condition in the policy that the vehicle may not be used for the conveyance of passengers for hire or reward, is not rendered of no effect by s. 102 of the Traffic Ordinance, 1951.

But there is a further point for decision. By virtue of proviso (ii) to s. 99 of the Traffic Ordinance, a person is not required to insure his own passengers

> "except in the case of a vehicle in which passengers are carried for hire or reward, etc."

Mr. Kiwanuka submits that on the facts of this case the vehicle was not being used for carrying passengers for hire or reward within the meaning of s. 99 and thus the certificate of insurance is valid. As accused/petitioner pleaded guilty to all the charges it is not surprising that the prosecutor gave only the briefest outline of the facts. It would seem that accused drove the vehicle on regular runs for commercial purposes. On that day he had come from Kampala. The prosecutor stated he did not know whether accused had a record. In the circumstances, I think it must be presumed accused has no record, and, I think, in fairness to accused, and in the absence of any evidence, it must also be presumed that accused did not habitually carry fare-paying passengers.

Our proviso (ii) to s. 99 is the same as proviso (ii) to s. 36 of the Road Traffic Act, 1930.

> "It is to be observed that the qualification is applied to the vehicle; there is only an obligation to cover passenger risks if the assured, as distinct from charging a fare or taking a reward on isolated occasions, makes a regular practice of so doing as to bring the vehicle within the relevant category."

(Halsbury's Laws of England (3rd Edn.), Vol. 22 at p. 368.

In *Wyatt v. Guildhall Insurance Co. Ltd.* (3), [1937] 1 All E.R. 792, the car was insured under a private motor car policy for use for social, domestic and pleasure purposes. The owner had to go to London. He offered to take two other persons who also wished to go to London for Shs. 25/- each. On the journey the car was in collision with a lorry. The owner was not, so far as was known, in the habit of carrying persons for payment. It was held that the owner of the car was not bound by Road Traffic Act, 1930, s. 36 (1) (which is the same as s. 99 of the Traffic Ordinance, 1951) to have in force a policy of insurance to cover any liability he might incur to the plaintiff (one of the passengers) in the circumstances of this journey, which was an isolated occasion. The effect of the sub-section is only to require the owner to have such a policy in force where the vehicle is habitually used for the carriage of passengers for hire or reward.

The facts in *McCarthy v. British Oak Insurance Co. Ltd*. (4), [1938] 3 All E.R. 1, were rather different. There the car was insured for social, domestic and pleasure purposes. The driver borrowed the car to take some friends on a trip which had been arranged for some time. When fetching the car the driver spent about Shs. 10/- on oil and petrol and this amount was reimbursed to him by his friends. It was held that the car was being used for social and domestic purposes within the meaning of the policy, and there was no such arrangement as would amount to a hiring. Mr. McMullin has argued that there is a distinction between "hire" and "reward" but it would seem that such a distinction is a fine one if it exists at all. *Wyatt v. Guildhall Insurance Co. Ltd*. (3), and *Bonham v. Zurich General Accident and Liability Insurance Co. Ltd*. (5), [1944] 2 All E.R. 573.

On these authorities, and on the known facts in this case, I would be prepared to find that the certificate of insurance was valid, but it is sufficient to say that there is, at least, a grave doubt and accused/petitioner is entitled to the benefit of such doubt.

Accordingly, the conviction of count 3 is quashed and the sentence set aside. The fine, if paid (Shs. 300/-) will be refunded. The order of disqualification from holding or obtaining a driving permit for 12 months is cancelled.

Appeal on one count allowed. Order of disqualification for twelve months set aside.

For the petitioner:
BKM Kiwanuka
BKM Kiwanuka, Kampala

For the respondent:
AM McMullin (Crown Counsel, Uganda)
The Attorney-General, Uganda

Rahim Rajan v R
[1958] 1 EA 448 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	11 August 1958
Case Number:	143/1958
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Criminal law – "Unlawful wounding" – Meaning of "wound" – Penal Code, s. 4, *s.* 215 (1) (*U.*).

Editor's Summary

The appellant, who was convicted by a magistrate at Jinja of unlawful wounding, kept a bar. When the complainant, a car driver, entered this bar, the staff ejected him on the orders of the appellant on the ground that the complainant had caused trouble there before. Having been ejected the complainant went over to his employer's car but was followed by the appellant who stabbed him on the shoulder with an instrument which was never found. Medical evidence proved that the complainant had a would half an inch long and three quarters of an inch deep which "had gone through the outer layers of the skin". On appeal against conviction it was contended *inter alia* that the evidence did not prove a "wound" within s. 4 of the Penal Code.

Held – although either the doctor had not expressed himself very clearly or the note of his evidence was not clear, there was ample evidence on which the magistrate could find there was a wound in the sense of the whole skin having been punctured or divided.

[**Editorial Note.** In the present case the High Court considered that the conduct of the complainant had been provocative and since from its dimensions the wound was not serious, the sentence of imprisonment was excessive. A fine of Shs. 500/- was accordingly substituted. The present report is confined to an extract from the judgment of the chief justice on the only substantial point of law involved.]

Appeal against conviction dismissed.

No cases referred to in judgment

Judgment

Sir Audley McKisack CJ: The appellant was convicted of the offence of unlawful wounding, contrary to s. 215 (1) of the Penal Code, and sentenced to four months' imprisonment. He appeals against conviction and sentence.

It is contended for the appellant that the evidence ought not to have been accepted by the learned trial magistrate as sufficient to prove the case against the accused, having regard to certain defects in that evidence and to the evidence given for the defence. It is further contended that in any event the evidence did not prove that there was a "wounding" within the meaning of the Penal Code. The definition of the word "wound" in s. 4 of that Code is as follows:

> " 'wound' means any incision or puncture which divides or pierces any exterior membrane of the body, and any membrane is exterior for the purpose of this definition which can be touched without dividing or piercing any other membrane."

The difficulty about this definition is that it contains the word "membrane", but that word is not itself defined. In English criminal law, to constitute a wound within the meaning of the Offences Against the Person Act, 1861, the continuity of the skin must be broken;

> "or, in other words, the outer covering of the body (that is, the whole skin, not the mere cuticle or upper skin) must be divided"–

Archbold (33rd Edn.), p. 1002.

The definition given by the Shorter Oxford Dictionary of the word "membrane" is of no great assistance. It is as follows:

> "1. A thin pliable sheet-like tissue (usually fibrous) serving to connect other structures or to line a part or organ . . . A morbid formation in certain diseases.
>
> "2. Parchment: a skin of parchment forming part of a roll."

Having regard to the position in English Law, it is difficult to see why the draftsman of the Penal Code should have used the word "membrane" rather than "skin", but I think he can hardly have intended any lesser degree of penetration to suffice. In other words, the test whether an injury amounts to a wound is the same under the Penal Code as under the Offences Against the Person Act, 1861.

On the evidence given by the prosecution witnesses I do not think there would be any difficulty in concluding that the complainant did receive a wound within the meaning of the Penal Code, were it not for a reference to the outer layers of the skin in the evidence of the medical witness (p. 4). In describing the injury on the complainant's body he is recorded as having made a statement to the following effect:

> "He had a stab wound on the left shoulder. Deltoid muscle. Half-inch in length and three-quarters inch deep. It had gone through the outer layers of the skin."

This statement about the "outer layers of the skin" could, if taken by itself, be construed as meaning that the whole skin had not been penetrated. But looking at the doctor's evidence as a whole, it seems impossible to construe it as meaning that the instrument causing the injury had stopped short after penetrating only the outer layers of the skin and had gone no further. Why otherwise would there be a reference to the deltoid muscle and to the injury being three-quarters inch deep?

It is unfortunate that the doctor either did not express himself very clearly or that the note of his evidence made by the magistrate is not more clear. But there was other evidence to support the view that there was in fact a wounding within the meaning of the Penal Code, to the effect that the complainant's shoulder was seen to be bleeding immediately after he claimed to have been stabbed by the accused (see evidence of P. 3 at foot of p. 6 of the typescript record). There is also the evidence of the complainant himself (P. 1) that he felt a stab wound and that blood flowed from it (p. 2 of record).

Thus there was in my view ample evidence on which the magistrate could find that there was a wound in the sense of the whole skin having been punctured or divided. He did so find, although I am puzzled by the fact that he apparently relied on the evidence that "the outer layers of the skin" had been pierced. If he was construing the expression "exterior membrane", which is in the Penal Code definition, of the word "wound" as being synonymous with the outer layer or layers of the skin, I think this was a misdirection. But the magistrate did go on to say:

> "Even disregarding this evidence (i.e., as to penetration of the outer layers) I feel it safe on the evidence of the complainant alone to find that it was a wound within the meaning of the law."

I think he might also have said that the evidence of P. 3 also went to show that there was such a wound. I therefore consider that the magistrate's conclusion

was correct, although I cannot altogether agree with the method of reasoning by which he reached that conclusion.

Appeal against conviction dismissed. Sentence of imprisonment set aside and a fine of Shs. 500/- *or one months' imprisonment in default substituted.*

For the appellant:
PJ Wilkinson
Baerlein & James, Jinja

For the respondent:
M Maloney (Crown Counsel, Uganda)
The Attorney-General, Uganda

Gurbachan Singh Kalsi v Yowani Ekori
[1958] 1 EA 450 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	19 September 1958
Case Number:	62/1958
Before:	Sir Kenneth O'Connor P, Gould JA and Sir Owen Corrie Ag JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court for Uganda–Lyon, J

[1] Res judicata – Building contract – Different causes of action – Nonfeasance and misfeasance – Claims inconsistent and mutually destructive – Whether subsequent claim alleging misfeasance competent after first action formed in nonfeasance dismissed – Civil Procedure Ordinance, s. 7, *s.* 77 (1) (*h*) (*U.*) *– Civil Procedure Rules, O.* 40, *r.* 1 (2) (*U.*).

Editor's Summary

In 1956 the respondent brought an action against the appellant, claiming damages for the appellant's failure to erect a house pursuant to a building contract. The damages claimed included Shs. 8,000/- paid to the appellant under the contract, and Shs. 5,150/- for building materials taken over by the appellant. In his plaint the respondent averred that the appellant had been requested on several occasions to start the work, but had done nothing. By his defence the appellant denied the allegations and counterclaimed Shs. 6,000/- for work done under the contract. The trial judge held that the appellant began the work, but was stopped by the respondent, who objected to the blocks the appellant intended to use. He found that the respondent was entitled to judgment for Shs. 150/- on the claim for materials taken over, but dismissed

the rest of the respondent's claim, and entered judgment for the appellant on the counterclaim. The respondent then began a fresh action, alleging that he had paid the appellant Shs. 8,000/- under the building contract, and since the appellant had only done work to the value of Shs. 1,000/-, he claimed Shs. 7,000/- and interest and damages for breach of contract. In his defence to this action the appellant pleaded res judicata and alleged performance of the contract. The judge, who heard the preliminary point taken by the appellant, held that the plea of res judicata failed because the issues raised on the pleadings in the second action had not been heard and decided in the first action, and ordered that the case must proceed. On appeal by leave against this order, a preliminary point was taken by the respondent that the appeal was incompetent, since an appeal against an order was only admissible under s. 77 (1) (*h*) of the Civil Procedure Ordinance. On the merits the appellant's contention was that in the two actions there was only one cause of action, namely an alleged breach of a building contract.

Held –

(i) the appeal was competent, since it was brought by leave under O. 40 r. 1 (2) of the Civil Procedure Rules.

(ii) the fact which it was necessary for the respondent to prove in the first action brought by him was that no work had been done by the appellant under the building contract, whilst in the second action he had to prove that though the work had been begun, it had not been completed and that inferior materials had been used; these were clearly distinct, inconsistent and mutually destructive pleas and as such could not be said to be such as ought to have been raised in the first action.

(iii) the fact that the respondent had previously brought an unsuccessful action, based upon nonfeasance, did not estop him from bringing a second action based upon misfeasance.

Appeal dismissed.

Case referred to in judgment:

(1) *Henderson v. Henderson*, 67 E.R. 313.

(2) *Serrao v. Noel* (1885), 15 Q.B.D. 549.

(3) *Read v. Brown* (1889), 22 Q.B.D. 128.

September 19. The following judgments were read:

Judgment

Sir Owen Corrie Ag JA: This is an appeal from an order, delivered on February 5, 1958, of the High Court of Uganda in an action brought by the respondent, Yowani Ekori, against the appellant, Gurbachan Singh Kalsi.

The facts are as follows:

On January 23, 1956, the respondent brought an action against the appellant (case 3/56) on a contract dated November 30, 1954, whereby the appellant had agreed to build a house for the respondent. The respondent claimed the sum of Shs. 13,150/- being as to Shs. 8,000/- moneys paid to the appellant in respect of the contract; and as to Shs. 5,150/-, the value of building materials taken over by the appellant. The respondent also claimed

> "damages for failure on the part of the defendant for not erecting the house."

By para. 5 of his plaint the respondent averred:

> "5. The plaintiff several times requested to the defendant to start the work but he went on telling that he will do it soon, but did nothing."

By para. 8 of his plaint the respondent further averred:

> "8. That during the period of September, 1954, to November, 1955, the plaintiff has requested several times to start the said work but (the defendant) did not do anything for building of the said house."

These averments were denied by the appellant in his written statement of defence. He also counterclaimed for Shs. 6,000/- for work done under the contract.

In his judgment Jones, Ag.J., in dealing with the respondent's claim, said:

> "The evidence led by the plaintiff was to the contrary. Even the plaintiff himself stated that the defendant started on August 10 but as he did not approve of the blocks which the defendant intended to use, stopped him from carrying on the work."

The court observed:

> "Had the plaintiff alleged that the work was defective and the material inferior it would have been a different matter altogether. There was no

application for leave to amend the plaint and the part of it relating to the failure to start fails."

On the claim in respect of materials the court found for the plaintiff for Shs. 150/-. On the counterclaim judgment was entered for the defendant with costs.

On July 3, 1957, the respondent filed a fresh plaint (Case 45 of 1957) claiming Shs. 7,000/- and interest and damages for breach of contract. By paras. 2, 3 and 4 of the plaint he stated that he had made payments to the appellant in respect of the building contract amounting to Shs. 8,000/-.

By para. 5 he stated that

"the defendant has only done part of the walls work--approximate value of the work is Shs. 1,000/– and has failed to carry out the terms of the contract. The blocks used by the defendant in the walls are very low and inferior in quality made of Mahrem only."

The appellant in para. 2 of his defence said:

"2. The defendant states that the judgment delivered in Civil Case 3/56 between the said plaintiff and the said defendant on the same subject matter whereby the suit was dismissed with costs to the defendant . . . operates as res judicata and consequently the plaintiff is estopped in law in initiating his action"

and he prayed that the suit be dismissed. Alternatively he alleged performance of his part of the contract.

In dealing with the claim of res judicata, Lyon, J., referred to s. 7 of the Civil Procedure Ordinance (Cap. 6) and to Explanations (3) and (4) of that section. Section 7 is as follows:

"7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

The Explanations are in the following terms:

"Explanation. (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other."

"Explanation. (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

Later in his judgment Lyon, J., said:

"That the plaintiff might have pleaded what he now pleads cannot be denied. Further if the real ground for his claim was that the work was defective, etc., he ought to have pleaded that. But I have come to the conclusion that it would not be right to hold that the question is deemed to have been heard and decided when the learned judge (Jones, J.) has expressly stated that he refused to try the issue because there was no allegation in the earlier plaint . . . The plea of res judicata therefore fails and the case must proceed."

It is against this order that the appellant now appeals. In his memorandum of appeal he maintains:

"That the learned judge erred in law disallowing the preliminary objection that the judgment in case 3 of 1956 between the same appellant and same respondent on the same subject matter and cause of action was res judicata."

and further,

> "That the learned judge in dismissing the plea of res judicata
>
> (*a*) failed to consider that there was enough evidence before the trial judge both from the appellant and the respondent about the subject matter of the instant suit.
>
> (*b*) failed to appreciate that the same evidence would maintain both actions and further failed to hold that the said evidence recorded in case 3/56 would determine matters for consideration in instant suit which properly pertained to the subject of litigation in the said former action, had the respondent exercising reasonable diligence raised them at that trial."

For the respondent, Mr. Patel has taken the preliminary objection that no appeal lies. The ground of his objection is that the appeal is only admissible if it comes within the terms of s. 77 (1) (*h*) of the Civil Procedure Ordinance which allows an appeal against:

> "(*h*) Any order made under rules from which an appeal is expressly allowed by rules."

The instant appeal is brought by leave under Order 40 r. 1 (2), which provides:

> "(2) An appeal under these rules shall not lie from any other order save with leave of the court making the order or of the court to which an appeal would lie if leave were given."

Mr. Patel's point is that this provision, though it allows an appeal does so by implication only and not "expressly" and he argues that it is ultra vires the rule-making power. We overruled this submission. In our opinion that an appeal lies is implicit in the express words of O. 40 r. 1 (2) and is, therefore, an appeal expressly allowed by rules.

In support of the appeal Mr. D'Silva has cited a passage from the judgment of the Vice-Chancellor in *Henderson v. Henderson* (1), 67 E.R. 313 at p. 319, which runs as follows:

> "In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time."

Mr. D'Silva has also referred to *Serrao v. Noel* (2) (1885), 15 Q.B.D. 549, in which Brett, M.R., said (at p. 558) "no more actions than one can be brought for the same cause of action"; and Bowen, L.J., said (at p. 559):

> "The principle is, that where there is but one cause of action, damages must be assessed once and for all."

It is the appellant's contention that in the two suits brought by the respondent there was only one cause of action, namely a breach of the building contract in that the appellant failed to complete the building and used inferior materials.

In *Read v. Brown* (3) (1889), 22 Q.B.D. 128, Lord Esher, M.R., said at p. 131:

> "It (cause of action) has been defined in *Cooke v. Gill* (L.R. 8 C.P. 107) to be this; every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

This definition was approved by Lopes, L.J., at p. 133. Applying this definition to the facts which have given rise to the instant appeal, it is clear that in the first action brought by the respondent the "fact which it would be necessary for the plaintiff to prove" was that no work had been done under the contract by the defendant.

In the second action the "fact which it would be necessary for the plaintiff to prove" was that though the work had been begun it had not been completed and inferior materials had been used. Clearly these are distinct, inconsistent and mutually destructive allegations. Inconsistent or mutually destructive pleas cannot be said to be such as ought to have been raised in the former suit. Chitaley & Rao, Civil Procedure Code (2nd Edn.) Vol. I, p. 167.

It follows, in my view, that the fact that the respondent had previously brought an unsuccessful action based upon an allegation of nonfeasance, did not estop him from bringing a second action based upon misfeasance, which, in the circumstances of the case, could not have been joined with the first. I hold that the appeal should be dismissed with costs.

Sir Kenneth O'Connor P: I agree. The appeal will be dismissed with costs.

Gould JA: I also agree.

Appeal dismissed.

For the appellant:
BE D'Silva
PJ Wilkinson, Kampala

For the respondent:
ML Patel
PB Patel, Soroti

Jetha Petrol Station Limited v Jamal Premji Lalani Limited
[1958] 1 EA 455 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	19 September 1958
Case Number:	57/1958
Before:	Sir Kenneth O'Connor P, Gould JA and Sir Owen Corrie Ag JA
Sourced by:	LawAfrica

Appeal from: H.M. High Court for Uganda–Bennett, J

[1] Contract – Proposal and acceptance – Written undertaking to pay conditional on receipt of specific sum – Assent to proposal by conduct – Consideration for promise – Indian Contract Act, 1872, *s.* 2 (*a*), (*b*) *and* (*d*), *s.* 3, *s.* 8, *s.* 31 *and s.* 32.

Editor's Summary

The appellants sued the respondents for Shs. 10,000/- alleged to be due under a contract constituted by certain letters. The respondents had written a letter dated January 6, 1957, to the appellants binding themselves to pay to the appellants Shs. 10,000/- receivable by the respondents from one, Sond, who had assigned to them a certain contract. By a letter dated January 9, 1957, Sond irrevocably authorised the respondents to pay the Shs. 10,000/- to the appellants. This letter was duly produced to the respondents by the appellants. The respondents received the Shs. 10,000/- but by letter to the respondents dated April 17, 1957, Sond purported to revoke the respondents' authority to make the payment to the appellants. At the hearing no oral evidence was called and the trial judge held that the documents disclosed no contract and dismissed the action. On appeal it was contended for the appellants that the letter of January 6, 1957, was a proposal which had been accepted by the delivery to the respondents of the authority dated January 9, 1957. The respondents contended that the letter of January 6 was not a proposal within s. 2 (*a*) of the Indian Contract Act.

Held –

(i) if the letter of January 6, 1957, was a proposal it was accepted by delivery of the authority of January 9, 1957, signed by Sond;

(ii) the respondents had by the terms of their letter of January 6, 1957, indicated their intention to be bound and the authority of January 9 constituted a valid acceptance;

(iii) since Sond had impliedly agreed to release the respondents from their liability to pay him the Shs. 10,000/- by signing the authorisation of January 9, 1957, to pay that sum to the appellants this provided good and valuable consideration under s. 2 (*d*) of the Indian Contract Act for the respondents' promise to the appellants and the appellants were entitled to judgment for the sum claimed.

Appeal allowed.

Case referred to in judgment:

(1) *Powell v. Streatham Manor Nursing Home*, [1935] A.C. 243; [1935] All E.R. Rep. 58.

(2) *Venkayyamma Rao v. Appa Rao* (1916), 39 Mad, 509.

(3) *Shamia v. Joory*, [1958] 1 All E.R. 111; [1958] 1 Q.B. 448.

September 19. The following judgments were read.

Judgment

Gould JA: This is an appeal from the decision of the High Court for Uganda dismissing an action to

recover the sum of Shs. 10,000/- alleged to be payable under a contract between the appellant and respondent companies (hereinafter called the appellants and respondents respectively).

The facts are brief, and commence with a letter dated January 6, 1957, given or sent by the respondents to the appellants. It is in the following terms:

"Mbarara,

Date: 6.1.1957.

Messrs. Jetha Petrol Station Ltd.,

Mbarara.

We, M/s Jamal Premji Lalani Ltd., bind ourselves to you Jetha Petrol Station Ltd. to pay Shs. 10,000/- to wit Shillings Ten Thousand fixed from the payment hereafter receivable by us for Harnam Singh Sond Contractor from the Ankole Native Government for the Mutoma Gombolola contract payment.

Mr. Harnam Sing Sond having assigned the said contract to us, from such payment as we may hereafter receive, upon production of written authority of Mr. Harnam Singh Sond we shall pay you on his behalf by debiting to his account the said sum of Shs. 10,000/-.

If we do not receive the abovementioned payment for any reason, we do not bind ourselves to make the said payment.

Sd. Badrudin Jamal

for Jamal Premji Lalani Ltd.

6.1.57."

The appellants duly produced to the respondents the written authority referred to in the letter of January 6, 1957. It is as follows:

"Harnamsingh Sond,

Building Contractor,

P.O. Box 36, Mbarara.

9th January, 1957.

Messrs. Jamal Premji Ltd.,

P.O. Box 36,

Mbarara.

Dear Sirs,

Authority of Payment.

You are hereby authorised to pay Messrs. Jetha Ismail Ltd., Mbarara, or order, and Messrs. Jetha Petrol Station Ltd., Mbarara, or order, as under, on production of this authority chit, which is valid, good for payment and not cancellable by me, under any circumstances.

Shs. 13,000/-	Shs. Thirteen thousand only to Jetha Ismail Ltd.
Shs. 10,000/-	Shs. Ten thousand only to Jetha Petrol Station Ltd.
Shs. 23,000/-	Shs. Twenty-three thousand only.

Please confirm the above payment individually to J. I. Ltd. and Jetha Petrol Station Ltd., on my behalf and oblige.

Yours faithfully,

Sd. Harnam Singh.

Copy to: Jetha Ismail Ltd., Mbarara."

The respondents received the sum of Shs. 10,000/- which was receivable from the Ankole Native Government, but on April 17, 1957, Harnam Singh Sond wrote to the respondents the following letter:

"Harnamsingh Sond,
Box 51,
Mbarara.

17th April, 1957.

The Manager,
Messrs. Jamal Premji Lalani Ltd.
P.O. Box 36,
Mbarara.

Dear Sir,

This is to notify you hereby that you should not make any payment on my behalf to Messrs. Jetha Ismail Ltd. of Mbarara and to Messrs. Jetha Petrol Station Ltd. of Mbarara. And the letter of authority given to you on January 9, 1957, is hereby treated as null and void and hence inoperative.

You are to note accordingly.

Yours sincerely,
(Sd.) Harnam Singh.

Copy to Jetha Ismail Ltd.
Box 26, Mbarara.
Jetha Petrol Station Ltd.,
Mbarara."

No evidence was called at the hearing of the action but, in addition to the facts above recited, counsel agreed that there was a debt of more than Shs. 10,000/- due from Harnam Singh Sond to the appellants. The substantial question raised by the pleadings was whether what had passed between the parties amounted to a valid contract whereby the respondents were bound to pay the sum of Shs. 10,000/- to the appellants.

The learned trial judge, having discussed in his judgment the principles relating to consideration applicable by virtue of the Indian Contract Act, which is in force in the Protectorate, made no specific finding upon that question (though it may perhaps be gathered that his view favoured the appellants' case) but based his decision to dismiss the claim upon a different ground, which he expressed as follows:

"Turning to the facts of the instant case, nowhere can I find any acceptance of a proposal. It is not averred that the defendant's promise to pay the plaintiff Shs. 10,000/- was made at the request of the plaintiff. Had such a request been made, then it could have been said that the request was a 'proposal' and that the defendant's letter of January 6, 1957, was an acceptance of that proposal.

"If the defendant's letter is regarded as a proposal, it does not appear that the proposal was ever accepted by the plaintiff. It is not averred that the plaintiff ever communicated to the defendant an acceptance of the terms of the letter.

"The fact that in due course the plaintiff demanded payment of the Shs. 10,000/- (as alleged in para. 8 of the plaint) is not an acceptance, since before a party to an alleged contract can demand performance of it by the other party, there must be a contract in existence.

> "In my opinion the facts of this case as pleaded and agreed by counsel do not disclose any contract between the plaintiff and the defendant."

Before this court counsel for the appellant contended that this was an incorrect view of the legal position; that the letter of January 6, 1957, was in law a proposal and that it had been accepted by the delivery to the respondents of the letter of January 9, 1957. For the respondents it was contended that the letter of January 6, 1957, was not properly to be construed as a proposal and that even if it were, there was still no contract between the parties as there was no consideration. In my approach to these questions I will have regard to the principles stated in *Powell v. Streatham Manor Nursing Home* (1), [1935] A.C. 243, that where, as here, the evidence consists exclusively of agreed documents and facts the appellate court is in as advantageous a position in construing and drawing inferences from them as was the court below.

For the purpose of the Indian Contract Act a "proposal" is described in s. 2 (*a*):

> "2 (*a*) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal."

By s. 2 (*b*) a proposal when assented to by the person to whom it is made is said to be accepted and the proposal therefore becomes a promise. Section 3 provides (*inter alia*) that an acceptance is deemed to be made by any act or omission of the party accepting by which he intends to communicate such acceptance or which has the effect of communicating it, and s. 8 is as follows:

> "8. Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal."

It is clear that if the letter of January 6, 1957, was a proposal it was accepted by the delivery of the authority from Harnam Singh Sond. It was made a condition that such authority be produced and, having regard to the provisions of s. 8 and to the decision of the Privy Council in *Venkayyamma Rao v. Appa Rao* (2) (1916), 39 Mad. 509, performance of that condition is an acceptance. This must be so logically as well as in law for if the appellants did not desire to take advantage of what was offered they would have taken no action. There is no question but that the acceptance was communicated to the respondents.

The real question for decision on this aspect of the matter is whether the letter of January 6, 1957, constituted a proposal. It certainly signified willingness on the part of the respondents to do something, that is to pay Shs. 10,000/- to the appellants, which fulfils the first requirements of s. 2 (*a*) of the Act. The fact that the willingness of the respondents was made subject to the condition that they received the moneys due from the Ankole Native Government does not alter the position, as provision is made for such contingent contracts by s. 31 and s. 32 of the Act. Contracts of this nature become enforceable after the event stipulated for has occurred. Rather less straight-forward is the question whether the respondents signified that willingness to pay, in the words of the section ". . . with a view to obtaining the assent" of the appellants to that act. No authority was quoted as a guide to the interpretation of these words and I feel that in their ordinary sense they do not mean that the offeror necessarily desires that the offer should be accepted but is making a proposal which the offeror intends the offeree to accept if he will.

Counsel for the respondents submitted that the letter in question was no more than an intimation that the respondents expected to become the agents of Harnam Singh Sond to receive certain moneys from the Ankole Native Government and would then pay the Shs. 10,000/- to the appellants if so authorised. This submission involves regarding the matter as analogous to

other case in which a mere statement of intention has been distinguished from an offer designed for acceptance, but I do not consider that it is an argument which can be accepted as valid having regard to the language of the letter of January 6, 1957. In the case of *Venkayyamma Rao v. Appa Rao* (2) a letter offering to convey property was held, in the particular circumstances, not merely to be an expression of intention but to constitute a conditional promise which was accepted and the condition performed, thereby making a completed contract. The condition was obviously gathered from other evidence as it was not expressed in the letter in question, but what appears to be relevant is the following passage from the judgment at p. 525 of the report:

> "The question of Papamma's intention is, of course, of fundamental importance, and it was much pressed upon the board that she never meant to be bound. Their lordships do not agree. They do not think that Papamma meant to avoid a bargain, or ever meant to have her grandniece and husband live on with her under the impression, on their part, that they were bound, whereas all the time she, Papamma, knew she was, and intended to be, free."

In writing the letter of January 6, 1957, the respondents, by specific words in the very first line and repeated by implication in the last, indicated their intention to be bound. To my mind the use of the words "we shall pay you on his behalf by debiting to his account . . ." in the second paragraph, do not detract from the fact that the undertaking given is manifestly a personal one. The capacity in which the respondents were to receive the money was no concern of the appellants and the position of an agent by no means precludes him from rendering himself personally liable. Even if Harnam Singh Sond could claim that the respondents had exceeded their authority in binding themselves personally that would leave untouched the position as between the respondents and the appellants.

For the reasons given above I have come to the conclusion that the letters relied upon constituted a valid proposal and effective acceptance and it remains to consider whether or not the promise so concluded was supported by consideration. It is common ground that under the Indian Contract Act consideration may move from some person other than the promisee and that it may be what is known as "past consideration." The relevant portion of the interpretation clause of the Act is s. 2 (*d*):

> "2 (*d*) When, at the desire of the promisor, the promisee or any other person has done or abstain from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise."

For the appellants it was submitted that the consideration for the promise moved from a third person, namely Harnam Singh Sond, and that it was that the respondents had had the benefit of the assignment from him mentioned in the letter of January 6, 1957. This is, however, rather a bare statement and there is nothing to show the court precisely what connection there was between the assignment and the promise arrived at between the parties to this action. If Harnam Singh Sond had stipulated as part of his agreement to assign that the respondents should enter into their arrangement with the appellants (which from the mention of the assignment in the respondents' letter seems the most probable inference) the respondents would clearly have received consideration, as it would be included in whatever they received under their assignment. There is no evidence, however, that such a stipulation was made. The alternative is that the assignment was first completed and the subsidiary arrangement made thereafter. It becomes then rather more difficult to say with confidence that the assignment was the consideration for the subsequent promise to pay

the appellants. It is surely going too far to say, even conceding that consideration may be "past", that because two parties have in the past concluded a contract or assignment, that fact will provide consideration for whatever either may do at the request of the other in the future. This objection I understood to underlie Mr. Wikinson's argument on the matter.

Upon the facts of the present case, however, I believe that the true approach is to be made from a rather different angle. It is obvious that under the terms of the assignment the moneys to be received by the respondents from the Ankole Native Government were to be received on behalf of Harnam Singh Sond and would in the normal course be payable to him by the respondents. When, therefore, Harnam Singh Sond signed and caused to be given to the respondents an authority to pay the appellants Shs. 10,000/-, he impliedly agreed to release the respondents from their liability to pay that amount to him. This agreement to release, which would certainly be "at the desire of the promisor" appears to me to provide good and valuable consideration for the respondents' promise to the appellants, though it can be said to arise from the assignment only in the sense that the respondents' prospective indebtedness to Harnam Singh Sond arose from that source.

If there was consideration for the conditional promise to pay, I do not think that cancellation by Harnam Singh Sond of the authority to pay effected after acceptance and performance of the consideration by the appellants (though before payment) relieves the respondents from liability under their contract with the appellants.

I am glad that I have arrived at this conclusion as the action appears to be one which might well have been brought as a claim for money had and received. It seems from a number of decided cases, of which a recent one is *Shamia v. Joory* (3), [1958] 1 Q.B. 448, in which the facts are basically similar to those of the present case, that the appellants would have had a good cause of action. As, however, the action has not been so framed, I will do no more than quote a passage from the judgment of Barry, J., at p. 457 in which he refers to earlier authorities:

> "There can, I think, be no doubt that the law on this subject was correctly stated by Blackburn, J., in *Griffin v. Weatherby*. Blackburn, J., used these words: 'Ever since the case of *Walker v. Rostron* it has been considered as settled law that where a person transfers to a creditor on account of a debt, whether due or not, a fund actually existing or accruing in the hands of a third person, and notifies the transfer to the holder of the fund, although there is no legal obligation on the holder to pay the amount of the debt to the transferee, yet the holder of the fund may, and if he does promise to pay to the transferee, then that which was merely an equitable right becomes a legal right in the transferee, founded on the promise; and the money becomes a fund received or to be received for and payable to the transferee, and when it has been received an action for money had and received to the use of the transferee lies at his suit against the holder'."

For the reasons given above, I consider that this appeal should be allowed and that the appellants are entitled to judgment for the amount claimed; they are also entitled to costs here and in the court below.

Sir Kenneth O'Connor P: I agree. There will be an order accordingly.

Sir Owen Corrie Ag JA: I also agree.

Appeal allowed.

For the appellants:
YV Phadke
Parekhji & Co, Kampala

For the respondents:
PJ Wilkinson
PJ Wilkinson, Kampala

Eastern Bakery v Castelino
[1958] 1 EA 461 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	19 September 1958
Case Number:	30/1958
Before:	Sir Kenneth O'Connor P, Gould JA and Sir Owen Corrie Ag JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court for Uganda–Lewis, J

[1] Pleading – Amendment – Application for leave to amend before trial – Principles upon which amendments to pleadings should be allowed.

Editor's Summary

The appellant had sued for possession of two rooms occupied by the defendant, in respect of which rent was much in arrear. After the parties had filed their pleadings, the appellant amended his plaint in minor respects, following which the defendant sought to file an amended defence, by which substantial new issues were raised. The appellant opposed the proposed amendments, and the District Registrar, Jinja, allowed certain and disallowed other amendments. From the District Registrar's ruling, the respondent successfully appealed to the High Court, whereupon the appellant brought this further appeal.

Held –

(i) generally an appellate court will not interfere with the discretion of a judge in allowing or disallowing an amendment to a pleading, unless it appears that in reaching his decision he has proceeded upon wrong materials or upon a wrong principle.

(ii) amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs.

(iii) the principles applicable to amendments of plaints are equally applicable to amendments of statements of defence.

[**Editorial Note**: In the present case the Court of Appeal made minor variations in the amendments allowed by the High Court to the defence, and dismissed the appeal. The present report is confined to an extract from the judgment of the Lord President upon the principles upon which amendments to pleadings should be allowed.]

Appeal dismissed.

Case referred to in judgment:

(1) *Tildesley v. Harper* (1878), 10 Ch. D. 393

(2) *Clarapede v. Commercial Union Association* (1883), 32 W.R. 262.

(3) *Budding v. Murdoch* (1875), 1 Ch. D. 42.

(4) *Ma Shwe Mya v. Maung Po Hnaung* (1921), 48 I.A. 214; 48 Cal. 832.

(5) *Raleigh v. Goschen*, [1898] 1 Ch. 73.

(6) *Weldon v. Neal* (1887), 19 Q.B.D. 394.

(7) *Hilton v. Sutton Steam Laundry*, [1946] K.B. 65; [1945] 2 All E.R. 425

Judgment

Sir Kenneth O'Connor P: Generally speaking, this court will not interfere with the discretion of a judge in allowing or disallowing an amendment to a pleading, unless it appears that in reaching his decision he has proceeded upon wrong materials or a wrong principle. The relevant rule of procedure is r. 18 of O. 6 of the Uganda Civil Procedure Rules, which reads:

> "18. The court may, at any stage of the proceedings, allow either party to alter or amend his pleadings in such a manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

Order 6 r. 18 of the Uganda Civil Procedure Rules corresponds to O. 28 r.1 of the Rules of the Supreme Court in England and to O. 6 r. 17 of the Indian Civil Procedure Rules. The principles which should guide a court in granting or refusing amendments to pleadings are set out in the commentaries on these rules contained respectively in the 1957 Annual Practice at p. 454 et seg. and in Chitaley & Rao on The Code of Civil Procedure (2nd Edn.) Vol. II at p. 1301 et seq., and the cases there cited.

It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs: *Tildesley v. Harper* (1) (1878), 10 Ch. D. 393; *Clarapede v. Commercial Union Association* (2) (1883), 32 W.R. 262. The court will not refuse to allow an amendment simply because it introduces a new case: *Budding v. Murdoch* (3) (1875), 1 Ch. D. 42. But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit: *Ma Shwe Mya v. Maung Po Hnaung* (4) (1921), 48 I.A. 214; 48 Cal. 832. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: *Raleigh v. Goschen* (5), [1898] 1 Ch. 73, 81; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ: *Weldon v. Neal* (6) (1887), 19 Q.B.D. 394; *Hilton v. Sutton Steam Laundry* (7), [1946] K.B. 65. The main principle is that an amendment should not be allowed if it causes injustice to the other side. Chitaley p. 1313.

The principles applicable to amendments of plaints are equally applicable to amendments of written statements of defence: Chitaley p. 1310. I have not found a precedent for allowing a counterclaim to be added by way of amendment; but in the absence of authority either way, I should not be prepared to interfere with the discretion of the trial judge in allowing such an amendment, provided that it did not transgress any of the principles set out above.

For the appellant:
JM Shah
Patel & Shah, Jinja

For the respondent:
PJ Wilkinson and *BE D'Silva*
PJ Wilkinson, Kampala

Hassanali M Sachoo v Jonkopings Och Vulcans Tandsticksfabriktiebolag
[1958] 1 EA 463 (CAZ)

Division: Court of Appeal at Zanzibar

Date of judgment: 20 August 1958

Case Number:	53/1958
Before:	Sir Kenneth O'Connor P, Briggs V–P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court for Zanzibar–Sir John Gray, Ag. J

[1] Passing off – Goods bearing device of animal – Competitor marketing goods with device of similar animal – Fraud expressly alleged – No explanation by defendant how he chose his device – Whether court may conclude that defendant's device deliberately chosen for purpose of passing off.

Editor's Summary

The respondents were manufacturers in Sweden of matches, which they had, since 1949, been exporting into Zanzibar. Their goods were well-known there. They had a trade mark embodying *inter alia* a red lion "passant", but the boxes of their matches imported into Zanzibar bore a label which was a variant of the registered trade mark, but embodying three red lions "passant". The appellant was an importer of matches into Zanzibar. In 1954 he tried to register a trade mark for matches embodying *inter alia* three lions "passant", but with a general get up unlike the respondents' trade mark or label. When the respondents objected to the appellant's application, the latter withdrew it, but in 1955 he registered a trade mark for matches which included a tiger "passant", but bore a close resemblance to the respondents' label. To this the respondents, apparently through an oversight, did not object. The respondents in 1957 sued for infringement of their trade mark and for passing off. The High Court held that the respondents' trade mark had been infringed, that there was on the part of the appellant actual fraud and intention to pass off the appellant's goods as those of the respondents, and granted an injunction restraining the appellant from both infringement and passing off. On appeal it was contended that the trial judge had erred in finding that there had been any infringement of the trade mark since the label issued by the respondents was different from their registered mark. It was also argued that the evidence showed that the appellant's goods were known as "Chui" (leopard) brand, and that there was no evidence of anyone having actually been deceived.

Held –

(i) the injunction granted should have been and would be confined to restraining the appellant from passing off his goods as those of the respondents.

(ii) the court would take judicial notice of the habit of illiterate and unsophisticated Africans to use the name of a familiar animal taken from the device on goods as identifying the brand; the appellant's device looked more like a lion or lioness than any other animal known to the average Zanzibar customer, and the background of the appellant's design was very similar to the label of the respondents.

(iii) since fraud had been clearly pleaded and the appellant had not given or called any evidence to explain how he came to select his marks, the conclusion was irresistible that the appellant intended to pass his goods off as the goods of the respondents.

Appeal dismissed.

Case referred to in judgment:

(1) *London General Omnibus Co. Ltd. v. Lavell*, [1901] 1 Ch. 135.

(2) *Re William Bailey* (*Birmingham*) *Ltd.'s Application* (1935), 52 R.P.C. 136.

(3) *Payton & Co. Ltd. v. Snelling & Co. Ltd*., [1903] A.C. 308.

(4) *Bourne v. Swan & Edgar Ltd*., [1903] 1 Ch. 211.

(5) *Johnston & Co. v. Orr-Ewing & Co*. (1882), 7 App. Cas. 219.

(6) *Tatem & Co*. (1915) *Ltd. v. Gaumont & Co. Ltd*. (1917), 34 R.P.C. 181.

(7) *Claudius Ash, Sons & Co. Ltd. v. Invicta Manufacturing Co. Ltd*. (1912), 29 R.P.C. 465.

(8) *Schweppes Ltd. v. Gibbens* (1905), 22 R.P.C. 113.

(9) *Hennessy & Co. v. Keating* (1908), 25 R.P.C. 361.

August 20. The following judgment were read by direction of the court.

Judgment

Briggs V-P: This was an appeal from a decree of Her Britannic Majesty's High Court of Zanzibar passed in favour of the plaintiffs-respondents in a suit for infringement of trade-mark and passing off. We dismissed the appeal with costs and now give our reasons.

The respondents are manufacturers of matches in Sweden, who have since 1949 been importing their goods into Zanzibar, and these goods are admittedly well known in the Zanzibar market. They have a registered trade-mark embodying *inter alia* a red lion "passant", but the goods imported into Zanzibar have at all times borne a label which is not exactly in accordance with the registered mark, but is a variant thereof also embodying a red lion "passant". I will refer to this label by the exhibit number of the specimen put in evidence as exhibit C, and similarly to the respondents' registered mark as exhibit B. The respondents' matches are known in the market as "Simba" brand, the word "Simba" being Swahili for lion.

The appellant is an importer of matches into Zanzibar. In 1954 he attempted to register a trade-mark for matches embodying *inter alia* three lions "passant", but with a general get-up quite unlike that of the respondents' exhibit B or C. The respondents objected to this mark, presumably on the ground that it would inevitably attract the brand name of "Simba" in the local market, and the appellant thereupon withdrew his application. In May, 1955, the appellant obtained registration of a trade mark for matches which bears a close resemblance to exhibit C, but embodies a tiger "passant" instead of the respondents' lion. No objection was then raised by the respondents, but they say that this was due to oversight. The registered design without colours is exhibit E, and the appellant has since then used it in two arrangements of colours, exhibits F and N respectively. Objection is taken to both of these. The suit was filed in August, 1957.

The High Court held that exhibits F and N infringed the respondents' mark, but the judgment was almost entirely concerned with passing-off, and the learned judge found that there was actual fraud and a deliberate intention to pass off the appellant's goods under exhibits F and N as the respondents' goods under exhibit C.

Counsel for the appellant first attacked that part of the judgment dealing with infringement, and I accepted his argument that this, so far as it went, was erroneous. In the first place, the learned judge apparently considered both infringement and passing-off in relation to exhibit C, whereas the only registered mark of the respondents is exhibit B. The design of the respondents' mark which the learned

judge describes in detail in his judgment and on which he bases his findings is clearly the design of exhibit C. He never considered specifically whether exhibits F and N were intended or likely to be mistaken for exhibit B, and in practice that issue did not arise, since exhibit B was not used locally. In the circumstances I thought the learned judge was not entitled to hold that there had been infringement of the registered mark, and I was

not convinced that he really intended to do so. He did, however, grant an injunction in terms restraining the appellant from infringing the mark exhibit B, as well as from passing off goods to the detriment of exhibit C. I think the form of the injunction should be amended so as to be confined to the latter purpose, but for the reasons given this will make no practical difference.

The case really turned on the passing-off, and for this purpose registration of the defendant's mark was immaterial. Section 50, Trade Marks Decree (Cap. 89). The appellant relied on evidence that in the local trade his goods were known as "Chui" brand. This was admitted to be the name used by retailers, but it was not admitted that it was in general use by customers. "Chui" is Swahili for leopard. Tigers being unknown in Africa, there is no specific word in Swahili for a tiger. One witness, by no means uneducated or unsophisticated, said he was unaware of the existence in India of a "different type of Chui called a Tiger". But he also said he had seen in Africa both spotted and striped Chui and that he did not think there were lions without manes in Africa, which is not strictly correct, and in any case does bare justice to the lionesses and young lions. Counsel for the appellant argued that "Chui" means a tiger as well as a leopard. The Standard English-Swahili Dictionary gives a six-word phrase, including the word "Chui", as the Swahili for tiger. A lioness is "Simba jike", which is merely "female lion". We are prepared in favour of the appellant to assume that among shop-keepers the appellant's goods are known as "Chui" brand and that some customers may refer to them as such; but the fact remains that the animal on exhibits F and N does not look remotely like a leopard, but might well be mistaken by an African for a lion or lioness, for the stripes are not conspicuous in the coloured forms, though easily visible on exhibit E. And in any event the primary complaint of the respondents is that their goods have been passed off by similarity of get-up, the question of attracting use of the same name being in this case secondary. In my opinion, however, there is good reason to suppose that many unsophisticated Africans would call matches under exhibits F or N "Simba".

The appellant's principal argument on passing-off was, first, that no evidence of anyone having been actually deceived was led by the respondents; their only evidence was of market rumours and was hearsay and inadmissible; on the other hand the appellant had called evidence that some people had not been deceived, and that the lion and tiger were easily distinguished. The other aspect of this argument was that the learned judge had acted, not on the evidence, but on a subjective visual impression, and that this was not permissible. Counsel relied on *London General Omnibus Co. v. Lavell* (1), [1901] 1 Ch. 135. In that case the Court of Appeal held in an action for deceit that the question whether an article was calculated to deceive could not be determined on visual impression alone.

As regards general similarity of get-up, counsel for the appellant was constrained to admit that the background of exhibits F and N was a deliberate copy of the background of exhibit C. There can be no doubt that this is correct. The similarities, which it is unnecessary to detail, could not possibly be accidental. Counsel submitted, however, that the rising suns and scrolls and also the colours used were common to the trade, and that a mere imitation of unessential parts of the get-up such as these was no evidence of fraudulent intention, or even of a probability that customers would be misled. The essential device, he said, was the lion in the one case and the tiger in the other. He stressed that the printed words differed and that the appellant's name was prominently displayed. He relied on exhibit R, which is apparently the competing label of a third party, and of which the background is also an obvious copy of exhibit C. He submitted that the difference between lions and tigers would be appreciated by the ordinary African, and that there was evidence

that many persons had not been deceived. The court was not entitled to make assumptions about the state of the market. *Re William Bailey* (*Birmingham*) *Ltd.'s Application* (2) (1935), 52 R.P.C. 136, 151. The passages from *Payton & Co. Ltd. v. Snelling* (3), [1901] A.C. 308, and *Bourne v. Swan & Edgar Ltd*. (4), [1903] 1 Ch. 211, were not really relevant and, taken out of their context, were misleading. Counsel relied on *Johnston & Co. v. Orr-Ewing & Co*. (5) (1882), 7 App. Cas. 219, 226, for the special importance of the name likely to be used by illiterate customers. He said there could be no monopoly in the use of a lion device-much less in a device of other animals. *Tatem & Co*. (1915) *Ltd. v. Gaumont & Co. Ltd.* (6) (1917), 34 R.P.C. 181, 188.

Counsel for the appellant further submitted that the learned trial judge had erred in attaching importance to the appellant's withdrawn application to register the mark of three lions (exhibit R), and submitted finally that the facts were at large for our decision, since the learned judge had misdirected himself in a passage of his judgment where he said,

> "In the second place, when registering his previous three lions design the defendant had the candour to state therein that the matches were 'specially manufactured for' himself. These three words are omitted from his tiger design, thus leaving those, who are not behind the scenes, with the impression that the matches are of his own manufacture and made in Zanzibar. As we know from para. 3 of his written statement the matches have in fact been imported by him from Hong Kong. The omission of the words, which appeared in the earlier design, amounts in my opinion to one calculated to deceive an ordinary member of the public."

I accepted the last of these submissions. The question whether the appellant was manufacturer or importer was wholly immaterial. In any event, I did not think the appellant's silence on the subject of manufacture was calculated to convey any false impression that he was himself the manufacturer. It seems that the learned judge did rely to some extent on this consideration as a pointer to the appellant's general intention. I thought, with respect, that he should not have done so, and that this would entitle us to review the facts as res integrae.

As regards the withdrawn application, I rejected counsel's submission entirely. If the similarity of the labels now in question was such as to suggest the possibility of a fraudulent intention in the appellant to pass his goods off as goods of the respondents, previous conduct of the appellant suggesting the same intention in other circumstances might be not merely relevant, but of great importance in proof of the appellant's state of mind. I thought the learned judge was right to attach weight to these facts.

On the question of similarity, it was necessary, first, to remember the type of customer concerned, the illiterate and unsophisticated African, comparable with the "child sent shopping by his mother", who occurs constantly in the English cases. We were entitled, I thought, to take judicial notice of the local habit of using the name of a familiar animal which is the device on goods as the brand-name of those goods, and also of the extreme improbability that a tiger would be treated in this way-or indeed recognised at all. The appellant's device looks much more like a lion or lioness than any other animal known to the average Zanzibar customer. The words printed on the labels do not serve to distinguish, since they are all incomprehensible to an illiterate customer. No doubt scrolls of some kind, rising suns of some kind, and colouring in red, black and white or yellow may be common to the trade, but in this case we have the admission that the whole background was deliberately copied. Exhibit R did not, I thought, help the appellant. Its background is also a deliberate copy of exhibit C, and two blacks do not in this case make a white. The attitudes of the lion and tiger and the general shape and size are closely

similar. The colouring, red and black shading, is the same. The difference in colour of sky is not prominent. The appellant had neither given nor called any evidence to explain how he came to select his marks, and in the absence of any explanation I was forced to the same conclusion as was the learned trial judge. I thought the appellant must have balanced two considerations against one another, first the desire to have a reasonable defence to any proceedings brought against him, and secondly, the desire to make the closest possible copy of the respondents' mark, with a view to diverting business from them to himself, not by way of fair competition, but by selling his goods as theirs, or enabling others to do so. He may have achieved the second objective, but not the first. This is a case where a fraudulent intention was clearly pleaded. Where, in such a case, real evidence strongly suggesting fraud is produced, and is supported by other evidence strongly suggesting a similar fraud on a previous occasion, an honest defendant will not merely be ready to give his explanation on oath, but will insist on doing so.

As regards the oral evidence for the plaintiffs, the nature of the local market must again be considered. It is laughable to suppose that any ordinary customer deceived by the appellant's mark would complain or report the matter to the respondents. It is in the highest degree unlikely that even extensive enquiries by the respondents would enable them to call any such person as a witness. They could readily have found, if they had wished to do, dishonest persons willing to give false evidence in the sense indicated; but honest evidence in that sense was hardly to be expected. The circumstances are so different from those of *London General Omnibus Co. v. Lavell* (1), that the principle applied there could not in our opinion be applied in this case. It was common ground there that the evidence required existed and could have been called. The plaintiffs deliberately refrained from calling it. There is no reason to think that any such evidence was available here. It should also be remembered that at the turn of the century one motor-bus was probably very like another, that one of the judge stressed that there were obvious differences in the get-up, and that fraud was not pleaded. These were all good reasons for declining to act on a visual impression alone. But the case did not, as I thought, lay down any rule of universal application. Cases of passing-off must admittedly be proved by evidence, but in many cases the real evidence may be more cogent than any oral evidence. I thought that the passages from *Payton v. Snelling* (3) and *Bourne v. Swan & Edgar* (4), on which the learned judge relied were in point and supported his reasoning and conclusions.

Subject to the minor matters to which I have referred, I agree with that reasoning and those conclusions. The decree should be varied in the way I have indicated, but this is of no practical importance and could not affect the question of costs.

I desire to add that I have had the advantage of reading the judgment of the learned president and agree with it.

Sir Kenneth O'Connor P: I fully agree with the judgment which has just been delivered and desire only to add some remarks distinguishing certain cases which were relied on by counsel for the appellant.

The case of *Claudius Ash, Sons & Co. Ltd. v. Invicta Manufacturing Co. Ltd.* (7) (1912), 29 R.P.C. 465 was an action for infringement of a trade mark and for passing-off. A dental composition was sold in tablets with an invented name stamped across them over a sunk disc, engine-turned. The same name stamped across a similar disc was used by the defendants. No fraud on the part of the defendants was pleaded; but at the trial it was held that, because of the use of the name, a fraudulent intent must be imputed to the defendants, and that there was a possibility to deception by reason of the use of the same

name in both marks. The Court of Appeal, however, upset this finding, holding that the plaintiff's trade mark had not been infringed, as the dissimilarities were marked; that the pleadings had not raised the issue that the use of the name was fraudulent in inception; and that the defendant's tablets were not calculated to deceive. In the House of Lords it was held, as to the infringement of the mark, that the infringement being negatived by evidence of persons from the limited class of people to whom the goods were tendered that none of them would be deceived, the House of Lords would not take the contrary view. As to the passing-off, it was held that, although where an intention to deceive is proved, no court would be astute in concluding that a dishonest defendant had been unsuccessful in his fraudulent design, yet that such a charge ought to be explicitly pleaded and proved by evidence. At p. 475 of the report of *Ash's* case (7) Earl Loreburn, L.C., said, in the course of the argument:

> "In the pleadings the respondents were not charged with intent to deceive and so were not given an opportunity to show what all the circumstances were."

The present case is clearly distinguishable. In the present case it was clearly pleaded that the label of the defendant was designed and adopted with the object of enabling that label to be mistaken for the plaintiff's well-known label. In the *Ash* case (7) Lord Loreburn said:

> "You must prove either that people have been deceived, or that it is calculated to deceive, but you have proved neither."

In the *Ash* case (7), the Court of Appeal had held that the defendant's tablets were not calculated to deceive the limited class of professional customers to whom the dental goods were tendered, the dissimilarities between the two designs being marked. In the present case, the learned judge found, and we agreed, that the defendant's design was calculated to deceive an unwary customer of the class to whom the respondents' matches were tendered, a far more general and ignorant class than the class of customer referred to in the *Ash* case (7). The passage in that case upon which counsel for the appellant principally relied is part of the opinion of Lord Loreburn at p. 475:

> "When once you establish the intent to deceive, it is only a short step to proving that the intent has been successful, but still it is a step even though it be a short step. To any such charge there must be, however, two conditions. The first is that it ought to be pleaded explicitly so as to give the defendant an opportunity of rebutting the accusation of intent. The second is that it must be proved by evidence."

Counsel submitted that there was no evidence in the present case that anyone had actually been deceived. But, it must be remembered that *Ash's* case (7) was a case in which it had not been shown (as it was shown in the present case) that the defendant's device was calculated to deceive. This (as Lord Loreburn said) is an alternative to proving actual deception by evidence. Moreover, I do not agree that there was no evidence in the present case of successful deception. I think that the result of market research and investigation of the Zanzibar market by the broker of the importers of the respondent's matches, begun in 1955 and continued in 1956, cannot be dismissed as mere hearsay. He states categorically that purchasers were buying "Chapa Chui" as "Chapa Simba" and that he knows this from investigations made in the bazaar. The investigations may well have included personal experience of purchasers buying matches of one mark under the impression that they were matches of the other. He was not cross-examined as to his means of knowledge. Moreover, his evidence that purchasers were buying the appellants' matches as "Chapa Simba" and that though there were other brands cheaper than "Chapa

Chui", "Chapa Chui" sold better because of its resemblance to the red lion is, to some extent, borne out by the evidence of the respondent's sales. I agree with the learned vice-president that, having regard to conditions in the local market and the type of customer for matches, it would be most difficult, if not impossible, to obtain honest evidence from any purchaser who had actually been misled by the appellant's design. I also agree with the learned vice-president's comments on *London General Omnibus Co. Ltd. v. Lavell* (1). With regard to that case I also desire to stress that it was an action for deceit and not a passing-off action, and to quote the comments of Farwell, J., on that case contained in his judgment in *Bourne v. Swan & Edgar Ltd*. (4), [1903] 1 Ch. 211 at p. 226:

> "Now, the case which has been several times referred to, and which has been thought to be in conflict with these cases, is *London General Omnibus Co. v. Lavell*, [1901] 1 Ch. 135, 137. I have carefully considered that case, and I have come to the conclusion that it really has no bearing whatever on passing-off cases. It is not for me to say whether the Court of Appeal were right or wrong in treating the action as a common law action for deceit; but that is what they did, and their judgment is based on the footing that it is an action for deceit. It appears not only in the headnote, but at the very beginning of the arguments the Lord Chief Justice interrupts counsel by saying, 'What right has the London General Omnibus Company . . . to bring an action for deceit without evidence of deceit? He repeats it again in the judgment. He says the fact that 'the two omnibuses so resemble one another that they might be mistaken one for the other was not sufficient evidence to support an injunction in an action for deceit.' This is, of course, quite true of an action for deceit, but it has no application to passing-off cases. The distinction between common-law actions for deceit and suits in equity against passing off, and the evidence required therein respectively is well settled: it is sufficient to refer to the judgment of Lord Westbury in the well-known case of *Edelsten v. Edelsten* (1863), 1 D.J. & S. 185-a passing-off case, where he says (1 D.J. & S. 199). 'At law the proper remedy is by an action on the case for deceit: and proof of fraud on the part of the defendant is of the essence of the action: but this court will act on the principle of protecting property alone, and it is not necessary for the injunction to prove fraud in the defendant or that the credit of the plaintiff is injured by the sale of an inferior article. The injury done to the plaintiff in his trade by loss of custom is sufficient to support his title to relief. Neither will the plaintiff be deprived of remedy in equity, even if it be shewn by the defendant that all the persons who bought from him goods bearing the plaintiff's trade mark were well aware that they were not of the plaintiff's manufacture. If the goods were so supplied by the defendants for the purpose of being sold again in the market, the injury to the plaintiff is sufficient. Again, it is not necessary for relief in equity, that proof should be given of persons having been actually deceived, and having bought goods with the defendants' mark under the belief that they were of the manufacture of the plaintiff, provided the court be satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other.' Lord Blackburn says very much the same thing in *Singer Manufacturing Co. v. Loog* (1882), 8 A.C. 15, 29. It is perfectly obvious, therefore, to my mind that when the Court of Appeal were dealing with the case of *London General Omnibus Co. v. Lavell*, [1901] 1 Ch. 135 they were dealing with it as a common law action for deceit. If it were not so, it would be impossible that they could have excluded the consideration of the ocular comparison of the two omnibus, having regard to the cases I have referred to in the House of Lords. They could not have overruled the

> three Lord Chancellors, and if they had done so they would themselves have been overruled by the subsequent decision of *Payton & Co. v. Snelling, Lampard & Co*., [1901] A.C. 311."

In *Schweppes Ltd. v. Gibbens* (8) (1905), 22 R.P.C. 113, 601 (cited in Kerly (7th Edn.) at p. 646) Warrington, J., whose judgment was approved by the majority of the Court of Appeal and by the House of Lords said:

> "It seems to me that each of these cases must be looked at by itself, and the judge looking at the label, or the get-up or the device, whatever it may be that is complained of, with such assistance as to the practice of the trade as he can get from witnesses, must decide for himself whether the article complained of is calculated to deceive or not."

And in *Hennessy & Co. v. Keating* (9) (1908), 25 R.P.C. 361 (a trade mark case) Lord Macnaghten said at p. 367:

> "The eye no doubt is generally the best test, and you will have to come to a comparison of the marks or labels sooner or later. Generally, but not always, the comparison is enough."

It remains only to add that *Tatem & Co*. (1915) *Ltd. v. Gaumont & Co. Ltd*. (6) upon which counsel for the appellant also relied was an action purely for infringement of a trade mark and it is clear from the judgment that the passage on p. 188, upon which counsel particularly relied, applied to such an action and not to a passing-off action. That case has no application to that part of the present suit which relates to passing-off.

Forbes JA: I entirely agree with both the judgments that have been delivered in this case.

Appeal dismissed.

For the appellant:
Bryan O'Donovan and *AA Lakha*
Balsara & Lakha, Zanzibar

For the respondents:
KS Talati
Wiggins & Stephens, Zanzibar

Kamwana s/o Mutia v R
[1958] 1 EA 471 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	29 September 1958
Case Number:	308/1958
Before:	Rudd Ag CJ and Connell J
Sourced by:	LawAfrica

[1] Criminal law – Judgment – Misdirection – Retracted confession admitted without inquiry – No direction whether retracted confession corroborated or safe to convict without corroboration – When conviction will be set aside.

[2] Criminal law – Judgment – Misdirection that guilt may be presumed where one alleged offence follows pattern of others – When such presumption relevant.

[3] Criminal law – Charge sheet – Joinder of counts for dissimilar offences in one charge sheet – Whether trial a nullity.

Editor's Summary

The appellant appealed against his conviction and sentence by a magistrate at Kitui, on three counts involving theft, breaking and entering premises and therein stealing money, and on a fourth count, for the possession of "bhang". On the first three counts there was substantial circumstantial evidence against the appellant, and on two of these counts there was also a retracted confession which the magistrate, without holding an inquiry within the trial, admitted as voluntary. The appellant's evidence was that the retracted confession was not made voluntarily. The magistrate, in his judgment, held that the confession was voluntary, but did not direct himself whether it was corroborated, or safe to convict without any corroborative evidence. He went on to find on another count that since this alleged offence fitted into the pattern of the other two, the presumption of guilt was therefore greater. The fourth count, alleging possession of "bhang" was not treated as an issue at the trial, but when the appellant had been convicted on the other three counts, he asked that this offence should be taken into consideration, whereupon the magistrate purported to convict him of this offence also, and imposed for it a separate sentence.

Held –

(i) the absence of an inquiry within the trial was not necessarily fatal to the convictions to which the retracted confession had contributed, especially since there was substantial evidence that the confession was made voluntarily.

(ii) the magistrate had erred in failing to direct himself adequately as to the admissibility of the confession, but a court is entitled to act upon a retracted confession, without corroboration; the confession must, however, be received with great caution and reserve.

R. v. Pangahesa s/o Mgimba (1948), 15 E.A.C.A. 79, and *R. v. Gae s/o Maimba and Another* (1945), 12 E.A.C.A. 82, followed.

(iii) where a lower court fails adequately to direct itself as to a retracted confession, an appellate court would set aside the conviction, unless it is clear that on a proper direction the lower court would still certainly have convicted, and in this case the evidence fully justified the convictions.

(iv) because a person has committed certain offences of a particular kind in a particular area, it does not follow that he is guilty of other offences of a similar nature committed about the same time in that area, unless there is some particularly distinctive feature common to all the offences, indicating that they were all committed by the same person; although the magistrate had misdirected himself as to the presumption of guilt, this misdirection did not materially affect his decision, and the conviction would be upheld.

(v) the count charging the appellant with the possession of "bhang" should not have been included in the same charge sheet with three other dissimilar counts, but since no injustice resulted from the improper joinder, the trial of

the other three counts should not be treated as a nullity; the conviction and sentence on the fourth count must, however, be set aside as a nullity.

Conviction and sentence on the fourth count set aside. Appeal dismissed on the other three counts.

Case referred to in judgment:

(1) *Miligwa s/o Mwinje and Another v. R.* (1953), 20 E.A.C.A. 255.

(2) *R. v. Gae s/o Maimba and Another* (1945), 12 E.A.C.A. 82.

(3) *R. v. Pangahesa s/o Mgimba* (1948), 15 E.A.C.A. 79.

(4) *R. v. Kaperere s/o Mwaya* (1948), 15 E.A.C.A. 56.

Judgment

Rudd Ag CJ: read the following judgment of the court: The appellant appeals from conviction and sentence by the first class magistrate at Kitui on four counts:–

(1) Theft from the Reverend D. G. MacDonagh on November 28/29, 1957, of Shs. 1,300/- and four English one pound notes at Mutume Mission in the Kitui District, contrary to s. 270 of the Penal Code.

(2) Breaking and entering the police canteen at Kitui on the night of November 29, 1957, and stealing Shs. 1,197/80 contrary to s. 301 (1) of the Penal Code.

(3) Breaking and entering J.D. Mehta's shop in Kitui on the night of November 29, 1957, and stealing Shs. 484/- therein contrary to s. 301 (1) of the Penal Code.

(4) Possession of 2 oz. of "bhang" on December 26, 1957, contrary to s. 10 (*b*) of the Dangerous Drugs Ordinance.

He was sentenced to eighteen months' imprisonment on each of the first three counts to run consecutively and on the fourth count to six months' imprisonment to run concurrently with the other sentences.

The question of the fourth count is easily disposed of because it appears that although the appellant was charged with this offence and pleaded "not guilty" to it, it was never treated as an issue in the trial until judgment had been given convicting the appellant on the other three counts. It appears from the record that after the appellant had been convicted on these other counts he asked for the offence charged in the fourth count to be taken into consideration, whereupon the magistrate purported to convict him on the fourth count and passed a separate and distinct sentence in respect of it.

In our opinion, the fourth count should not have been joined with the other counts on one charge sheet but inasmuch as the issue on this count was not treated as an issue in the trial and no injustice resulted from the improper joinder we consider that the trial of the other counts should not be treated as a nullity.

In the circumstances disclosed on the record, the offence laid in the fourth count should, at most, only have been taken into consideration in connection with the sentences to be imposed in respect of the other counts. A separate conviction and sentence should not have been passed in respect of it. Further, it is doubtful if this offence should not have been passed in respect of it. Further, it is doubtful if this offence should even have been taken into consideration. The ordinary rule is that a court should not take other offences into consideration unless they are similar to the offence or offences in respect of which the

prisoner has been convicted. If the offences desired to be taken into consideration are dissimilar from the one of which the prisoner has been convicted, the court should not take it into consideration even with the consent of the prosecution without first considering whether, in all the circumstances, it is proper to do so. Archbold (33rd Edn.), p. 219 and the cases there cited.

In the result there can be no doubt in our opinion but that the separate conviction and sentence in respect of the fourth count must be treated as a nullity and set aside.

As regards the other three counts, we consider that there was evidence which would have been capable of supporting each of these convictions if the lower court had given itself all proper directions and had not misdirected itself. In the case of the first count, there was a misdirection and in the case of the second and third counts directions ought to have been given as regards corroboration of a retracted confession but no such directions were given. The question before this court is, therefore, whether the convictions on each or any of these counts should be upheld in view of the misdirection in connection with the first count and the non-direction in connection with the second and third counts.

In connection with the second and third counts, the lower court held that a confession made by the appellant to a police officer under proper caution was voluntary. This confession was, in fact, retracted in the lower court but the magistrate admitted it in evidence without first holding an inquiry within a trial and without directing himself expressly that it is dangerous to act upon a retracted confession unless it is corroborated in material particulars or unless the court, after a full consideration of the circumstances, is satisfied of its truth. *Miligwa s/o Mwinje and Another v. R.* (1) (1953), 20 E.A.C.A. 255.

We think that the absence of an inquiry within a trial in this case is not necessarily fatal to the convictions on the second and third counts. The prosecution produced a very substantial body of evidence from several witnesses which all went to show that the confession was voluntary. The appellant himself elected to give evidence and while he did not deal with this particular matter in chief he was cross-examined as to it and said that the confession was not a voluntary one. He was given an opportunity to call witnesses. It therefore appears that the lower court had before it all the evidence which would have been produced before it if it had held a trial within the trial. On this evidence it was competent for the lower court to find that the confession was a voluntary confession. The lower court, in fact, carefully considered this evidence and found that the confession was, in fact, voluntary. In these circumstances, no injustice was occasioned by the failure to hold a trial or inquiry within the trial.

But the confession was, in fact, retracted and the lower court should not have convicted the appellant on the second and third counts on the basis of this confession without first considering whether it was corroborated or whether it was safe to convict on it without corroboration in the circumstances of the case. It is now well settled that there is no law or practice making corroboration of a retracted confession essential. Corroboration of a retracted confession is desirable but if the court is fully satisfied that the confession cannot but be true there is no reason, in law, why it should not act upon it. *R. v. Gae s/o Maimba and Another* (2) (1945), 12 E.A.C.A. 82, and *R. v. Pangahesa s/o Mgimba* (3) (1948), 15 E.A.C.A. 79. But although a court may act upon a retracted confession without corroboration, such confession must be received with great caution and reserve. *R. v. Kaperere s/o Mwaya* (4) (1948), 15 E.A.C.A. 56.

When a confession is retracted the trial court should in every case make it quite clear in its judgment that it has taken into consideration the fact that the confession has been retracted and that its retraction requires that the confession should not be relied upon to support a conviction unless it is corroborated or unless there are circumstances in the case to show that it is true and that it can safely be acted upon.

We think that the lower court did consider the circumstances of the case but it did not direct itself to the fact that the confession was retracted and that corroboration was desirable. In those circumstances, this court accepts the view that the convictions should be set aside unless it can say that if the proper

directions had been given the lower court would still certainly have convicted. On the other hand, if on consideration of all the circumstances of the case as disclosed by the evidence, this court is of opinion that if the proper directions had been given the lower court would certainly have reached the same conclusion as to the guilt of the appellant, then we think the convictions should be upheld.

As will appear later, it was implicit in the appellant's own case that he had been in prison some time before the end of November, 1957. He claimed to have been given Shs. 1,260/- as compensation for an injury to his left shoulder which occurred in 1956 when he was in prison. This evidence was accepted by the prosecution and the lower court but there was evidence that towards the end of November, 1957, the appellant appeared to be in very needy circumstances, poorly dressed and that at that time he claimed to be destitute. He was arrested by the police on December 25, 1957, dressed in a complete outfit of new clothes and was found to be in possession of a brand new wallet containing Shs. 158/85 including a note for Shs. 100/-. On arrest he was asked to explain his altered circumstances but refused to do so. He was taken into custody on suspicion. On December 26 the sum of Shs. 3,300/- in Shs. 100/- notes and four English one pound notes were found in a house belonging to the appellant's uncle who said that all these notes had been brought to him by the appellant in company with two other men on December 25. In the same house the police found a considerable quantity of clothing, some of which appeared to be new or recently bought, packets of cigarettes, empty drink bottles and some tins of meat. The appellant claimed to be the owner of all this property.

After the discovery of this money and property an inspector of police asked the appellant if he could explain how he came by it, and the inspector said that the appellant then said, that he had stolen it from the police canteen and from Mehta's store. The appellant was immediately cautioned in connection with the three offences laid in the first three counts and made a confession regarding the second and third counts but said nothing about the first count. In this confession the appellant related how he, in company with two other men, broke into the police canteen and stole Shs. 1,200/- in a cash box at 1 a.m. on the morning of November 29. He also related how he and the same men subsequently broke into Mehta's store and stole a cash box and another box, stating that the lock on Mehta's shop had been opened by one of his companions with a key. He stated that the cash box had been thrown away in the bush and confirmed that he had given the Shs. 3,300/- to his uncle. Although this confession was retracted in the lower court, the magistrate was satisfied that it had been made voluntarily by the appellant.

We consider that this finding was justified on the evidence before the lower court. It was proved by the prosecution that the police canteen was broken into on the night of November 29, 1957, and that a cash box containing Shs. 1,197/80 was stolen therefrom, together with some packets of cigarettes. It was also proved that on the same night, according to the prosecution, Mehta's store was entered; it had been left locked and was found to be still locked when the theft was discovered the next morning. A cash box containing Shs. 94/- and a box containing a charity collection were stolen from this store or shop. A cash box was later discovered where it had been thrown away in the bush. The charity collection consisted mainly of 50 cent pieces but also included a few shilling pieces and a few foreign coins. This collection had been sprinkled with red and white powder as a religious ritual in connection with Diwali. It was kept in a cloth bag in the charity box.

On December 27, the police searched the hut of the appellant's mother and found buried in the floor a cloth bag containing 50 cent pieces to the value of Shs. 389/50 and two foreign coins. The coins were covered with red and white powder and were sticky. The cloth bag smelt of Asiatic perfume. The powder

on the coins, and the bag itself, was identified respectively as similar to the powder that was sprinkled on the charity collection which was stolen from Mehta's store and as the actual bag in which that collection had been kept. The coins were washed to facilitate counting but we have noted that some of them still bore red marks which appear to be consistent with the fact that they had been in contact with a red pigmented substance such as is used by Hindus. The appellant admitted that these coins were his and that a brand new Agfa camera, value about Shs. 500/-, which was found at the same time, was also his. He claimed that the coins were the proceeds of a theft which he had committed in February, 1955, in respect of which he had been convicted and had served his sentence in prison. When it was pointed out to him that the bag contained some coins which were dated 1956 he said that he had later added some coins to the original contents of the bag. This explanation was not accepted.

In view of the definite identification of the cloth bag and the red and white powder which was found on the coins, coupled with the appellant's confession, we consider that the third count was conclusively proved and that any other decision upon that count would have been unreasonable. We would point out that the fact that the appellant said in his confession that the lock of the shop had been opened with a key is completely consistent with the fact that when the offence was discovered the lock was intact and the store was still locked. We dismiss the appeal as regards the third count.

The evidence against the accused on the second count consists only in the appellant's confession and the fact that he was found to be in possession of a considerable sum of money on December 25, whereas he appeared to be in very needy circumstances just prior to the end of November. The appellant attempted to explain his possession of the considerable amount of money that was traced to him by saying that it included the Shs. 1,260/- awarded to him as compensation in respect of his injury in 1956, together with Shs. 400/- the proceeds of a theft which he had committed in 1955, and Shs. 2,000/- which he said his mother had given to him in case she might suddenly die. The appellant's mother confirmed that she had given the appellant Shs. 2,000/- which she said was the proceeds of sales of mangoes, but as to this, it was proved that on the basis of the amount which she had paid in cess liveable on the sale of mangoes, she could not have obtained anything like Shs. 2,000/- or even Shs. 200/- from this source. Whereupon she said that she had supplemented the proceeds of the mangoes with her earnings as a prostitute. We consider that the magistrate was perfectly entitled to find that the suggestion that the appellant had been given Shs. 2,000/- by his mother was completely false.

In our opinion, the fact that the appellant was in possession of so much money at the time of his arrest–in view of the fact that before these offences had been committed he appeared to be destitute–and in view of his failure to account for a very large part of the money that was traced to him, and the fact that he attempted to put forward a pack of lies in explanation, amount to circumstances which would indicate that his original confession was true. This confession is confirmed to some extent, by the fact that the amount of money which the appellant said was stolen is very close to the amount which was proved to have been stolen and by the fact that when the appellant left the Shs. 3,300/- at his uncle's house he was accompanied by two other men, which tends to bear out the statement in the confession to the effect that the offence, in relation to the second count, was committed by the appellant in company with two other men. We recognise that it does not follow from the fact that the evidence would have been sufficient to support a conviction if all proper directions had been given, that the same evidence would justify the conviction being maintained where all proper directions had not been given, but on our

consideration of all the facts and circumstances in this case, we are satisfied that if the magistrate had given himself the proper directions, he would still have convicted the appellant in respect of the second count. We therefore dismiss the appeal as regards that count.

No question regarding the confession arises in connection with the third count, since there is nothing in the confession which relates to this count.

The evidence on this count was that on November 29 a missionary father at Mutune Catholic Mission discovered that a sum of between Shs. 1,200/- and Shs. 1,400/- was missing from the cash box in his office. The money included two notes of Shs. 100/- each in an envelope and over Shs. 1,000/- in one-hundred shilling and twenty shilling notes in a small box. The balance was in smaller notes and coin. There were also some English one pound notes missing from the box. The box was attached to a table but was normally locked. When it was discovered that the money was missing, the box was found to be unlocked. It was in view of anyone passing. It was proved that English one pound notes were extremely rare in the Kitui district. Four of such notes had been given to the appellant's uncle by the appellant on December 25, 1957. The appellant, in evidence, stated that these four notes had been given to him in February, 1951, by one Juma, but on reconsidering, the appellant said,

> "No, they were not given to me in 1951 but were given to me in November last year (1957) by 'this man Juma whom I knew in 1951,"

and towards the end of the evidence he said "the four English notes I was given by Juma Butaki on December 18, 1957".

In his summary of the evidence in relation to count one, the magistrate stated, *inter alia*, that it was established that the sight of an English pound note in Kitui was a rarity, that the appellant gave three different versions as to the date of the receipt of the English notes that were found, namely February, 1951, November, 1957, and December 18, 1957, and that he did not attempt to call Juma to substantiate the fact that he had given these notes to the appellant. These findings were supported by the evidence and on them the magistrate was, in our opinion, entitled to hold that the English one pound notes that were traced to the appellant had been stolen from the Catholic Mission at Mutume which is about three miles from Kitui. The magistrate then proceeded to hold, correctly, in our opinion, that the appellant was proved to have been in recent possession of these notes in relation to the time of the theft and to consider the presumption that would arise from such recent possession in the absence of a reasonable explanation. The magistrate then went on to say

> "In my opinion, this offence fits into the pattern of the others and the presumption of guilt is therefore greater".

The magistrate misdirected himself in thinking that the fact that the appellant had been proved to have committed other similar offences in the same district, at about the same time, had any relevance in connection with the first count. Such evidence would not be admissible to show system or course of conduct in the circumstances of this case and it does not follow that because a person has committed a certain number of offences of a particular kind, in a particular area, that he is guilty of other offences of a similar nature committed at about the same time, in the same area, unless there is some particularly distinctive feature common to all the offences such as would indicate that they were all committed by the same person. There was no distinctive common feature of that kind in the evidence in this case. If we considered that this misdirection was a substantial factor in inducing the magistrate to convict the appellant on the first count, we would have to set aside the conviction unless we were satisfied that the

case was so strong that any other result, other than a conviction, would

have been unreasonable upon the evidence. On a full consideration of the findings in relation to this count, we feel satisfied that the misdirection was not a material factor which influenced the magistrate's mind in inducing him to convict upon this count. The magistrate had already found that the English notes were part of the property that was stolen from the Mission and he had already found that the appellant was in possession of them in circumstances in which his possession could be considered to be recent in relation to the theft. He had already found, in effect, that the appellant's explanation of the possession of these notes was inconsistent, unsatisfactory and untrue and he had already applied the presumption that arises in such a case that the appellant had stolen the notes.

We are further of the opinion, that the fact that the appellant was in possession of a large number of one-hundred shilling notes and that a number of one-hundred shilling notes were included in the money that was stolen with the English one pound notes, is a not unimportant feature tending to show the guilt of the appellant in view of the fact that he was unable to account satisfactorily for the surprising amount of money, in the circumstances, that was traced to him on December 25 and the fact that he had told what can only have been considered as a pack of lies in attempting to account for a large proportion of the money that was traced to him. In our opinion, the misdirection upon this count did not amount to more than an unfortunate afterthought on the part of the magistrate which did not materially affect his decision that the appellant was guilty.

We disallow the appeal in relation to the first count.

In the result, the appeal is allowed in relation to the fourth count and the conviction and sentence in respect of this count are set aside, but as regards the other three counts, the appeal is dismissed and the convictions and sentences in respect of the first, second and third counts are upheld.

Conviction and sentences on the fourth count set aside. Appeal dismissed on the other three counts.

The appellant appeared in person.

For the respondent:
GP Nazareth (Crown Counsel, Kenya)
The Attorney-General, Kenya

Re DM Pandya (a bankrupt)

[1958] 1 EA 478 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	18 July 1958
Case Number:	9/1957
Before:	Spry Ag J
Sourced by:	LawAfrica

[1] Bankruptcy – Property available for distribution – Settlement within two years of bankruptcy – Agreement for transfer of property for consideration – Consideration partly payable to creditors and partly at future date to bankrupt's wife – Agreement later embodied in a consent judgment – Whether judgment void against trustee in bankruptcy – Bankruptcy Ordinance (*Cap.* 25), *s.* 40, *and s.* 44 (4) (*T.*).

Editor's Summary

The official receiver, as trustee of the bankrupt, moved the court in 1957 for a declaration that an arrangement, embodied in a judgment made by consent in 1955 in certain other proceedings, constituted a settlement which was void under s. 44 of the Bankruptcy Ordinance. The agreement between the parties in terms of which judgment was entered in 1955 was a family arrangement by which the plaintiff, now the bankrupt, agreed to transfer certain properties to the defendants, namely, four of the respondents, for which they should pay Shs. 125,000/- "to the plaintiff or his order" by paying the plaintiff's debts up to Shs. 55,000/-, and the balance to the plaintiff's wife three years after the date of the judgment, with interest on this balance to be paid to the plaintiff's wife, in the meantime. Judgment by consent, on these terms, was entered on September 12, 1955, and the plaintiff's bankruptcy commenced on April 2, 1957. On the hearing of the motion it was contended for the official receiver that either the judgment amounted to a settlement of money, and was recoverable under s. 40, or it was a settlement which was void against a trustee in bankruptcy, under s. 44 of the Bankruptcy Ordinance. For the respondents, who were the bankrupt's wife and the defendants in the proceedings in 1955, it was argued that "settlement" in s. 44 (4) meant a conveyance or transfer of property, that a consent or compromise is a decree, and an adjudication of rights between parties.

Held –

(i) the judgment by consent was not a settlement of money, since there was no fund in existence.

(ii) "settlement" in s. 44 (4) is stated to "include" a conveyance or settlement and, therefore, the definition is not exclusive; a settlement could be created by a declaration of trust. *Shrager v. March*, [1908] A.C. 402.

(iii) the consent judgment constituted a settlement within the meaning of the Bankruptcy Ordinance, and was void against the trustee in bankruptcy, since it was made within two years of the commencement of the bankruptcy.

(iv) the four respondents, who were the defendants in the proceedings in 1955, were not trustees holding a fund, but debtors owing a debt of record; it was not open to the court to vary the date of payment as contained in the consent judgment.

Declaration that the settlement contained in the consent judgment is void against the official receiver as trustee of the bankrupt. Order that the four respondents pay to the official receiver a sum not exceeding Shs. 67,076/98, and interest, sufficient to pay the creditors of the bankrupt in full, and costs.

Case referred to in judgment:

(1) *Shrager v. March*, [1908] A.C. 402.

(2) *In re Player* (1885), 15 Q.B.D. 682.

(3) *In re Vansittart*, [1893] 1 Q.B. 181.

(4) *In re Tankard*, [1899] 2 Q.B. 57.

(5) *In re Plummer*, [1900] 2 Q.B. 790.

(6) *In re Reis*, [1904] 1 K.B. 451.

Judgment

Spry Ag J: In these proceedings the official receiver is moving the court for a declaration that an arrangement embodied in a consent judgment constituted a settlement which is void against him under the provisions of s. 44 of the Bankruptcy Ordinance and for consequential relief.

It is, I think, necessary in the first place to decide what was the effect of the consent judgment in Civil Case No. 19 of 1955. The written agreement between the parties in terms of which judgment was entered provided, *inter alia*, that the plaintiff, now the bankrupt, should transfer certain properties to the defendants, that is the first four respondents, and that they should

> "pay Shs. 125,000/- to the plaintiff or his order which are to be paid as under:–
>
> (*a*) The defendants will pay the plaintiff's debts up to Shs. 55,000/- to his various creditors;
>
> (*b*) The balance, i.e. Shs. 70,000/- plus if there is any surplus from item (*a*) shall be paid to Mrs. Indumati wife of the plaintiff after three years from the date of this judgment and the defendants will in the meantime pay to Mrs. Indumati interest at the rate of (ten) 10% per annum at the end of each month commencing from October 12, 1955."

This created a debt of record, payable at a future date, with interest in the meanwhile on the sum payable to the wife (the fifth respondent). Mr. Thornton, for the official receiver, claimed that this amounted to a settlement of money but this cannot be because there was no fund in existence. That does not, however, dispose of the matter.

It is not easy to decide what is the effect of the words "or his order" in para. (1) of the written agreement. At first sight, they appear to govern the whole paragraph. If this were so, sub-para. (*a*) and sub-para. (*b*) would be nothing more than revocable directions as to the manner of payment and the debt would remain due to the bankrupt, in which case it would, of course, be recoverable by the official receiver under s. 40 of the Bankruptcy Ordinance. Taking into account, however, all the circumstances, I do not think this is a correct interpretation. The compromise was essentially a family arrangement and it is reasonable to suppose that the family as a whole was interested in seeing that the bankrupt's debts were paid off and a fund established for the maintenance of his wife. Sub-para. (*a*) and sub-para. (*b*) amount therefore to the "order", except that it still remained for the bankrupt to nominate his creditors. If this were not so, sub-para. (*a*) and sub-para. (*b*) would be irrelevant to the proceedings.

It would seem, then, that sub-para. (*b*) was intended to operate as an assignment of a debt. How far was it effective for that purpose? The wife was not a party to the proceedings and could not therefore sue for the money, unless she could show that the object of the contract was to secure a benefit to her as cestui que trust. There is nothing on the face of the agreement to indicate such an intention but equally there is nothing to suggest that the transaction was intended to satisfy any antecedent debt or obligation. Having regard to the marital relationship and the fact that the whole compromise was a family arrangement, I think there is an irresistible presumption that the intention was to put the wife in the position of a cestui que trust.

There remains to be considered whether such an arrangement constitutes a settlement within the meaning of s. 44. I have no hesitation in holding that it does. Mr. Jhaveri relied on the definition of "settlement" in sub-s. (4) of s. 44 as including any conveyance or transfer of property, but this is not an exclusive definition: the legislature has used the word "include" and not the word "mean". It is not essential for there to be any conveyance or transfer; a settlement can, for example, be created by a declaration of trust (*Shrager v. March* (1), [1908] A.C. 402). Nor is it necessary for the property to be vested in trustees; it is clear on the authorities that it can be given outright to the beneficiary.

Mr. Jhaveri further argued that a consent or compromise is a decree and that a decree is an adjudication of rights between parties. That is undoubtedly true, but I am not prepared to agree with Mr. Jhaveri that it can be nothing more. It does not follow that where judgment is entered in terms of a written agreement, the judgment may not be evidence of a collateral transaction which, as a matter of convenience, has been embodied in the agreement. That is what has been done here.

So much for the form; now as to the substance. It is clear that the property, which I hold to be a debt, is capable of being the subject of a settlement, because things in action are expressly included in the definition of "property" in s. 2 of the Bankruptcy Ordinance. Secondly, the intention behind the gift must be that the property given is to be retained, not necessarily in its existing form but at least in a recognisable form. In other words, the section is not intended to relate to gifts which are intended for dissipation or expenditure. (*In re Player* (2) (1885), 15 Q.B.D. 682; *In re Vansittart* (3), [1893] 1 Q.B. 181; *In re Tankard* (4), [1899] 2 Q.B. 57; *In re Plummer* (5), [1900] 2 Q.B. 790 (C.A.).). Having regard to the amount involved and to the circumstances in which the arrangement was made, I have no doubt that the gift was intended to establish a capital fund for the benefit of the wife, the income of which would ensure her maintenance.

I am therefore of the opinion that the arrangement embodied in the consent judgment constituted a settlement within the meaning of the Bankruptcy Ordinance. It remains to decide whether as such it is void as against the trustee. The first condition is that it must have been made within two years of the date when the settlor became bankrupt, and for this purpose "became bankrupt" means committed the first of the acts of bankruptcy proved to have been committed by the bankrupt within the three months preceding the presentation of the petition (*In re Reis* (6), [1904] 1 K.B. 451). The consent judgment was dated September 12, 1955, and the commencement of the bankruptcy was April 2, 1957. Mr. Jhaveri has, however, argued that the annexure "3" to the written statement of defence in Civil Case No. 19 of 1955, at s. (3) under the heading "No. 103" proves that the settlement, if there was one, was made at an earlier date, that is to say December 4, 1953. I do not think that Mr. Jhaveri has correctly interpreted the memorandum of December 4, 1953, but it is not necessary for me to decide this because that memorandum was an executory agreement and was clearly replaced by the agreement embodied in the consent judgment. The two agreements are different in character and the latter was certainly not concluded in fulfilment of any obligation contained in the former. Whatever may have been the effect of the earlier settlement, therefore, it is irrelevant to the question whether or not the settlement evidenced by the consent judgment should be set aside.

Finally, it is not suggested nor is there any evidence to indicate that the settlement was in favour of a purchaser in good faith and for valuable consideration or that the settlement was of property which accrued to the bankrupt in right of his wife. It was clearly not a settlement before and in consideration of marriage, as the evidence shows that the bankrupt and his wife have been married for more than fifteen years.

Section 44 of the Bankruptcy Ordinance makes certain settlements void as against the trustee in the bankruptcy, not void for all purposes, and the official receiver has accordingly very properly only sought to avoid the settlement to the extent of the amount needed for payment of the bankrupt's creditors.

There is one final point with which I think I should deal, although it has not been mentioned by counsel. The first four respondents are not, as was suggested, trustees holding a fund, but debtors owing a debt of record. That debt does not fall due until three years after the date of the consent judgment. I do not think it is open to me in these proceedings to vary that provision. Fortunately, the period has almost elapsed.

I hold therefore that the applicant is entitled

(*a*) to a declaration that the settlement by the bankrupt on his wife of the sum of Shs. 70,000/- or thereabouts owing to him by the first four respondents, which settlement was contained in the consent judgment dated September 12, 1955, in High Court Civil Case No. 19 of 1955 is void as against the official receiver as the trustee in bankruptcy of the estate of Dhaneshwar Mohanlal Pandya;

(*b*) to an order that the first four respondents do pay to the official receiver as such trustee on September 13, 1958, such sum, not exceeding Shs. 67,076/98 and the current interest thereon at ten per centum per annum, as may be necessary to enable the official receiver to pay in full the creditors of the bankrupt, and to pay the taxed costs of the official receiver.

Liberty to either party to apply in chambers for an account of the sum payable under para. (*b*) above.

Declaration and order accordingly.

For the applicant:
RS Thornton
Fraser Murray, Thornton & Co, Dar-es-Salaam

For the respondents:
KL Jhaveri
Patel, Desai & Jhaveri, Dar-es-Salaam

Re an Application by the Attorney-General of Tanganyika
[1958] 1 EA 482 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	23 September 1958
Case Number:	117/1958
Before:	Cram Ag J
Sourced by:	LawAfrica

[1] Mandamus – Refusal to state case – Whether court will entertain application for leave to apply for

mandamus when alternative statutory remedy of appeal available – Criminal Procedure Code, s. 370 (*K.*).

[2] Mandamus – Application for leave to apply for order – Application invoking civil jurisdiction of court – Whether application competent – Law Reform (*Miscellaneous Provisions*) *Ordinance,* 1956*, s.* 8*, s.* 9*, and s.* 11 (*K.*) *– Criminal Procedure Code, s.* 389 (*K.*).

Editor's Summary

A mother, having removed her child to Kenya from the custody of the father in Tanganyika, the resident magistrate at Tanga issued a warrant for her arrest under the Fugitive Offenders Act, 1881. She was duly arrested and brought before a magistrate at Nakuru, Kenya, who after hearing evidence purported to exercise the discretion conferred by s. 5 and s. 10 or s. 5 and s. 19 of the Act, and having found that to return the prisoner to Tanganyika would be oppressive, discharged her absolutely. The magistrate refused to state a case, whereupon the Attorney-General of Tanganyika applied *ex parte* by summons in chambers to the Supreme Court of Kenya for leave to apply for an order of mandamus, requiring the magistrate to state a case for the opinion of the Supreme Court. This application, supported by affidavit, was filed pursuant to O. LIII of the Civil Procedure (Revised) Rules, 1948, in the Civil Registry of the Supreme Court.

Held –

(i) the application was misconceived, since the prerogative jurisdiction of the court cannot ordinarily be invoked so long as a statutory remedy by way of appeal is available, and in this case s. 370 of the Criminal Procedure Code entitled the applicant to apply to the Supreme Court, calling upon the magistrate to show cause why a case should not be stated.

(ii) the application should have been made to the criminal jurisdiction of the Supreme Court; the purpose of s. 11 of the Law Reform (Miscellaneous Provisions) Ordinance, 1956, which repealed s. 389 of the Criminal Procedure Code was not to transfer prerogative procedure from the criminal to the civil jurisdiction of the court, but to bring the local law into line with that contained in the Administration of Justice (Miscellaneous Provisions) Act, 1938.

Application dismissed.

Case referred to in judgment:

(1) *R. v. Governor of Brixton Prison, Ex parte Bidwell*, [1937] 1 K.B. 305; [1936] 3 All E.R. 1.

(2) *R. v. Secretary of State for India in Council, Ex parte Ezekiel*, [1941] 2 All E.R. 546.

(3) *R. v. Henderson*, [1950] 1 All E.R. 283.

(4) *Re Murray Ross* (*a prisoner*), [1921] N.Z.L.R. 292.

Judgment

Cram Ag J: The Hon. the Attorney-General of the Trust Territory of Tanganyika (who is not a law officer of the Colony and Protectorate of Kenya, as defined in s. 3 of the Interpretation and General

Provisions Ordinance, 1956) has applied by agency of an advocate, by summons in chambers, for leave to apply for an order of mandamus to issue to Mr. J. Rollings, resident magistrate, Nakuru, to state and sign a case for the opinion of the Supreme Court of Kenya in his Miscellaneous Criminal Case No. 3 of 1958. The summons is supported by an affidavit of facts. At the hearing a copy of the magistrate's order, objected to, was produced.

The application is clearly intituled as an invocation of the civil jurisdiction of the Supreme Court and is filed in the Civil Registry and, in limine, the point must be disposed of whether it ought properly to have been addressed to the court's criminal jurisdiction. The second issue is whether the prerogative jurisdiction ought at all to have been canvassed if substantive law is available.

The situation created by the magistrate's order is, apparently, unique, so far as authority is to be found among English, Kenya or Commonwealth precedents. It is as well to set forth the relevant facts. The fons et origo was an alleged taking away of a child from the custody of its father at Tanga, by its mother, out of Tanganyika into Kenya, leading, I infer to a complaint made by the father to the appropriate authority and to the framing of charges of kidnapping a person out of the Territory and kidnapping a person from lawful guardianship contrary to s. 247 of the Tanganyika Penal Code. Both offences in the one section amount to felony. As the mother had left Tanganyika, the resident magistrate, at Tanga, elected to regard her as a fugitive offender and issued a warrant, purporting to act under the provisions of the Fugitive Offenders Act, 1881. I have not to decide here, if, in fact, the mother was either an offender or a fugitive, within the meaning of the Act. Both Tanganyika and Kenya are "British possessions" as defined by s. 39 of the Act. Further, by the East Africa Fugitive Offenders Order-in-Council, 1920, the Act has been applied by reason of contiguity, in terms of s. 12, to the two possessions *inter alia*s as part of a group of British possessions. This application enabled the magistrate to use the provisions of Part II of the Act, as he did. It is also to be observed that the effect of the Order-in-Council, read with s. 13, is to enable a magistrate, in Kenya, without more, to back a warrant issued by a lawful authority merely in Tanganyika. Whether this provision escaped the notice of the authorities in Tanganyika or whether ob majorem cautelam, the warrant was endorsed by the acting Chief Secretary of Tanganyika, who purported to act under the provisions of s. 3 which provides for warrants issued from one part of Her Majesty's dominions, not subject to a group Order-in-Council, for execution in another part.

With respect, the magistrate does not seem to have comprehended the full effect of the group Order-in-Council, in his short ruling. However, when the warrant reached him, he, quite properly, backed it and saw to its execution.

The alleged fugitive was duly arrested and brought before the magistrate. The proper procedure then to be followed is laid down in s. 5 of the Act, as explained by numerous authorities. The magistrate is enjoined to

> "hear the case in the same manner and have the same jurisdiction and powers, as near as may be (including the power to remand and to admit to bail), as if the fugitive were charged with an offence committed within his jurisdiction".

The magistrate is further directed to consider if the warrant for the apprehension of the fugitive is "duly authenticated" and such evidence is produced as (subject to the provisions of the Act) according to the law ordinarily administered by the magistrate,

> "raises a strong or probable presumption that the fugitive committed the offence mentioned in the warrant and that the offence is one to which (Part I) of the Act applies".

On the strength of these findings the magistrate is, mandatorily, commanded to commit the fugitive to prison to await his return. The standard of proof is that which would in a criminal trial amount to *prima facie* evidence, after the close of the prosecution case, without more. *R. v. Governor of Brixton Prison, Ex parte Bidwell* (1), [1937] 1 K.B. 305.

At the time of committal, the magistrate is required, by s. 5, to inform the prisoner that he has a right to apply for "a writ of habeas corpus" (which is an appeal to the criminal jurisdiction of a superior court) "or other like process" presumably, by inference, also on the criminal side. Of recent time, superior courts, in the United Kingdom, have been inclining more and more to the admission of a reference by general motion by the prisoner, in terms of s. 10, also, I think, an application to the criminal jurisdiction, viz. *R. v. Secretary of State for India in Council, Ex parte Ezekiel* (2), [1941] 2 All E.R. 546, and *Re Henderson* (3), [1950] 1 All E.R. 283.

It is to be observed that the jurisdiction given to a superior court, by s. 10 of Part I, is given, in identical terms, to the magistrate, by s. 19 of Part II. This has been so stated judicially in Commonwealth precedents but it is obvious enough not to require citation. The result of reading s. 5 with either s. 10 or s. 19 seems to be that, even although a *prima facie* case for committal has been attained on the evidence, a discretion remains to discharge the prisoner absolutely or on bail on certain considerations being established.

That is what the magistrate at Nakuru apparently purported to do. Without any express finding, on the evidence produced to him, that the standard of proof had been attained, he purported to exercise his discretion on certain grounds, which seemed good and sufficient to him and came to the conclusion that to return the prisoner to Tanganyika would be "oppressive" and discharged her absolutely.

So far, no doubt can remain that the Fugitive Offenders Act, 1881, sounds in the sphere of the criminal law alone. The title enacts that it is to be an Act dealing with "offenders" and s. 2 defines a "fugitive" as a "person accused of having committed an offence".

While Part I of the Act provides, as remedies to the prisoner, a right to apply for a writ of habeas corpus or conceivably, a right to apply on the criminal side by general motion for relief, it does not, specifically, enact how the lawful authority could have a remedy should he feel a grievance upon an order of the magistrate discharging the prisoner. I conjecture that remedy may lie by an invocation of the prerogative. But any such invocation would necessarily be of the criminal jurisdiction of the superior court. But what remedy is open to either prisoner or lawful authority where there is either committal or discharge under s. 19? Appeal is provided by s. 19, viz.:

> ". . . Any order or refusal to make an order of discharge by a magistrate under this section shall be subject to an appeal to a superior court".

That is, I think, a provision requiring close scrutiny. Where the magistrate purports to commit under s. 5, Part I, use must be made of the remedies there provided, expressly or by inference. Where, however, the magistrate would have committed under Part I, s. 5, but has acted in the exercise of his discretion under s. 19, then the remedies of both prisoner or lawful authority seem confined to appeal. Appeal is mandatorily enjoined. It might seem that the prisoner could apply by writ of habeas corpus objecting to the finding of a *prima facie* case and order of committal under s. 5 and, at the same time, have a right to appeal against the magistrate's refusal to discharge him under s. 19, which appeal would exclude his remedy by general motion under s. 10. Or, the intention of the Act may be that, once the magistrate has exercised his discretion under s. 19, the proper and, indeed, the only remedy, is by appeal under that section. At the

end of whatever approach sits the superior court,

enabled to inquire into the whole issue. That the "superior court" is a court of criminal jurisdiction is not left in doubt and is a matter of express legislation Section 39 enacts *inter alia*:

> "The expression 'superior court' means—
>
> > ". . . (4) In a British possession, any court having in that possession the like criminal jurisdiction to that which is vested in the High Court of Justice in England, or such court or judge as may be determined by any Act or Ordinance of that possession".

In Kenya, the Appellate Court intended is, undoubtedly, the Supreme Court, exercising its criminal jurisdiction by Order-in-Council, or local Ordinance.

No provision is made how appeal is to be brought, but, plainly, the procedure by criminal appeal to the Supreme Court must be that, or assimilated to that, enacted in the Criminal Procedure Code. If relief is mandatorily to be by way of appeal from an order made under s. 19, it cannot by any manner of gloss be read as an invocation of the prerogative. Nor, I think, can the appellant merely, in the absence of express provision in the Act, be permitted to ignore the local law and to evolve his own procedure or method of approach to the superior court.

I think it is immaterial to consider whether or not there must be a conviction before the Criminal Procedure Code will apply. The procedure laid down under the Act provides for a criminal or quasi-criminal trial and an exercise of criminal jurisdiction on part of the magistrate leading to a substantive finding even if preliminary which is appealable. The Criminal Procedure Code, I considered, must be read therefore, mutatis mutandis where appropriate, substituting for "conviction" the final order of committal of the magistrate. At any rate, it can hardly be the subject of argument that either the prisoner or the lawful authority has a right of appeal either on the merits or on point of law.

No doubt, all of these considerations, were, at the outset at any rate, clearly recognised by the lawful authority. I do not wish to prejudice the issue on the merits, by seeming to shadow whether or not the Hon. Attorney-General of Tanganyika is, properly speaking, a party to the appeal but, at all events, it is not the subject of argument that he required the resident magistrate to state and sign a case for the opinion of the Supreme Court. In my respectful view, that was a proper course, open by appeal on point of law, to whoever felt legitimately aggrieved by the order of the magistrate and the proper procedure to be followed, in my view, is that laid down in the Criminal Procedure Code at s. 367. The appellant's advocate expressly recognised, in his letter of August 5, 1958, exhibited with his affidavit, that the right of appeal under s. 19 of the Act could, competently, be maintained under the procedure enacted in s. 367 of the Code. The magistrate in his refusal to state a case was also of opinion that s. 367 was appropriate and he found his reasons for refusal in an interpretation of that section, namely, that the Hon. Attorney-General of Tanganyika was not a "party to the proceedings".

The appellant, I say with respect, then quite properly wished to discover if the magistrate could not be compelled by the Supreme Court to state and sign a case for the opinion of that court. That is a perfectly correct attitude following upon the magistrate's reasoned refusal to do so, in point of law. What, however, I find less easy to follow is his invocation of the prerogative jurisdiction of the Supreme Court, the more especially so, in a clear criminal matter, of its civil jurisdiction.

It is well-settled law that, where there is express legislation as to appeal, the prerogative, while not repealed (for that is difficult to conceive) cannot ordinarily be invoked unless and until the local substantive provisions have been fully exploited and found wanting in remedy. The ancient remedy of

prerogative is from time to time superseded. In a sense it becomes obsolete. Express procedure is laid down in the Criminal Procedure Code in case of refusal to state and sign a case. Melius est petere fontes. It may well be that that procedure is, in all but name, a crystallisation of procedure to obtain an order of mandamus, but the name is not unimportant. Procedure by prerogative is a distinct historical remedy whereas procedure by local Ordinance provides a distinct statutory remedy. The two cannot and ought not to be confused. An invocation of the prerogative made, after supersession of that remedy, cannot be readily translated into an application by statutory remedy. The proper course after application, in error, in my view, is to dismiss the application with, of course, liberty venire de novo by the proper procedure.

Section 370 of the Criminal Procedure Code enacts:

> "When a subordinate court has refused to state a case as aforesaid it shall be lawful for the appellant to apply to the Supreme Court within two months of such refusal, upon an affidavit of facts, for a rule calling upon such subordinate court and also upon the respondent to show cause why such a case should not be stated and the Supreme Court may make the same absolute or discharge it . . .".

If it is a correct interpretation of s. 19 of the Act that an appeal lies by case stated and that proper procedure has been followed and ought to be followed under s. 369 of the Criminal Procedure Code up to and as far as refusal to state a case, with respect, I am unable to see how the appellant can now be permitted to abandon the procedure he has followed, recede from the statutory procedure hitherto followed and ignore procedure for relief provided by a statute and be permitted to invoke the non-statutory jurisdiction provided by the prerogative. If I am right, the correct course is to dismiss this application, on this ground, and to indicate that the appellant may apply for a rule in terms of s. 370 of the Criminal Procedure Code. There is some authority against duality of remedy in the New Zealand case of *Re Murray Ross* (*a prisoner*) (4), [1921] N.Z.L.R. 292, in which it was held that procedure by a prisoner by habeas corpus under s. 19 was not competent.

There remains the issue of the invocation of the Supreme Court's civil jurisdiction. I consider with respect that this follows from a misconception of the intention of the Law Reform (Miscellaneous Provisions) Ordinance, No. 48 of 1956, at s. 9. It is the case that, at s. 11, s. 389 of the Criminal Procedure Code, which provided that the Supreme Court might in the exercise of its criminal jurisdiction issue any writ which might be issued by the High Court of Judicature in England and power to make rules to regulate procedure, was repealed. But this, I think, was not in preparation for a somersault from a criminal to a civil jurisdiction. Section 8 of Ordinance 48 of 1956 brought the local law into line with the procedure by prerogative order as contained in the Administration of Justice (Miscellaneous Provisions) Act, 1938, and prohibited procedure by prerogative writ. The Ordinance, by its long title was enacted

> "to effect miscellaneous reforms in the law relating to civil procedure and prerogative writs".

That is, it was intended to reform not only civil procedure and the procedure relating to prerogative writs in exercise of civil but also in criminal jurisdiction. That this is so is perfectly clear from s. 8 and s. 9, where the two jurisdictions are, specifically, mentioned as subsisting and distinguished. The Ordinance never was intended to blend the civil with the criminal jurisdictions relating to the prerogative, viz.:

> "9.(1) Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court–

(*a*) prescribing the procedure and the fees payable on documents filed or issued in cases where an order of mandamus, prohibition or certiorari is sought;

(*b*) requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application order is made for any such order;

(*c*) requiring that, where leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made."

Sub-section (4) runs:

> "Until rules under sub-s. (1) of this section have been made the rules of court under s. 99 of the Supreme Court of Judicature (Consolidation) Act, 1925, pursuant to the provisions of s. 10 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, shall apply mutatis mutandis."

The present application purports to proceed under O. 53 of the Civil Procedure (Revised) Rules, 1948, as amended. The amendment is headed "The Civil Procedure Ordinance. Cap. 5" and the long title runs:

> "In exercise of the powers conferred by s. 81 of the Civil Procedure Ordinance, and by virtue of the provisions of s. 30 of the Crown Proceedings Ordinance, 1956, and s. 9 of the Law Reform (Miscellaneous Provisions) Ordinance, 1956, the Rules Committee hereby makes the following Rules:–".

The Rules are headed "The Civil Procedure (Amendment) (No. 2) Rules, 1957" and Rule 1 runs:–

> "These Rules may be cited as the Civil Procedure (Amendment) No. 2) Rules, 1957."

Order 53, r. 1, regulates that no order for mandamus or certiorari is to be made unless leave has been granted in accordance with the rule. The rule further provided for an application for leave by summons in chambers, in fact, for the sort of procedure purported to be followed here.

That is, if it were intended that civil and criminal procedure were to be made to run on identical lines in applications for orders for mandamus and certiorari and this intention has been the subject of rules, the result has been to embed a criminal procedure rule in civil procedure rules, entitled civil procedure rules and the safe guide is the rule-making power contained in s. 9 of the Ordinance, No. 48 of 1956, referred to in the long title of the amendment. One interpretation of the amendment is that the Rules Committee, set up under s. 81 of the Civil Procedure Ordinance, are compendiously entitled to make rules not only to govern civil procedure but also to make rules to govern criminal procedure relating to the exercise of the prerogative, of course, still keeping the jurisdictions separate. Section 9 was never, I think, intended to accomplish the virtually inconceivable feat of resolving civil and criminal jurisdiction into one composite jurisdiction. No doubt, it is more than a little confusing to find in rules intituled "Civil Procedure Rules" a regulation for the quashing of a conviction, but the rules must be interpreted as they stand. No doubt, too, the present applicant, by the title and short title was led to apply in the civil court, and that is why he addressed his application wrongly. Notwithstanding the title of the rules, the rules must be read with the power to make criminal procedure rules given to the Rules Committee and O. 53 regulates a criminal as well as a civil procedure by application for leave.

I am of the view that an application made to the civil jurisdiction is in error and cannot be amended and must be dismissed with, of course, leave to apply again to the criminal jurisdiction.

The application is therefore dismissed with an order that any costs incurred, are to be borne by the applicant.

Application dismissed.

For the applicant:
K Bechgaard
K Bechgaard, Nairobi

Mohinder Lal Gill v R
[1958] 1 EA 488 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	29 September 1958
Case Number:	397/1958
Before:	Rudd Ag CJ and Connell J
Sourced by:	LawAfrica

[1] Criminal law – Theft – Delivery of goods by employee to tradesman – False invoice prepared for employer showing sale of goods to another tradesman – Subsequent purchase and payment by tradesman to whom delivery made – Whether charge of theft by a servant lies after goods purchased and paid for – Penal Code, s. 276 (*K.*).

Editor's Summary

The appellant was employed as a lorry driver and salesman by a company manufacturing aerated waters. His duties were to take out on the lorry loads of his employers' goods and to make sales and collect "empties". He was supplied with a book of numbered invoices each of which was in duplicate and when making a sale his duty was to write out an invoice which the purchaser would then sign and receive, leaving the carbon duplicate in the book which the appellant's employers would receive from him with a return of the sales made. In February, 1958, he sold a quantity of his employers' goods to the Naivasha Commercial Stores on a numbered invoice which their employee signed. By use of an extra carbon and an invoice torn from a subsequent page in the book, the appellant obtained the employee's signature on a blank invoice which in March he used when delivering 400 cases of waters to the Bombay Trading Company at Naivasha. For this transaction he issued no invoice to the recipient of the goods but he filled in the duplicate so as to lead his employers to believe he had made another sale to the Naivasha Commercial Stores, whereas he had not been to that store nor had he seen their employee that day. When

the Naivasha Commercial Stores were billed for this consignment they repudiated the transaction, investigations were made and the consignment was found in the store of the Bombay Trading Company. The latter then wrote to the appellant's employers that they had bought this consignment in March and offered to pay for it. This offer was accepted and the price was paid. The appellant was later charged with theft by a servant, convicted and sentenced to three years' imprisonment and thereafter to report to the police for three years. On appeal it was contended that the subsequent purchase of and payment for the goods by the Bombay Trading Company vested the goods in them as from the date of delivery and accordingly no charge of theft against the appellant could thereafter be substantiated.

Held –

(i) there was no evidence of any sale until the offer to purchase was made and accepted and had there been such a sale by the appellant an invoice for the goods would have been issued at the time of delivery; the appellant had in fact forged a false invoice and reported a sale to another purchaser.

(ii) the evidence did not, however, disclose a case of theft by taking since the appellant was lawfully in possession of the goods until he disposed of them; the delivery of the goods was fraudulent conversion with intent to deprive the true owner of its property in the goods.

(iii) theft as defined in the Penal Code differs from larceny under the law of England and includes theft by conversion whereas in England larceny and fraudulent conversion are separate offences; the appellant never represented to his employers that he had sold the goods to the recipients and since there could be no question of a mistake by the appellant the appeal would be dismissed.

Appeal against conviction and sentence dismissed.

Case referred to:

(1) *R. v. Taylor*, 10 Cox C.C. 544.

Judgment

Rudd Ag CJ: read the following judgment of the court: The appellant appeals from a conviction of theft by servant contrary to s. 276 of the Penal Code and sentence of three years' imprisonment and thereafter to report to the police for three years.

The facts disclosed by the evidence are that the appellant was employed by Fitzgerald Baynes & Company as a lorry driver who sold and delivered the company's soft drinks and who received returned empties. On February 24, 1958, he sold a quantity of his employers' goods to the Naivasha Commercial Stores, the invoice for these goods was number 399750 and was signed on behalf of the purchaser by their employee Mugo. The appellant was supplied with a book of numbered invoices which were in duplicate. When he made a sale he would write out an invoice which would be signed on behalf of the purchaser and a copy, by means of carbon paper, would appear on the duplicate invoice. The original invoice would be given to the purchaser and the duplicate handed in by the appellant to his employers together with a return of the sales made.

In the case of the sale to the Naivasha Commercial Stores on February 24 a carbon copy of Mugo's signature was obtained not only on the duplicate of the invoice numbered 399750 but also on one of the invoices numbered 399782 as well. As the invoices were bound in a block or book one of the invoices numbered 399782 must have been torn out and brought up close to the invoice numbered 399750 and a carbon must have been used in such a way as to obtain a carbon copy of Mugo's signature on an invoice numbered 399782 when he signed the invoice numbered 399750. In the result a carbon copy of Mugo's signature appeared on a blank invoice numbered 399782.

On March 22, 1958, the appellant delivered 400 cases of his employers' goods at the premises of the Bombay Trading Company at Naivasha. He did not issue any invoice for these goods to the Bombay Trading Company or to anyone connected with that company, but he used the blank invoice numbered 399782 bearing a carbon copy of Mugo's signature and filled in on that, by using carbon paper, the

details of the goods which he had delivered at the premises of the Bombay Trading Company and then submitted this false duplicate invoice to his employers as proof of a delivery and sale of the goods to the Naivasha Commercial Stores, whereas in truth and in fact, the appellant had not been to the Naivasha Commercial Stores or seen Mugo on that day

and the consignment had been delivered to the Bombay Trading Company and not to the Naivasha Commercial Stores. When, in due course, the Naivasha Commercial Stores were billed with this consignment they denied the alleged transaction. In the course of the investigation that followed the consignment in question was discovered in the premises of the Bombay Trading Company. After this discovery the Bombay Trading Company wrote to the appellant's employers saying that they had bought the consignment on March 22, 1958, and offering to pay for it. This offer was accepted and the Bombay Trading Company paid the price of the goods.

Neither the appellant nor any representative of the Bombay Trading Company gave evidence before the lower court nor did the appellant attempt to give any explanation by way of an unsworn statement or call any witnesses. Evidence was given of a statement made by the appellant to the police during the investigation, in which he said that he had delivered the goods in question to the Naivasha Commercial Stores and not to the Bombay Trading Company and that Mugo had signed for it on March 22 in the usual and ordinary way. This statement was false in almost every respect. It was not objected to at the time it was put in evidence but subsequently counsel for the appellant objected that it was not entirely voluntary. In deciding the case the magistrate did not attempt to assess the weight to be attached to this statement in view of the objection that was made to it albeit that objection was made at a later stage. In effect the magistrate discarded the statement and did not address his mind to it. The appellant was convicted of theft of the 400 cases belonging to his employers.

On behalf of the appellant it was argued in this court that the action of the Bombay Trading Company in paying for the goods subsequently, on the basis of a sale to them on March 22, and the acceptance by the owner of the purchase price from the Bombay Trading Company had the effect of vesting the property in the goods in the Bombay Trading Company as from March 22 and that, thereafter, no charge of theft against the appellant could be substantiated since he was entitled to sell the goods to the Bombay Trading Company.

We do not consider this argument to be well founded. In our opinion there is no evidence of any sale to the Bombay Trading Company prior to the time when that company offered to pay the owner for the goods in question and the owner agreed to accept such payment. The evidence is quite against any sale to the Bombay Trading Company on behalf of the owner by the appellant on March 22. If there had been such a sale on that date they would have been given an invoice there and then. The owner would have been given a duplicate when the appellant returned and the appellant would have reported or made a return of the sale to the Bombay Trading Company to his employers. None of these things occurred. In fact the appellant forged a false invoice to the Naivasha Commercial Stores and reported a sale by him to them instead of a sale to the Bombay Trading Company. Since no sale had been made to the Naivasha Commercial Stores the property in the goods remained in the defendant's employers until they subsequently agreed to sell them to the Bombay Trading Company. The true state of affairs appeared to be that the appellant intended to dispose of the goods at the ultimate expense of the Naivasha Commercial Stores and even after the Naivasha Commercial Stores denied the transaction he still persisted in his original false allegation as shown by his statement to the police. In our opinion that statement was admissible in evidence because it was not put forward in evidence by the Crown as a true statement. It was put forward as a false statement, which, in fact, it was, and not as a confession. If it had been true it would have completely exculpated the appellant. It was never denied that the appellant made this statement and quite clearly no pressure was put upon the appellant to make a statement in the terms in which this statement was made.

We agree that the evidence does not disclose a case of theft by taking since the appellant was lawfully in possession of the goods until he disposed of them by delivering them at the premises of the Bombay Trading Company. In our opinion that delivery was a fraudulent conversion with intent to deprive the true owner of its property in the goods.

The definition of theft in our Penal Code differs from the definition of larceny in English law. Our definition includes in the offence theft by conversion as well as theft by taking and carrying away; whereas in England larceny and fraudulent conversion are separate offences. The cases cited on behalf of the appellant are all cases to which the law of England applies and, in our opinion, they do not represent the law in Kenya in view of the terms of the definition of theft in the Penal Code.

In the course of argument *R. v. Taylor* (1), 10 Cox C.C. 544, was referred to but it appears to have no application in this case. The fact that the appellant was employed by Fitzgerald Baynes & Company was not proved merely by repute in this case.

The evidence does not disclose that the appellant ever represented to anyone that he had sold, on behalf of his employers, the goods in question to the Bombay Trading Company. There can be no question of any accidental mistake or error of recollection on the part of the appellant and he does not say that there was. The obtaining of Mugo's signature on the blank invoice could hardly have been accidental. The fact that the original invoice has never come to light and that Mugo never signed an invoice for those goods coupled with the absence of any explanation clearly negatives the possibility of accident. For these reasons we dismiss the appeal against conviction. We do not consider the sentence excessive in view of the fact that the offence must have been deliberately planned and the fact that the appellant had previously been convicted of dishonesty as regards his employer and had been generously given another chance by them.

Appeal against conviction and sentence dismissed.

For the appellant:
M Kean
Sirley & Kean, Nairobi

For the respondent:
GP Nazareth (Crown Counsel, Kenya)
The Attorney-General, Kenya

Afzal Khan Awan v R
[1958] 1 EA 492 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	29 September 1958
Case Number:	305/1958
Before:	Rudd Ag CJ and Connell J

Sourced by: LawAfrica

[1] Criminal law – Evidence – Clerk accused of fraudulent false accounting – Accused employed under written letter of appointment not tendered in evidence – Whether parol evidence of employment admissible – Penal Code, s. 325 (*K.*) *– English Falsification of Accounts Act,* 1875, *s.* 1.

Editor's Summary

The appellant was convicted of fraudulent false accounting. The particulars of the offence as stated in the charge sheet were that the appellant "being a clerk or servant to . . ." omitted to record the receipt of Shs. 6,000/-. At the trial evidence was given that the appellant held the post of chief clerk under a letter of appointment which was not produced in evidence. On appeal it was contended that parol evidence of the terms of the appellant's appointment was inadmissible and that since the letter of appointment was not produced there was no evidence that the appellant was a clerk or servant.

Held – where a person is employed under a written contract of service and the terms of that contract are material the proper evidence thereof is the document itself; but the question whether a person is a clerk or servant depends upon whether he is subject to the control of another and bound to obey the orders of that other and this could be proved by parol evidence, except where there is doubt as to the identity of the employer.

Appeal dismissed.

Judgment

Rudd Ag CJ: read the following judgment of the court: The appellant appeals from conviction of fraudulent false accounting contrary to s. 325 of the Penal Code. The particulars of the offence as stated in the charge sheet were as follows:

> "1st Count. –Afzal Khan Awan, on October 30, 1956, at Kericho within the Nyanza Province, being a clerk or servant to Messrs. Motor Mart and Exchange Ltd., Kericho, with intent to defraud omitted from the daily cash received book belonging to Messrs. Motor Mart and Exchange Ltd., his employers, a material particular, that is to say a receipt on the said day of Shs. 6,000/- from Cheruyot A. Sang."

Section 325 of the Penal Code reads as follows:

> "325. Any person who, being a clerk or servant, or being employed or acting in the capacity of a clerk or servant, does any of the acts following with intent to defraud, that is to say–
>
> (*a*) destroys, alters, mutilates, or falsifies any book, document, valuable security or account which belongs to or is in the possession of his employer, or has been received by him on account of his employer, or any entry in any such book, document or account, or is privy to any such act; or
>
> (*b*) makes, or is privy to making, any false entry in any such book, document or account; or

(*c*) omits, or is privy to omitting, any material particular from any such book, document or account,

is guilty of a felony, and is liable to imprisonment for seven years."

Learned counsel for the appellant only argued one ground in support of the appeal. He admitted that this ground had little merit but argued that in law it was good and sufficient to entitle the appellant to succeed. He submitted that there was no evidence to prove that the appellant was a clerk or servant to Messrs. Motor Mart and Exchange Ltd., Kericho, inasmuch as it was stated in evidence that the appellant held the post of chief clerk under a letter of appointment which was not produced. It was therefore argued that parol evidence of the terms of his employment could not be admitted and that since the letter of appointment was not produced in evidence there was no admissible evidence that the appellant was a clerk or servant. There was clear and undisputed evidence that the appellant was acting in the capacity of a clerk or servant but it was submitted that, inasmuch as he was charged with being a clerk or servant, he could not be convicted on the basis that he was acting in the capacity of a clerk or servant since that was not stated in the particulars of the charge. In support of this argument counsel referred to Archbold (33rd Edn.) at p. 777 where it is stated under the head of "Evidence" in connection with falsification of accounts contrary to s. 1 of the Falsification of Accounts Act, 1875:

"The proof under this head will be the same as in cases of embezzlement, as to which see ante, p. 636".

On p. 636 the learned authors of Archbold commence their consideration of evidence in the case of embezzlement. Under the heading "Clerk or Servant" and the sub-heading "Control of employer". They say:

"Prove, therefore, that the prisoner, at the time he received the chattel, money or valuable security, was clerk or servant to J.N., or employed for the purpose or in the capacity of a clerk or servant as stated in the indictment, acting under and bound to obey the orders of his master or employer. This may be proved by evidence that he acted as such. *R. v. Beacall*, 1 C. & P. 312; *R. v. Wellings*, 1 C. & P. 454; *R. v. Welch*, 1 Den. 199."

On p. 638 under the heading "Contract of Service" the learned authors say:

"If the contract of service was in writing, parol evidence of it is inadmissible, unless notice to produce has been given: *Re Clapton*, 3 Cox 126; *R. v. Dodson*, 62 J.P. 729. Where the prisoner was charged with embezzlement, but, his employer, who made the engagement with him, was not called to prove the terms thereof, but only his managing clerk, who knew them through repute alone, having been informed of them by his employer, it was held that there was no evidence to go to the jury that the prisoner was servant to the prosecutor: *R. v. Taylor*, 10 Cox 544."

And under the heading "In the capacity of clerk or servant" it is stated:

"In *R. v. Woolley*, 4 Cox 255, Patteson, J., held that these words were applicable only where the prisoner is employed on temporary occasions and does not usually fill the situation, but such limitation, it seems, would now be regarded as unduly narrow."

There is no doubt, of course, that where a person is employed under a written contract of service and where the actual terms of that contract are material then the proper evidence of the terms of the contract is the written document itself and parol evidence is not admissible; but if the actual terms of the written contract of service are an essential ingredient of the offence and if the offence can be established as having been committed irrespective of the terms of the

contract, then we see no reason to prevent the offence being capable of complete proof by parol evidence, for in that case the actual terms of the contract of service would not be material which was essential to conviction.

The question as to whether or not a person is a clerk or servant of another depends upon whether he was subject to the control of the other and bound to obey his orders as to what work he should do and how he should do it.

In our opinion this could be proved by parol evidence. The position may be different if there was any dispute or reason to doubt as to the identity of the employer, but that is not the case in the instant appeal.

In England the offence of embezzlement is confined to a person

> "being clerk or servant or person employed in the capacity of clerk or servant",

but the specimen indictment given in Archbold on p. 635 does not specifically refer to a "person employed in the capacity of a clerk or servant". It merely states "being clerk or servant to J.N."

Again under the Falsification of Accounts Act, 1871, s. 1, the offence under that section is stated to be committed by

> "any clerk, officer or servant or any person employed or acting in the capacity of a clerk, officer or servant",

but the specimen indictment only states in this connection "being clerk or servant to J.N."

In our opinion, where it is proved that a person has been acting in the capacity of a clerk or servant to another is guilty of any of the acts or omissions stated in s. 325 of the Penal Code with intent to defraud, he is guilty of an offence under that section and may be convicted even though the particulars of the charge referred to him as being a clerk or servant without stating that he was acting as a clerk or servant and in such a case the particular terms of his written contract of service may be immaterial.

In the instant appeal there is no doubt whatever but that the appellant was at the time, and in regard to the events in question, acting in the capacity of a clerk or servant to the Motor Mart and Exchange Ltd., Kericho. He himself admitted that he was working for that company and said that he acted under the orders and control of its manager. In our opinion that constitutes him in law a servant of the company. There is no question but that he was guilty of the other essentials to the offence as stated in the charge and, in our opinion, he was properly convicted. In the circumstances of this case we consider that the actual terms of his letter of appointment were not material.

The appeal is dismissed.

Appeal dismissed.

For the appellant:
J O'Brien Kelly
J O'Brien Kelly, Nairobi

For the respondent:
GP Nazareth (Crown Counsel, Kenya)
The Attorney-General, Kenya

Manyaki d/o Nyaganya and others v R
[1958] 1 EA 495 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	3 September 1958
Case Number:	98/1958
Before:	Sir Kenneth O'Connor P, Gould JA and Templeton J
Sourced by:	LawAfrica

[1] Criminal law – Evidence – Court's power to summon person whose evidence essential to just decision – Judge recording at trial that such evidence essential – Witness not called as evidence likely to be prejudicial to accused – Whether witness must be called – Criminal Procedure Code, s. 151 (1) *and* (2) (*T.*) *– Indian Code of Criminal Procedure,* 1898*, s.* 540.

Editor's Summary

At the trial of the appellants on a charge of murder one, N., who had given evidence at the preliminary inquiry was not called as a witness. After the first appellant's evidence had concluded, the trial judge noted on the record that the court would call N. under s. 151 of the Criminal Procedure Code since her evidence appeared essential to the just decision of the case. The court then heard counsel for and against calling N, and after an adjournment the judge stated that, since the calling of N. would be prejudicial to the defence, she would not be called as had been intended. The appellants were nevertheless convicted and on the hearing of their appeal against conviction, the appellate court noted that N. had not been called as a witness. Both counsel appearing on the appeal then requested the court to look at N.'s deposition at the preliminary inquiry which on inspection showed that her evidence did not support the case for the prosecution.

Held –

(i) a trial judge is in Tanganyika under a statutory duty, once he comes to the conclusion that evidence is essential to the just decision of the case, to call the person who can give such evidence, and to do so whatever the effect of the evidence might be.

(ii) the trial judge had decided the case almost entirely on the evidence of one witness who, though not an accomplice, had possibly out of fear for her own safety made a false and misleading statement to the police; the evidence of such a witness is unsafe as the sole foundation for a conviction, particularly in a capital case, unless supported aliunde.

Appeal allowed. Conviction set aside.

Case referred to in judgment:

(1) *Davies v. Director of Public Prosecutions,* [1954] 1 All E.R. 507; [1954] A.C. 378.

(2) *R. v. Levy*, [1912] 1 K.B. 158.

(3) *R. v. Jones*, [1949] 1 K.B. 194; [1949] 2 All E.R. 964.

(4) *Gathitu v. R.* (1956), 23 E.A.C.A. 526.

(5) *Swami v. King Emperor*, [1939] 1 All E.R. 396.

(6) *R. v. Harris*, 20 Cr. App. R. 86.

(7) *R. v. Wallwork*, 42 Cr. App. R. 153.

(8) *In re Narayanan* (1942), A.I.R. Mad. 223.

(9) *Boniface s/o Muhindi and Another v. R.*, [1957] E.A. 566 (C.A.).

(10) *Chai Munga Dagamra v. R.*, Kenya Supreme Court Criminal Appeal No. 116 of 1956 (unreported).

(11) *Aw Deria Hussein Dolbahanta Jama Said v. R.* (1953), 20 E.A.C.A. 181.

(12) *Newmark v. R.* (1934), 1 E.A.C.A. 162.

(13) *R. v. Mangatinda Ole Dusiat* (1933), 15 K.L.R. 112.

Judgment

Gould JA: read the following judgment of the court: On June 16, 1958, the four appellants were convicted by the Supreme Court of Tanganyika of the murder, on or about August 9, 1957, of one Makemba (variously spelt “Mahemba”, “Mabemba” and “Makembo”) s/o Wambura. Against this conviction and the resulting sentence of death the appellants now appeal to this court.

The deceased (whom I will call Makemba) was an adopted son of the first appellant, Manyaki d/o Nyaganya. Manyaki was an elderly woman living apart from her husband in the compound of her adopted son, Makemba. Makemba had two houses in his compound. In one he lived with his three wives: in the second lived Manyaki and her sister, one Wambura. The names of Makemba’s three wives were: (1) Nzota, (2) Wakuru, (3) Nyakiberu: Makemba was a leper who had, previously to his death, on at least one occasion been to the leprosarium at Shinyanga for treatment and had returned home. Manyaki had paid the bride-price for each of Makemba’s wives. There was some evidence that the original happy relations between Manyaki and her adopted son, Makemba, had become strained and that they used to quarrel. There was evidence from one witness that Makemba had frequently asked Manyaki to leave his compound. On the other hand, it was alleged that Manyaki had brought a suit against Makemba with the object of evicting him from the compound and that she had lost this action. This Manyaki denied.

Makemba was seen alive by a relative of his, one Magambo, in July, 1957. Not having seen Makemba for three weeks after this, Magambo went to Makemba’s house and asked Manyaki where he had gone. Manyaki said that Makemba had gone to Shinyanga leprosarium for treatment. In September, 1957, Magambo again inquired about Makemba and was given the same reply. In December, 1957, Magambo again went to Manyaki’s house and, having made inquiries of the other two of Makemba’s wives, i.e. Nzota and Wakuru, communicated with the police at Musoma. Investigations ensued and the third appellant, Marembo, took the police to a place about half a mile from Makemba’s home and said “We buried the body there”. An exhumation followed at which Marembo and the second appellant, Twino, were present and both identified the remains as those of Makemba, saying that they had buried him there.

The remains were virtually unrecognisable, though there was some evidence of recognition of the clothes and hair, but we think that the learned judge, in coming to the conclusion, as he must have done (though there is no express finding to that effect), that the remains were those of Makemba, relied mainly on the above-mentioned statements of Marembo and Twino that they had buried Makemba at that spot. The medical officer who conducted the post-mortem was unable to state the cause of death owing to the degree of decomposition of the body. The hyoid bone was broken, which is a common feature in cases of strangulation, but there was a rope round the neck and if the body had been dragged by the head to the grave, or lowered perpendicularly into the grave by means of the rope, the hyoid bone could have been broken in that way. There was evidence that it was usual to convey the body of a leper to the place of burial by dragging him by the neck by a rope so as to avoid contamination with the leprous corpse. Accordingly, there is nothing in the medical evidence to prove that the deceased met his death by foul play, and evidence that he was murdered must be looked for elsewhere.

The case for the prosecution turned upon the evidence of Wakuru, the second wife of Makemba, who testified that on the evening of the last day upon which she saw her husband alive, she, he, and the first wife, Nzota, had their evening

meal together in Makemba's house. After this, Manyaki (the first appellant) came to the house, followed about half an hour later by the other appellants. According to Wakuru, the appellants then attacked makemba. She and Nzota ran outside. The first appellant shouted after them

> "Don't run away at all to anywhere. We are doing our little job inside this house".

Wakuru went to her own house in the same compound and Nzota returned to the house they had left. The first appellant called Wakuru and said: "We have finished. Come and see your husband." Wakuru refused to go. Later Wakuru says that she saw the second, third and fourth appellants carrying the body of her husband away in a sort of deck-chair. He had a rope round his neck. She never saw her husband again. She did not give the alarm or make a report because the fourth appellant, the headman to whom normally a report should be made, was involved in the crime. Accordingly, she did not say anything to anyone until the police came to investigate in December. She then made two statements to the police, first stating that the deceased had gone to the leprosarium at Shinyanga and afterwards giving the story to which she testified in court.

The only motive suggested for the murder of Makemba was that his adoptive mother, Manyaki, was anxious to get rid of him and there was a suggestion that she had given cattle to the second and third appellants as a reward for their part in the killing, and that she had given Shs. 300/- to the fourth appellant.

The prosecution put forward Wakuru as a witness of truth. They did not call Nzota at the trial, notwithstanding that, according to Wakuru, she was an eye-witness of the attack on Makemba and that she had given evidence at the preliminary inquiry. The defence did not call Nzota either. This will be referred to later.

Manyaki testified that the deceased had complained of heat in the stomach: she had prepared and given him the customary tribal medicine for leprosy: Nzota was present, Wakuru was not: the deceased had drunk the medicine at 7 a.m., started purging at 9 a.m., his condition had become serious at 6 p.m. and he had died next morning at cockcrow. According to Manyaki, Nzota and the witness were there and the deceased had died of the medicine by misadventure. Manyaki said further that she had fetched the third appellant, Marembo: he had dragged the body into the bush by means of a rope round the neck: he was accompanied by Manyaki and Nzota: he had buried the body. Manyaki said further that she had not announced the death or the place of burial: had she done so, some people would have taken pieces of the leper's flesh for black magic–for the purpose of giving the flesh to others who would then contract the disease. Manyaki said that she also stopped the people at home from mentioning the death because if the deceased's children learnt of it, they would mourn, and it is a common belief that people who mourn a leper catch leprosy. Manyaki said that she had put it about that the deceased had gone to the leprosarium at Shinyanga for treatment. She said that Wakuru was telling lies: she (Wakuru) was in league with one Mayani. This story Manyaki first told at the preliminary inquiry. She had previously made an extra-judicial statement to a magistrate, Mr. Marchant, giving a totally different version of events. She had then accused Nzota, Mwanangwa, Nyambereka of Kihunda (apparently the fourth appellant), Marembo (third appellant) and Twino (second appellant) of murdering the deceased.

The other appellants did not give evidence at the trial. They had previously made extra-judicial statements to a magistrate. The second appellant, Twino, had said that he had no idea that Makemba was dead; he (Twino) had been told that Makemba had gone to Shinyanga. Marembo, the third appellant, said that Manyaki had called him and he had gone to her house and found

Makemba dead and had been told that he had died of an overdose of purgative medicine: Manyaki had asked him to help her bury the corpse: this he had done: he had been accompanied by Manyaki and Nzota. The fourth appellant, Jacton, had said that he had visited Makemba's house and been told that Makemba had gone to Shinyanga.

The learned judge believed the evidence of Wakuru and took into account, as against Manyaki, her extra-judicial statement to the magistrate which was in conflict with her evidence in court.

Twino and Marembo, the second and third appellants, were convicted on Wakuru's evidence and on their statements to the police officer that they had buried Makemba at the spot which they indicated.

The fourth appellant, Jacton, was convicted on the evidence of Wakuru only.

At the hearing of the appeal the first three appellants were unrepresented, the fourth appellant was represented by counsel. The first ground of appeal put forward on behalf of the fourth appellant was that the learned judge erred in failing to direct himself as to the necessity, or alternatively the desirability, of corroboration of the evidence of the witness Wakuru, that the judge should have held that she was an accomplice, or at least so connected with the alleged crime as to render corroboration of her evidence desirable, and that there was no such corroboration. In support, counsel argued that, by reason of the false statement which Wakuru made to the police, she was an accessory after the fact to the murder of Makemba and thus particeps criminis and an accomplice within the rules in *Davies v. Director of Public Prosecutions* (1), [1954] A.C. 378: that fear of the consequences to herself would not be a defence to a prosecution for being an accessory and, therefore, could not remove her from the category of accomplice: the judge was under duty to, and did, decide whether she was an accomplice or not: and that if he decided that she was not an accomplice because she was in fear, that was a misdirection.

The learned judge, after reviewing Wakuru's dependent position in the homestead as a pregnant and inexperienced young widow opposed to a formidable matriarch, Manyaki, and the village headman, Jacton, found as follows:

> "If the motive for her concealment and for her putting out the Shinyanga story was (and I find that it was) one of fear for her own safety, and not of helping the murderers, that disposes of any argument that she was an accessory after the fact, and therefore an accomplice."

There was evidence on which the learned judge could make the finding that Wakuru's motive in saying at first to the police that the deceased had gone to Shinyanga was fear for her own safety. That was a finding of fact with which we should not interfere. We think that the learned judge was right in saying that such a finding disposed of the argument that she was an accessory after the fact and therefore an accomplice: *R. v. Levy* (2), [1912] 1 K.B. 158, 161; *R. v. Jones* (3), [1949] 1 K.B. 194; *Gathitu v. R.* (4) (1956), 23 E.A.C.A. 526. We think that this ground of appeal fails.

The second ground of appeal of the fourth appellant was:

> "2. The learned judge erred in relying in his judgment as against this appellant on certain extra-judicial statements, principally of the first accused, Manyaki, and in relying as against this appellant on the evidence of the first accused, Manyaki, for the purpose of finding that the deceased died by violence. The learned judge ought to have disregarded entirely the evidence and statements of the first accused and the statements of the second and third accused."

We did not understand learned counsel to argue that Manyaki's evidence given at the trial on affirmation in the presence of the other accused, was not

evidence against them. What he did argue was that Manyaki's extra-judicial statement to the magistrate was not evidence against her co-accused and that the learned judge, while he had correctly warned himself of this in para. 9 of his judgment, had in fact taken this statement into consideration in assessing the evidence against the fourth appellant. We do not think that this is correct. We think that in all the places in his judgment where the learned judge took Manyaki's extra-judicial statements into consideration, he was considering the case against her and that he did not take it into account in considering the case against the other three accused. We think that this is clear, for example, from paras. 25 and 26 of his judgment. This ground of appeal fails.

Objection was also taken by counsel for the appellants to the admission of the evidence of Sub-Inspector Francis to the effect that beside the grave of the deceased the second and third appellants had said that these were the remains of Makemba. It was argued that as these appellants were then in custody, statements made without a caution having been administered as required by the Police Ordinance should not have been admitted and that the statements were inadmissible under s. 26 of the Indian Evidence Act. We do not think, however, that the statements were confessions within the meaning of s. 26 or s. 25 of the Indian Evidence Act. At the most they were admissions of a gravely incriminating fact. (*Swami v. King Emperor* (5), [1939] 1 All E.R. 396, 405.) We doubt whether, in the circumstances of this case, they were even that.

We do not think that any of the points raised in argument on behalf of the fourth accused ought to succeed. Nevertheless we do not consider the trial satisfactory.

As already pointed out, the prosecution did not call the first wife of the deceased, Nzota, notwithstanding that, according to the extra-judicial statement of Manyaki she was present when, or just after, the attack was made on Makemba in Makemba's house, and notwithstanding that according to the extra-judicial statement of Marembo, she helped to take Makemba's body out of Manyaki's house where he was alleged to have died from an overdose of a purgative medicine. On either of these versions, Nzota was an eye-witness. Nzota had given evidence at the preliminary inquiry and was presumably available. It was not stated that she was not called by the prosecution because they could not rely on her telling the truth. Neither did the defence call her, although according to the evidence of Manyaki, she had been present when Manyaki gave the purgative medicine to Makemba and when he died. Nzota could hardly have been a more material witness. Her evidence might, if believed, have been very important on the question whether the deceased met his death by violence or by an overdose of purgative medicine. It has already been pointed out that there was nothing in the medical evidence which could decide that essential question and, as the case was left, that decision was made entirely on the evidence of Wakuru who had (as had Nzota) given a contradictory statement to the police.

At the close of the evidence of the first accused, Manyaki, there is an entry in the trial record as follows:

> "The court intimates that it will call Nzota d/o Sangiri (P.I.P.W. 5) pursuant to s. 151 of the Criminal Procedure Code, since her evidence appears to the court essential to the just decision of the case."

The learned judge noted that he would not regard the case for the defendant as closed until Nzota had been called and that the defence would be in a position to call evidence in rebuttal if desired and that any necessary adjournment would be given. There follows a note, on p. 48 of the record, that the court heard the arguments of all advocates for and against calling by the court of a witness at this stage. The court adjourned and, after the adjournment, there is a note to the effect that the court informed the advocates that on

further reflection it was of opinion that the calling by it of Nzota would be prejudicial to the defence in an unfair manner, and that it therefore would not call her.

The section which governs the matter is s. 151 of the Tanganyika Criminal Procedure Code which reads as follows:

> "151. (1) Any court may, at any stage of an inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.
>
> "(2) The power created by sub-s. (1) shall be exercised in the same circumstances and subject to the same limitations as the power created by s. 540 of the Indian Code of Criminal Procedure, 1898."

In England there seems to be some conflict of opinion as to whether the rule that the prosecution can only call further evidence after the close of their case to rebut matters arising ex improviso which no human ingenuity can foresee applies also to the judge. In *R. v. Harris* (6) (1927), 20 Cr. App. R. 86, at p. 89, Avory, J., said that the rule

> "should also apply to the judge who calls the witness, i.e. after the close of the case for the defence fresh evidence is limited to something arising ex improviso."

In *R. v. Wallwork* (7) (1958), 42 Cr. App. R. 153, at p. 158, however, Lord Goddard, L.C.J., said:

> "The learned judge took the view, and I think learned counsel took the view, that as the case for the prosecution had been closed, further witnesses could not be called for the prosecution, and, in our view, they could not have been called for the prosecution unless after the case for the defence some point had arisen which took the prosecution by surprise, when, according to the decided cases, evidence in rebuttal could have been given. The learned judge took the view that he could not call the witness. With all respect to the learned judge, this court does not take that view. This court takes the view that in a criminal trial–and I emphasise a criminal trial because it is different in civil proceedings–if the presiding judge, whether he is a judge of assize or chairman of quarter sessions, is of opinion that some person ought to be called who can throw material light on the subject, in his discretion he may call him and examine him himself."

But in England the position is different. In England the matter lies entirely within the discretion of the judge. In Tanganyika, on the other hand, there is an express statutory provisions in sub-s. (1) of s. 151 that the court shall summon and examine a witness if his evidence appears to it essential to the just decision of the case. Sub-s. (2) (which has no counterpart in the Kenya or Uganda Codes) seems to make applicable the Indian authorities on s. 540 of the Indian Code of Criminal Procedure which is in identical terms with s. 151 (1) of the Tanganyika Code. Many of the Indian cases are not available here; but after examining some that are available, they seem to establish that in any case in which the calling of an additional witness by the court may prejudice the defence, the discretionary power given by s. 151 should be sparingly exercised and should not be used merely to bolster up the prosecution. Nevertheless the court is under a duty to call and examine a witness if his evidence appears to it essential to the just decision of the case and it is not an improper exercise of the power to call such a witness, even if his evidence supports the case for the prosecution and not that of the accused: *In re Narayanan* (8) (1942),

A.I.R. Mad. 223; *Boniface s/o Muhindi & Another v. R.* (9), [1957] E.A. 566 (C.A.).

We agree with the commentary on s. 540 contained in Mitra's Criminal Procedure Code, para. 1412 at p. 2141:

> "Under the latter part of this section the court is bound to summon and examine any witnesses whose evidence seems to be essential to the just decision of the case–*Ram Sarup*, 6 C.W.N. 98. Discretion by s. 540 is wide, but the section is not wholly discretionary. The last part of it imposes upon the magistrate an obligation; it is, that the court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. If the magistrate is of opinion that the evidence of certain witnesses is essential, then the section imposes upon him the obligation of summoning them."

This seems to be the plain meaning of the provisions of sub-s. (1) of s. 151 the equivalent of which is in force in other territories which do not have sub-s. (2).

Local decisions in those territories (as was pointed out in *Chai Munga Dagamra v. R.* (10), Kenya Supreme Court Criminal Appeal No. 116 of 1956 (unreported)), are in conflict. We prefer to follow *Aw Deria Hussein Dolbahanta Jama Said v. R.* (11) (1953), 20 E.A.C.A. 181, which depends upon the wording of s. 384 of the Somaliland Criminal Procedure Code–a section identical in wording with s. 151 (1) of the Tanganyika Code-rather than *Newmark v. R.* (12) (1934), 1 E.A.C.A. 162, and *R. v. Mangatinda Ole Dusiat* (13) (1933), 15 K.L.R. 112, which depend upon the applicability of *R. v. Harris* (6). The English authorities may perhaps be a guide to the discretionary part of sub-s. (1) but they are not a guide to the mandatory part of it.

We are of opinion that once the learned judge had come to the conclusion (which seems to have been amply justified) that Nzota's evidence was essential to the just decision of the case, he was under a statutory duty to call her, whether her evidence would be prejudicial to the defence or not, unless, indeed, after hearing argument, he changed his mind as to whether her evidence was essential to the just determination of the case. This, in his note on p. 48, he has not said. As the prosecution, whose witness Nzota was at the preliminary inquiry, decided not to call her, there may have been grounds for drawing a presumption under illustration (*g*) to s. 114 of the Indian Evidence Act that her evidence would not be favourable to the Crown. The learned judge drew no such presumption and decided in favour of the Crown.

At the request of both counsel appearing on the appeal and in order that justice might be done, we looked at the deposition of Nzota given at the preliminary inquiry. She testified *inter alia*:

(*a*) that the deceased had only had twenty head of cattle and that twenty remained. This was relevant as tending to negative the suggestion that Manyaki had given cattle to the second and third appellants for their part in the murder;

(*b*) that Manyaki had given the deceased medicine from which he had died and that the third appellant (Marembo) had been called by Manyaki to bury him: that the third appellant had dragged the corpse away with a rope round its neck, but where to the witness did not know, as neither she nor Manyaki had accompanied Marembo;

(*c*) that Wakuru was not there, as she was in hospital with a threatened abortion. This reinforced the evidence of Manyaki on this point.

It is obvious that this testimony did not support the case for the Crown. It differed only in a minor respect from the cases of Manyaki and Marembo. It is true that Nzota also admitted in her deposition that she had previously given an inconsistent story to the police (though to what extent her previous

story was inconsistent did not appear) and her evidence might have been shown in cross-examination to be untrue and, therefore, in its ultimate effect, prejudicial to the defence; but, if she adhered to her deposition, her evidence in chief would have been, on the face of it, far more favourable to the case for the defence than to the case for the Crown. The learned judge, having (rightly in our opinion) come to the conclusion that Nzota's evidence was essential to the just decision of the case, was not (unless he changed his mind) entitled to refrain from calling her as a witness merely because, for some reason which is not at all apparent, he thought that the defence might thereby be prejudiced. In the result, essential evidence, which, though suspect having regard to her previous inconsistent statement to the police, would appear from the deposition to have been favourable, for the most part, to the defence was withheld from consideration.

The learned judge decided the case almost entirely upon the evidence of Wakuru. There may have been some slight additional evidence against Manyaki; but there was virtually nothing else against the other appellants. The learned judge seems to have thought that the admissions of Marembo and Twino that they had buried the body were highly incriminating; but they were equally consistent with the burial of a leper who had died by misadventure. There was virtually nothing but Wakuru's evidence against the fourth appellant.

We have held that Wakuru was not an accomplice; but she was a witness who, whether out of fear for her own safety or not, had made a false and misleading statement to the police. The evidence of such a witness is unsafe as the sole foundation for a conviction, particularly in a capital case, unless supported aliunde.

For the reasons we have given we think that the trial was unsatisfactory.

The appeals are allowed and the convictions and sentences set aside. The appellants must be released.

Appeal allowed. Conviction set aside.

The first, second and third appellants did not appear and were not represented.

For the fourth appellant:
Fraser Murray
Fraser Murray, Thornton & Co, Dar-es-Salaam

For the respondent:
GC Thornton (Crown Counsel, Tanganyika)
The Attorney-General, Tanganyika

DP Sachania and another v Hirji Pitamber

[1958] 1 EA 503 (HCZ)

Division: HM High Court for Zanzibar at Zanzibar

Date of judgment: 27 September 1958

Case Number: 34/1958

Before: Windham CJ

Sourced by: LawAfrica

[1] Limitation of action – Action for administration accounts and payment of losses through waste – Action filed over three years after order for filing accounts made – Accounts alleged false – Period of limitation – Limitation Decree (*Cap.* 11) (*Z.*) *– Art.* 116 *and art.* 119 *of Schedule thereto.*

Editor's Summary

The plaintiff sued as next friend of a minor alleging that accounts prepared by the defendant in respect of the management of certain properties and collection of rents for a deceased estate were false and sought an order for administration by the court, that proper accounts be taken and for payment by the defendant of the loss suffered by the estate through the defendant's waste. The deceased had died in 1941 and by a vesting deed in 1942 the immovable properties of the testator were vested by the executors, one of whom was the defendant, in amongst others the plaintiff. The defendant, however, according to the plaint continued to manage and collect rents from the properties, purporting to do so as executor, and he failed despite requests to supply or file in court accounts of his administration. The plaintiff obtained an order for the filing of accounts, which when produced and inspected in April, 1955, the plaintiff considered to be false and to show waste. After pleadings had been filed the defendant took an objection in limine, which he had not raised in his pleading, that the suit was time-barred under the Limitation Decree.

Held –

(i) when a question of limitation is raised by a defendant in limine it is the duty of the court to consider the point, but in doing so the court will look only at the plaint and will decide, in the light of the facts alleged and the prayer in the plaint, whether the claim is time-barred, the allegations of fact being assumed for that purpose to be true.

(ii) since the plaintiff was not claiming a legacy but administration and the payment of moneys lost through waste, the article in the Schedule to the Limitation Decree which applied was art. 116 and not art. 119 as claimed by the defendant.

(iii) under art. 116 the period of limitation is six years reckoned from the time the right to sue accrued; in this case the plaintiff could not have sued before he had examined the accounts and since the action was filed on May 10, 1958, the defendant's contention failed.

Order accordingly.

Case referred to in judgment:

(1) *Salebhai Abdul Kadar Basrai v. Bai Safiabu* (1912), 36 Bom. 111.

(2) *Rajamannar v. Venkata Krishnayya* (1902), 25 Mad. 361.

Judgment

Windham CJ: The defendant through his counsel has argued in limine a point which he has not raised in his pleadings but which nevertheless it is the duty of this court to consider, namely the question

whether this suit is time-barred under the Limitation Decree. When such a point is raised at this stage the court will look only at the plaint, and will decide whether in the light of the prayers and the allegations of fact therein, those allegations being assumed for the present purpose to be true, the claim is barred.

This is a suit by a beneficiary under a will against one of the executors. The deceased died on June 16, 1941. By a vesting deed dated October 17,

1942, the immovable properties left by the deceased were vested by the executors in (inter alios) the plaintiff. But thereafter the defendant, according to the plaint, continued to manage and collect rents from these properties, purporting to do so as executor, and he failed, in spite of requests, to supply or to file in court true and full accounts of his administration. Accordingly the plaintiff, on March 2, 1955, applied for, and six days later obtained, an order of this court requiring the defendant to file such accounts, which on April 28, 1955, he did, a copy of the accounts being annexed to the plaint. The plaintiff, being dissatisfied with them, filed this suit on May 10, 1958, and in his plaint, after setting out the above allegations of fact, and also the many particulars in which he alleges that the defendant in the course of his administration has wasted the deceased's estate, prays that the estate be administered by the court and that proper accounts be taken, and prays secondly that the defendant be ordered to pay him the sum of Shs. 43,971/47 as the loss suffered by the estate through the defendant's acts of waste.

After carefully reading the plaint I am satisfied that the plaintiff is not claiming in it any legacy, whether in words or in effect. Accordingly the article of the Schedule to the Limitation Decree which is applicable is not art. 119, as contended on behalf of the defendant. I hold that the article which does apply is art. 116, the suit being for administration, with no prayer direct or indirect for the payment of any legacy, and for the payment of moneys lost to the estate through alleged acts of waste. The term "legacy" cannot cover the latter, since a legacy is a sum of money or other property left to a person under a specific provision of the will. That art. 116 (which corresponds to art. 120 in the Indian Limitation Act, 1908) is in these circumstances the article applicable emerges clearly from a perusal of the Indian decisions in *Salebhai Abdul Kadar Basrai v. Bai Safiabu* (1) (1912), 36 Bom. 111, and *Rajamannar v. Venkata Krishnayya* (2) (1902), 25 Mad. 361. And see also Rustomji's Law of Limitation (5th Edn.) at p. 1041, under the heading "Administration Suit".

The period of limitation under art. 116 is six years reckoned from when the right to sue accrues. Now in the present case the suit, as set out in the plaint, is for administration of the estate by the court by reason of the accounts submitted by the defendant (for which the plaintiff had previously requested him without success) proving false, and for the payment of moneys due to the estate through the defendant's acts of waste and maladministration. It is clear from a perusal of paras. 11 and 12 of the plaint that all these allegations of waste and maladministration arise from an examination by the plaintiff of the accounts eventually submitted by the defendant on April 28, 1955, and that until he had examined those accounts the plaintiff was in a position neither to discover falsities in them leading to the necessity of asking the court to administer the estate nor to ask the defendant to make good those particular losses to the estate through waste which only came to his knowledge upon his examination of the accounts. In short, the plaintiff could not have brought this action any earlier than April 28, 1955. And since the date when a plaintiff's "right to sue accrues" is the earliest date when he could have sued for the relief sought, then the right to sue in the present case accrued on April 28, 1955. The action was filed on May 10, 1958, well within the six years which under art. 116 is the period of limitation reckoned from when the right to sue accrues.

For these reasons I hold that the defendant's contention in limine that this suit is time-barred must fail. The plaintiff will have his costs on this issue in any event.

Order accordingly.

For the plaintiff:
Abdulrasul Lakha

Balsara & Lakha, Zanzibar

For the defendant:
Dinshaw Karai
Dinshaw Karai

The Attorney-General v Shamba Ali Kajembe
[1958] 1 EA 505 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	11 August 1958
Case Number:	86/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika–Harbord, J

[1] Criminal law – Corruption – Complainant's bicycle stolen – Complainant offering to withdraw complaint if compensated for loss – Money paid to policeman for compensating complainant – Whether money received corruptly – Whether corrupt motive in giver and recipient relevant – Penal Code, s. 91 (1) *and s.* 91 (2) (*T.*) *– Penal Decree, s.* 88 *and s.* 89 (*Z.*).

Editor's Summary

Zena, daughter of Mzee, had a brother Jafferi who stole a bicycle in August, 1956, from one Simon and sold it to Ali Juma. In April, 1957, Ali Juma, who had been found in possession of the bicycle, was arrested. He told the police that Jafferi had sold it to him. The respondent was then a sub-inspector of police at Kigoma where the case was being investigated. Hearing of the investigation Zena telegraphed to Jafferi at Mwanza telling him the cycle was in police hands and to send a receipt to prove his title to it. Zena did not then know that Jafferi had stolen the bicycle. The police learnt about the telegram and the respondent sent for Zena, and said the matter was serious. Zena asked him how it could be put right and whether her brother could be fined. Simon later came to Zena's house and told her he would drop the case if compensated whereupon Zena told him she was taking money to the respondent who could buy Simon a new bicycle; if the money was insufficient Simon could take back his cycle and some money as compensation for being deprived of it. When Zena arrived at the police station the respondent was not there, but he came to Zena's house next day accompanied by a plain clothes constable when Zena handed over Shs. 340/- to the respondent who took it and left, assuring her she need not worry further. Simon did not get any of the money and, when Jafferi was convicted later at Mwanza and imprisoned, Zena demanded her money back, saying that since there had been no fine, the money was not needed. The respondent subsequently returned Shs. 100/- to Zena, but before he had repaid the whole, an investigation into the respondent's conduct was begun by his superiors and he was later charged with and convicted of official corruption, contrary to s. 91 (1) of the Penal Code. On appeal it was contended for the respondent

that the facts did not disclose the offence charged. The judge who heard the appeal held that Zena, an African, thought the cycle owner would himself get the case against her brother withdrawn on receiving what was justly due to him and that the case would then fall away of itself; that Zena's intention in giving the money to the respondent was innocent, as she wished to get the cycle owner to withdraw his complaint and the respondent could not be guilty of corruptly receiving the money so tendered. He accordingly allowed the appeal and quashed the conviction. The Attorney-General appealed from this decision.

Held –

(i) in charges of corruption under s. 91 (1) of the Penal Code, it is the mental attitude of the recipient which is crucial in determining whether or not an offence has been committed; if the recipient accepts a gift which he knows to be corruptly given, on account of some act or omission in the discharge of his duty, or with intent to influence him thereafter, so that he may do some act or may make some omission, the recipient is guilty of the offence and it matters not that he may have no intention of showing a favour

to the donor; but a corrupt intention on the part of the giver is not an essential ingredient of the offence. *R. v. Akbarali K. Jetha* (1947), 14 E.A.C.A. 122, considered.

(ii) the judge who heard the appeal found that Zena's purpose in handing the Shs. 340/- to the respondent was that he should hand it to the complainant who, on getting what was justly due to him, would withdraw the case against her brother; if so, the money was not received by the respondent for himself, but for Simon, and it was possible to support the acquittal of the respondent on that ground.

Per Curiam – "We do not think that a benefit obtained for another, in which the accused is entirely disinterested, could be said to have been obtained by him corruptly."

(iii) the magistrate's inference that receipt of the money by the respondent was incompatible with a vigorous and honest prosecution of Jafferi, was a possible, but not an inevitable inference, and there was an element of doubt, on which the respondent should have been given the benefit.

Appeal dismissed.

Case referred to in judgment:

(1) *R. v. Akbarali K. Jetha* (1947), 14 E.A.C.A. 122.

(2) *Said Mohamed Murtadha v. R.* (1954), 21 E.A.C.A. 190.

(3) *Bradford Election Petition* (No. 2) (1869), 19 L.T. 723.

(4) *Emperor v. Rama Nana* (1921), 46 Bom. 317.

(5) *Commissioner of Stamps, Straits Settlements v. Oei Tjong Swan*, [1933] A.C. 378.

Judgment

The following judgment was read by direction of the court: This is an appeal by the Crown from a judgment of the High Court of Tanganyika allowing an appeal from the conviction of the respondent by the District Court of Tabora on a charge of official corruption contrary to s. 91 (1) of the Penal Code. On July 21, we dismissed the appeal and now give our reasons.

The facts as found by the magistrate and accepted by the learned judge were briefly as follows:

Zena, daughter of Mzee, has a young brother, Jafferi. Jafferi stole a bicycle in August, 1956, from one Simon and sold it to Ali Juma. In April, 1957, Ali Juma was found in possession of the stolen cycle and was arrested. He told the police that Jafferi had sold it to him. The respondent was then a sub inspector of police at Kigoma where the case was being investigated. News of the investigation reached the ears of Zena who sent a telegram to Jafferi, who was then in Mwanza, telling him that the cycle was in the hands of the police and that he should quickly send a receipt to prove his title to it. Zena did not then know that Jafferi had stolen it. The police got to know of the despatch of this telegram and the respondent sent for Zena. He told Zena that the matter was serious. She asked how it could be put right and whether it was possible for her brother to be fined. What replies the respondent made to this question did not emerge.

Simon (owner of the cycle) came to Zena's house and told her that he would drop the case if he got compensation. He asked for money to buy a new cycle. Zena, in her evidence, stated that she told him

that she was taking the money to the respondent, who should buy Simon a new cycle; but if the money was insufficient for this, Simon could take back his own cycle and some money as compensation for the period during which he had been deprived of it. Simon said that he wanted the money quickly. Zena took Shs. 340/- to the police

station. The respondent was not there. A constable telephoned to the respondent who said that he would come to Zena's house next day. He came, accompanied by a plain clothes constable. Zena gave Shs. 340/- to the accused who took it and left, saying that Zena had no further need to worry.

A few days later Zena saw Simon. Simon said that he was waiting. Zena said that she had given the money to the respondent. Zena met the respondent who told her that she need not go to Mwanza, where the case against Jafferi was to be held, as he had done everything and there was no need to worry. Jafferi was convicted of the theft of the bicycle and sentenced to eight months' imprisonment. Simon said that he had not received the money. Zena then demanded her money back from the respondent saying that there had been no fine and so it had not been needed. Subsequently the respondent returned Shs. 100/- to Zena; but before he had repaid the whole, the matter had passed into the hands of his superiors for investigation of the respondent's conduct.

The learned judge, considering himself bound by a judgment of this court in *R. v. Akbarali K. Jetha* (1) (1947), 14 E.A.C.A. 122, held that, as Zena's intention in giving the money to the respondent had been innocent, the respondent could not be guilty of corruptly receiving the money within the meaning of s. 91 (1) of the Penal Code. The learned judge dealt with the matter as follows:

> "10. I turn finally to Mr. Mann's third submission, viz. that the facts as found by the learned resident magistrate did not disclose the offence of official corruption. Mr. Mann refers the court to the judgment read by Sir Barclay Nihill, P., in the case of *Akbarali K. Jetha* ((1947), 14 E.A.C.A. 122 at p. 123):
>
> " 'The essence of the offence of official corruption is the motive which animates the giver; if he gives either on account of some past act or omission in his favour, or with the hope and expectation that his gift may so influence the donee that something may thereafter be done or omitted in his favour the offence is complete. It is not necessary that there should be a corrupt and express bargain between the giver and the recipient. Conversely, by sub-s. (1) of the section, it is the mental attitude of the recipient which constitutes the offence; if he accepts a gift with the knowledge that it is being given to him on account of some past act or omission or with the intent to influence him thereafter so that in the discharge of his official duties he may do some act or make some omission, he is guilty of the offence created by the sub-section and it matters not that in fact he may have no intention of showing favour to the donor.'
>
> "11. Now in that passage the Court of Appeal is dealing with both sub-sections. It deals first with sub-s. (2) of s. 91, which is directed against the giver of a bribe, and the judgment says that the essence of the offence is the motive which animates the giver. But when, beginning with the word, 'conversely, the judgment goes on to deal with the receiver of the bribe, the Court of Appeal equally brings in the purpose of the giver, for the judgment says 'if he' (the recipient) 'accepts a gift with the knowledge that it is being given to him on account of some past act or omission, or with the intent to influence him thereafter', etc.
>
> "12. What, then, was Zena's purpose in handing the Shs. 340/- to the accused? Her evidence on this question has been set out in para. 5 (supra) and it seems clear that the cycle-owner offered to withdraw his complaint if he was compensated for the damage he had suffered by the theft. Zena then sought to use the accused as a friendly go-between (as even a magistrate could have been in cases coming under s. 134 (Criminal Procedure

Code)) in what she regarded as a civil transaction. The notion that complaints can be settled out of court is common to Africans and it does not occur to them that because a punch on the nose is a misdemeanour, while the theft of Shs. 1/- is a felony, therefore the former may lawfully be settled out of court, while it will be the criminal compounding of a felony so to settle the latter. The distinction between misdemeanours and felonies does not exist in native law and custom, so far as I am aware.

"13. Her idea seems to have been that the cycle-owner would himself bring the case against her brother to an end by withdrawing the complaint on getting what was justly due to him, not that the accused should stifle the prosecution. She seems to have thought that on complainant's withdrawal the case would fall away of itself, as it would when s. 134 operated. If this be so, then the accused did not, in terms of the sub-section corruptly receive the Shs. 340/- for the cycle-owner on account of something to be afterwards done (or omitted) by the accused in the discharge of his duties as a sub-inspector. In Sir Barclay Nihill's words, the Shs. 340/- was not given to the accused with the intent to influence the sub-inspector, but with intent to influence cycle-owner, and this with no consciously bad motive. If that was the intent, there was no corruption, and if the accused then or thereafter decided to misappropriate the money, even at the cost of stifling the prosecution, or attempting to do so, there was still no corruption, but only theft and the compounding a felony. I would add that in my view it is straining the language of the sub-section too far to say that the thing to be done by the accused in the discharge of the duties of his office and on account of which the Shs. 340/- was received by him for the benefit of another, was to act as a go-between, and that therefore the requirements of the sub-section are satisfied.

"14. I therefore allow the appeal, quash the conviction and set aside the sentence, but in doing so I would observe that in my view it is a very proper case for a second appeal."

Section 91 of the Penal Code, which was in force at the material time reads:

"Official Corruption.

"91. Any person who–

(1) being employed in the public service, and being charged with the performance of any duty by virtue of such employment, corruptly solicits, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by him in the discharge of the duties of his office; or

(2) corruptly gives, confers, or procures, or promises or offers to give or confer, or to procure or attempt to procure to, upon, or for any person employed in the public service or to, upon, or for any other person, any property or benefit of any kind on account of any such act or omission on the part of the person so employed,

is guilty of a misdemeanour, and is liable to imprisonment for three years."

The respondent in the present case was charged with corruptly receiving money under s. 91 (1). In *Akbarali's* case (1) the appellant had been charged with corruptly giving money under s. 91 (2), and, as stated in the judgment, the only matter in dispute was whether the appellant, that is to say the giver, had or had not a corrupt intention. It had been argued that he was not guilty

because there had been no express bargain between him and the recipient as to what favours he was to receive and because the recipient did not know what favours he expected to receive. It was there held that this did not matter so long as the giver had a general corrupt intention. The case is a binding authority only upon s. 91 (2). The remarks of the learned Chief Justice of Kenya, as he then was, upon s. 91 (1) are obiter dicta. We think, with great respect, that they are correct in the context of the facts with which the court was dealing in *Akbarali's* case (1). But they are not exhaustive. It is undoubtedly correct that in cases under sub-s. (1) of s. 91, it is the mental attitude of the recipient which is crucial in determining whether or not an offence against that sub-section has been committed and that if he accepts a gift which he knows to be corruptly given on account of some act or omission in the discharge of the duties of his office, or with the intent to influence him thereafter so that, in the discharge of his official duties, he may do some act or make some omission, he is guilty of the offence created by the sub-section and it matters not that in fact he may have no intention of showing favour to the donor. But that is not to say that a corrupt intention on the part of the giver is an essential ingredient in an offence under sub-s. (1) of s. 91. As Sir Barclay Nihill said, it is the mental attitude of the receiver which is important under sub-s. (1).

The learned Crown counsel who appeared for the attorney-general also drew our attention to a dictum appearing in the judgment of this court in *Said Mohamed Murtadha v. R.* (2) (1954), 21 E.A.C.A. 190. That was an appeal from a conviction for extortion under s. 89 of the Penal Decree of Zanzibar. There had also been a charge under s. 88 of the Penal Decree, which corresponds with s. 91 of the Penal Code of Tanganyika. The dictum referred to is at p. 193:

> "He" (the magistrate) "holds, in our view rightly, that a charge under s. 88 of the Penal Decree requires a guilty mind in the giver of the bribe as well as the receiver."

Learned Crown counsel pointed out that this was an obiter dictum, since there was no appeal before the court against Murtadha's acquittal on the charge under s. 88. He asked us to examine this dictum, and the passage referred to in *Akbarali's* case (1), as the attorney-general attached considerable importance to the matter. This anxiety we can understand as, if it should be held that a corrupt intention or purpose on the part of the giver is an essential ingredient of an offence against sub-s. (1) of s. 91, this might be thought to deal a blow at the enforcement of the criminal law, for instance in the common case of a police trap, where the motive of the giver is not corrupt and he has not a guilty mind. We may say at once that we do not think that the above-quoted dictum in *Murtadha's* case (2), though perhaps too widely stated, should be taken as laying down that an offence against sub-s. (1) of s. 88 of the Zanzibar Penal Decree cannot, in any case, be committed, unless the giver has a guilty mind. The court there used the word "bribe" which connotes a corrupt gift and begs the question now at issue; also, in *Murtadha's* case (2) the attention of the court was primarily directed to a charge under s. 89 and not to a charge under s. 88 (1). In *Akbarali's* case (1) and also in *Murtadha's* case (2) this court was not considering an offence by way of solicitation or attempt. Nor was it considering the case of a trap, where there is an ostensible, but not a real, corrupt bargain. Nor again was it considering case where, by reason of infancy, mental deficiency or the like, there could be no criminality in the giver. It was considering only the usual case of the completed corrupt bargain, and was emphasising that in those cases, unless mutuality to the extent which we shall later describe is established, the offence of "receiving" contrary to s. 91 (1) is not established, though there may be an offence of solicitation or attempt.

In considering whether a corrupt intention on the part of the giver is an

essential ingredient of an offence under s. 91 (1) of the Tanganyika Penal Code, it may be useful to consider the construction which has been placed upon the word "corruptly" appearing in certain English and Indian statutes, by judicial decisions in those countries; bearing in mind, however, that the statutory provisions there construed are not the same as s. 91 and that the word "corruptly" may bear different meanings in different contexts. There is a judicial definition of "corruptly" as used in the Corrupt and Illegal Practices Act (17 and 18 Vict. c. 102) contained in *Bradford Election Petition* (*No. 2*) (3) (1869), 19 L.T. 723, at p. 727:

> "Now what is the exact meaning of that word 'corruptly'? It is difficult to tell; but I am satisfied it means a thing done with an evil mind–done with an evil intention; and except there be an evil mind or an evil intention accompanying the act it is not corruptly done. And thus when the word corruptly is used it means an act done by a man knowing that he is doing what is wrong, and doing so with evil feelings and evil intentions. I think it may be safely said that is the meaning of the word 'corruptly'."

The word "corruptly" is used in six sections of the Indian Penal Code and it is clear that in that Code it is used in the sense not only of bribery, but in the sense of gaining some advantage inconsistent with official duty or the rights of others. In *Emperor v. Rama Nana* (4) (1921), 46 Bom. 317, the accused was charged with corruptly giving false evidence under s. 196 of the Indian Penal Code. It was alleged that an offence under s. 196 had not been committed because it had not been shown that the false witness had been bribed to give his evidence. It was held by McLeod, C.J., *inter alia* that "corruption" should be given its ordinary meaning of vitiated, tainted or putrid; that bribery is not the only cause which produces corruption; and that the desire to screen an offender from the legal consequences of his act could well be designated as a corrupt motive and it would not require evidence to satisfy the court that the witnesses in giving false evidence had that desire. The corrupt motive would be self-evident from the fact that the false testimony was given. McLeod, C.J., added:

> "But I very much doubt whether the user cannot be corrupt unless it involves the corruption of a third person."

But those cases were decided on different statutory provisions. As already mentioned, the precise meaning to be accorded to the word "corruptly" may vary according to the context in which it is used; and the answer to the question of what it means in s. 91 (1)

> "must be found from an examination of the Ordinance itself, for the best and safest guide to the intention of all legislation is afforded by what the legislature itself said."

(*Commissioner of Stamps v. Oei Tjong Swan* (5), [1933] A.C. 378, 387.) The fourth meaning assigned to "corrupt" in the Oxford Dictionary is

> "perverted from uprightness and fidelity in the discharge of a duty; influenced by bribery or the like; venal".

In our view, an examination of s. 91 (1) shows that "corruptly" is there used as the adverb of "corrupt" in that narrower sense. We think that this is an inescapable inference from the fact that the subject dealt with is the receipt of property or a benefit on account of something done or to be done.

The question of law which the Crown now asks us to decide is whether, in order to constitute an offence under s. 91 (1), there must be a corrupt motive or intention in the giver, as well as in the receiver of the property or benefit There are no express words in the sub-section requiring this, and it is unusual in a criminal charge for it to be necessary for the prosecution to prove the

intention of someone other than the accused. Is there a necessary implication from the wording of the sub-section requiring a corrupt intention in the giver to be shown?

The words of s. 91 (1) are set out above. The points requiring proof in order to constitute an offence under sub-s. (1) are seven, and seven only, that is to say–

(1) that the accused is a person employed in the public service;

(2) that he is charged with the performance of a duty by virtue of such employment;

(3) that he corruptly solicits, receives or obtains or agrees or attempts to receive or obtain;

(4) any property or benefit of any kind;

(5) for himself or any other person;

(6) on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by him;

(7) in the discharge of the duties of his office.

The words quoted under (6) above

> "on account of anything already done or omitted to be done or to be afterwards done or omitted to be done by him"

require that the act or omission must be something effected or to be effected by the accused and imply that the general object must be understood by both parties. To that extent there must be mutuality. But the precise means to be employed to attain the object need not be stipulated, nor need there be any express agreement. (*R. v. Akbarali K. Jetha* (1)).

Do the words "corruptly solicits, receives or obtains or agrees or attempts to receive or obtain" imply that there must be a corrupt motive in the giver as well as the receiver? The word "corruptly" governs all these verbs; and it could be argued that "corruptly agrees" or "corruptly receives" or "corruptly obtains" implies some kind of mutually corrupt bargain in effecting which both receiver and giver would have a guilty mind. And, of course, this would be the usual case. But there are also the words "corruptly solicits" and "corruptly attempts to receive or obtain". Clearly a corrupt solicitation is an unilateral action implying no guilty mind on behalf of the person solicited until the solicitation is agreed to. Similarly an attempt need not necessarily imply any guilty mind in the other party.

In our view, sub-s. (1) means exactly what it says and "corruptly" means that the corrupt purpose or motive must be in the mind of the person who solicits, receives or obtains or agrees or attempts to receive or obtain, irrespective of whether the other party to the conversation, communication or transaction has a corrupt motive or not. The mind of the giver is relevant under sub-s. (2): it is not essential to prove a corrupt mind in the giver on a charge under sub-s. (1), though this will normally be one of the circumstances surrounding the offence. The ostensible object of the parties must, we think, be one involving "corruption" on the part of the recipient in the narrow sense indicated above.

Section 1 of the Public Bodies Corrupt Practices Act, 1889, in England has a similar dichotomy to that in s. 91 of the Tanganyika Penal Code, that is to say that the offence of corruptly soliciting, receiving or agreeing to receive a gift or advantage is dealt with in sub-s. (1), and the offence of corruptly giving, offering, etc., a gift or advantage is dealt with in sub-s. (2). So far as we can ascertain, there is no case in the books in which it has ever been held that in a prosecution for corruptly receiving a gift under sub-s. (1) of s. 1 of that Act, a corrupt motive in the giver must be proved.

The words in s. 91 (1) “for himself or for any other person” require that the benefit must be for the accused or, we think, for another person in whom the

accused is interested, such, for instance, as a relative, friend or superior, so that the effect of the benefit to the third party may itself be a gratification to the accused. We do not think that a benefit obtained for another, in which the accused is entirely disinterested, could be said to have been obtained by him "corruptly".

The learned judge appears to have found that Zena's purpose in handing the Shs. 340/- to the respondent was that he should hand it to the complainant, Simon, who, on getting what was justly due to him would withdraw the case against her brother. If so, the money was not received by the respondent for himself, but only for Simon, and the respondent would not receive any direct or indirect benefit himself: all the respondent was to do was to act as a go-between. The learned judge refused to find that this alone would satisfy the requirements of the section. It would be possible to support the learned judge's acquittal of the respondent on those grounds.

But there is another ground for holding that the respondent should not have been convicted. The learned magistrate, after reviewing the facts, found that Zena had paid Shs. 340/- to the respondent. We did not quarrel with this finding of fact. There was plenty of evidence upon which the magistrate could come to this conclusion. We did, however, think that the inference which he drew from this fact was unsound. The learned magistrate dealt with the matter as follows. At p. 53 he said:

> "Zena says she took Shs. 340/- to the police station to accused but he was not there. However, accused passed word to her that he would call and see her. She says he did so and that she gave him the Shs. 340/- in the presence of a plain clothes constable. The accused took the money saying she had no need to worry any further about the matter.
>
> "If this evidence is correct it indicates that accused received this money by virtue of his position in that he promised to do something in respect of a case which he was investigating. It is not clear what accused was going to do at that stage, but it could not be inferred other than that he intended to favour Zena (P.W. 7) in the matter of her brother's case of cycle stealing."

And at p. 60 he said:

> "It is not clear from the evidence whether accused ever intended to help Zena's brother, he may have only pretended that he would help her brother with regard to the impending prosecution. Accused never got the chance of carrying out any such intention, because as his evidence shows he was called away from Kigoma for several days to investigate a murder. When he returned he found the case had been sent to Mwanza and the witnesses were just due to leave Kigoma.
>
> "Therefore the mere fact that Jafferi, Zena's brother, was prosecuted to conviction does not necessarily show that accused never intended to try and prevent this. He had not the chance of carrying out such an intention. The charge states (ct. III) that accused got the money from Zena on account of something to be done by him in the discharge of his duties. I am satisfied that the thing to be done was to show some favour to Jafferi in connection with the latter's charge of stealing. Whether it was to abstain from prosecuting Jafferi is not clear, but I am satisfied it was a promise to settle the matter in a way which would make Zena happy, and this could scarcely be taken to mean a vigorous and honest prosecution by accused in the course of his duties."

We thought that these directions were unsatisfactory and that it was incorrect to say that the taking of the money was necessarily incompatible with a vigorous and honest prosecution of Jafferi. That was a possible, but not the inevitable, inference. The respondent might, at that stage, have intended to produce the

money in court as restitution, or to see that it was paid to the complainant and to inform the court accordingly. If so, he would not have received a benefit for himself and, though he would have received a benefit for the complainant he would not have received it "corruptly". No offence would have been committed against s. 91 (1) of the Penal Code. If the respondent, having innocently received the money, afterwards decided to, and did, misappropriate the money and convert it to his own use, that might well have constituted some other offence such as theft. (We do not pause to consider what offence would have been committed.) But that would not constitute official corruption. We were satisfied that the passages referred to were misdirections. In the circumstances, we did not think that the conviction could stand. There was an element of doubt, of which the respondent should have been given the benefit. We, therefore, dismissed the appeal; maintaining the order of the learned judge; but not altogether for the same reasons.

Appeal dismissed.

For the appellant:
AM Troup (Crown Counsel, Tanganyika)
The Attorney-General, Tanganyika

The respondent appeared in person.

The Administrator General v Suleiman Bin Seif Bin Hamed El Busaidi and another

[1958] 1 EA 513 (SCZ)

Division:	HH The Sultan's Court for Zanzibar at Zanzibar
Date of judgment:	19 July 1958
Case Number:	8/1958 (O.S.)
Before:	Law J
Sourced by:	LawAfrica

[1] Sale of land – Transfer of ownership – Coconut crop sold after price paid but before conveyance – Consent of Land Alienation Board to sale given after crop sold – Conveyance registered and endorsed with Board's consent after crop sold – Whether vendor or purchaser entitled to price paid for crop – Transfer of Property Decree, s. 54 *and s.* 55 (*Z.*) *– Land Alienation decree, s.* 4 (1) *and s.* 11 (*Z.*).

Editor's Summary

To resolve a dispute between the two heirs of a deceased as to the method of division of a shamba, the heirs consented, on March 13, 1958, to an order of the court being made, whereby the whole shamba would be sold at an auction, at which the only bidders would be the two heirs. This auction took place on

the day the order of court was made, and on March 14, when the price payable was received by the Administrator-General, he applied for the permission of the Land Alienation Board to sell the shamba to the successful bidder. On March 18, the coconut crop of the shamba was sold for Shs. 700/-. The consent of the board was received on April 1, and on May 13 the shamba was formally conveyed. The successful bidder, having been registered as the owner, claimed the Shs. 700/- proceeds of sale of the crop, on the ground that on payment of the price he became the owner, and was entitled to the rents and profits. The Administrator-General claimed that the sale was not complete until, *inter alia*, the price had been paid and the board's consent received, whilst the unsuccessful bidder claimed that ownership only passed when the board's consent was endorsed on the conveyance.

Held –

(i) in view of the terms of s. 54 and s. 55 of the Transfer of Property Decree, and s. 4 (1) and s. 11 of the Land Alienation Decree, the ownership in the shamba did not pass until the consent of the Land Alienation Board was endorsed on the registered conveyance.

(ii) until the conveyance was registered and endorsed with the consent of the board, the successful bidder had no right to the rents and profits, but only a charge on the land in respect of the price.

Order that the Shs. 700/- be paid to the Administrator-General on behalf of the deceased estate.

Case referred to in judgment:

(1) *Muthia Chetty v. Sinna Velliam Chetty* (1912), 35 Mad. 625.

(2) *K. N. Mohamedbhai v. Mansukram Vakhatchand* (1900), 24 Bom. 400.

(3) *Said bin Sultan bin Mohamed v. Jokha binti Sultan bin Salum* (1955), 22 E.A.C.A. 273.

(4) *Walsh v. Lonsdale* (1882), 21 Ch.D. 9.

(5) *Income Tax Commissioner, Bombay v. Dhanomal Kewalram*, [1947] Kar. 240.

Judgment

Law J: This hearing arises out of an originating summons referred into court for argument. The facts are briefly as follows:

The Administrator-General (plaintiff) as administrator of the estate of an Arab lady, Karima binti Suleiman bin Hemed, deceased, was in possession of a shamba at Kama, part of the deceased's estate. The two defendants are Arabs and as sole heirs of Karima binti Suleiman were entitled to an equal share in the said shamba. They could not agree as to the method of its division, but on March 13, 1958, a consent order was recorded, the material parts whereof are set out below:

> "The whole shamba at Kama will be sold by private auction, the bidders being the two defendants only. Mr. Nazarali to act as auctioneer and conduct the sale this morning. The successful bidder will pay half the purchase price plus half the administration costs of the estate of the deceased to the Administrator-General within one month of to-day. Should he fail to do so, the other defendant's last bid shall stand and he shall pay half the amount of the said bid plus half the administration costs of the estate of the deceased to the Administrator-General within one month of the date of default, and on such payment he shall be declared the purchase. Administrator-General to have his costs out of the estate, each defendant to pay his own costs. Purchase price as ascertained after the auction will be recorded by the court. Liberty to apply."

The auction was then held, and taken on the same day the following consent order was recorded on the file:

> "First defendant is declared to be the purchaser of the shamba at the price of 51,000/- (subject to the consent of the Land Alienation Board); by consent, suit settled on the terms set out above. Liberty to apply."

The first defendant duly paid half the purchase price to the Administrator-General on March 14, 1958, and on the same day the Administrator-General applied to the Land Alienation Board for permission to sell the shamba pursuant to the court's order. On April 1, 1958, the Land Alienation Board's consent was received, and on April 9, 1958, the first defendant paid his share of the administration expenses pursuant

to the court’s order. On May 13,

1958, the shamba at Kama was formally conveyed to the first defendant. The issue at present before the court relates to a sum of Shs. 700/- received by the Administrator-General in respect of the sale of the coconut crop on the Kama shamba. The sale took place on March 18, 1958, that is to say five days after the first defendant was declared the purchaser at the private auction held by consent under the court's auspices, and four days after payment by the first defendant of the purchase price; but before the consent of the Land Alienation Board had been received, and before payment by the first defendant of his share of the administration expenses and before formal conveyance to him of the shamba. The question to be decided by the court is whether the estate of the deceased or the first defendant is entitled to this sum of Shs. 700/-. In the first case it would be divided equally between the two defendants as co-heirs, and in the second case the first defendant would receive the whole Shs. 700/-.

The contention of the various parties can be summarised as follows:

The Administrator-General submits that the sale was not complete until–

(*a*) first defendant had paid the purchase price;

(*b*) first defendant had paid his share of the administration expenses; and

(*c*) the consent of the Land Alienation Board had been received.

The second defendant submits that the first defendant did not become the owner of Kama shamba until the Land Alienation Board's consent had been endorsed on the conveyance as in Zanzibar under the Transfer of Property Decree and the Land Alienation Decree ownership can only pass on the registration of a deed of conveyance after the Land Alienation Board's consent has been obtained.

The first defendant's contention is that he became the owner of the shamba entitled to the rents and profits thereof on payment of the purchase price.

The following are relevant references to local legislation:

(1) Section 54 of the Transfer of Property Decree and in particular the following paragraphs:

> " 'Sale' is a transfer of ownership in exchange for a price paid . . .; Such transfer . . . can be made only by a registered instrument; a contract for the sale of immovable property . . . does not of itself create any interest in or charge on such property."

(2) Section 55 of the said Decree, and in particular the following parts thereof–sub-s. (4) para. (*a*), which reads:

> "The seller is entitled to the rents and profits of the property till the ownership thereof pass to the buyer";

and sub-s. (6) para. (*a*), which reads:

> "The buyer is entitled, where the ownership of the property has passed to him, . . . to the rents and profits thereof."

(3) Section 4 (1) of the Land Alienation Decree, 1939, as amended by Decree No. 26 of 1953, the material parts whereof read as follows:

> "No disposition of land by an Arab or African made after, or evidenced by an instrument executed after, the 19th day of December, 1953, . . . shall be of any effect unless and until consent is given thereto by the board . . . and such consent is endorsed upon the instrument effecting such transaction."

(4) By s. 11 of the Land Alienation Decree:

> "For the purposes of this Decree, the Administrator-General . . . while administrating . . . the

estate of an Arab or an African shall be deemed to be an Arab or an African."

Now the sum of Shs. 700/- paid in respect of the coconut crop on Kama shamba was admittedly a "profit" of that property. The rights to profits of a property is an incident of the right of ownership. Until ownership passes, the seller is entitled to the profits. Applying the statutory provisions set out above, the ownership in Kama shamba did not pass to the first defendant until the Land Alienation Board's consent to the sale had been obtained and endorsed on the registered conveyance, which latter event took place on May 13, 1958. It follows that in law the Administrator-General, as seller of the estate, is entitled to receive the Shs. 700/- paid on March 18, 1958.

Mr. Balsara for the first defendant claims, however, that equitable consideration should not be excluded. He submits that if s. 54 and s. 55 of Transfer of Property Decree are considered as a whole, they are based on principles of equity. It is inequitable, he says, for the estate administered by the Administrator-General to have the benefits of possession, such as profits and rents, as well as having received the purchase price.

Mr. Balsara relies on *Muthia Chetty v. Sinna Velliam Chetty* (1) (1912), 35 Mad. 625, and in particular on the following extract:

> "As observed in Fry on Specific Performance, it is obviously inequitable in the absence of express stipulation that either party to the contract should at one and the same time enjoy the benefits flowing from possession of the property and those flowing from possession of the purchase money. The estate and purchase money are things mutually exclusive. 'You cannot,' said Knight-Bruce, V.-C., in a case arising out of the sale of some slob lands at Chichester, 'have both money and mud'."

Muthia Chetty v. Sinna Velliam Chetty (1) was a case concerning a vendor who remained in possession but claimed to be entitled to interest on the purchase price from the buyer so long as it remained unpaid. In its judgment, the court also remarked–

> "that clause (i.e. s. 55, sub-s. (4) (*a*)) does not give the vendor an absolute right to interest on the purchase money irrespective of the equities and circumstances of each case".

It will be noted that the court was of opinion that it could take equities into consideration when applying s. 55 (4) (*a*) of the Indian Transfer of Property Act, which is identical with the corresponding Zanzibar section. Mr. Balsara also places reliance on *K. N. Mohamedbhai v. Mansukram Vakhatchand* (2) (1900), 24 Bom. 400, in which case the court held that a vendor who had received the purchase price was, from that moment until execution of the conveyance, a trustee for the purchaser having no attachable interest in the land sold. That case, however, can be distinguished from the present issue as it was decided upon an interpretation of s. 55 (6) (*b*) of the Transfer of Property Act which gives a buyer a charge on the property in respect of any part of the purchase price paid, whether ownership has passed or not.

If this case were to be decided according to English law, I would follow Knight-Bruce, V.-C.'s, dictum quoted in *Muthia Chetty v. Sinna Velliam Chetty* (1) and hold that the Administrator-General cannot have both the "money and the mud", and award the disputed Shs. 700/- to the first defendant. But I am very doubtful whether in the circumstances of this case equitable consideration can be applied, having regard to the clear statutory provisions. In *Said bin Sultan bin Mohamed v. Jokha binti Sultan bin Salum* (3) (1955), 22 E.A.C.A. 273, the Court of Appeal held that where a sale of land is not completed by registration the purchaser is not the legal owner, and that the equity of *Walsh v. Lonsdale* (4) (1882), 21 Ch.D. 9, is excluded by the statutory requirement of the Registration of Documents Decree. By analogy it seems to me that I am precluded from applying equitable considerations to the clear statutory provisions of s. 55 (4) (*a*) and s. 55 (6) (*a*) of the Transfer of Property

Decree. In each case, the rights of the seller or buyer, as the case may be, to rents and profits, are specifically stated to be conditional on the passing of ownership. A transfer of ownership can only be effected by registered instrument. Until therefore the conveyance of Kama shamba to the first defendant was executed, registered and endorsed with the Land Alienation Board's consent on May 13, 1958, the first defendant acquired no right to rents and profits in the said property, but only a charge on the land in respect of purchase price paid, by s. 55 (6) (*b*). As stated in Chitaley's The Transfer of Property Act (3rd Edn.), Vol. II, p. 992,

> "No question as to the buyer's right to rents and profits can arise under this Act before the contract for sale has been completed by the execution of the conveyance."

K. N. Mohamedbhai v. Mansukram Vakhatchand (2) is in my opinion of doubtful authority to-day having regard to more recent cases such as *Income Tax Commissioner, Bombay v. Dhanomal Kewalram* (5), [1947] Kar. 240, which decided that payment of price and even delivery of possession would not convey any title until registered conveyance is executed and does not constitute the person who receives the price a benamidar (trustee) for the person paying the price, as Indian law does not make distinction between equitable and legal ownership.

After careful consideration of what I apprehend to be the law on the subject, I hold, although not without some doubt, that the Shs. 700/- in dispute must be paid to the Administrator-General on behalf of the estate of the deceased, and the question posed in the originating summons dated June 14, 1958, is answered accordingly.

Order that the Shs. 700/- *be paid to the Administrator-General on behalf of the deceased estate.*

For the Administrator-General:
S Walshe

For the first defendant:
JS Balsara
Balsara & Lakha, Zanzibar

For the second defendant:
KS Talati
Wiggins & Stephens, Zanzibar

For the plaintiff:
The Administrator-General, Zanzibar

Sadrudin Ibrahim v R
[1958] 1 EA 518 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	30 August 1958
Case Number:	346/1958

Before: Rudd Ag CJ and Miles J

Sourced by: LawAfrica

[1] Arrest – Without warrant – Police officer asking for person's name and address – Refusal to give details – Arrest for obstructing police officer in due execution of duty – Criminal Procedure Code (*Cap.* 27), *s.* 28 (*c*) *and s.* 93 (*K.*) *– Penal Code* (*Cap.* 24), *s.* 245 *and s.* 248 (*b*) (*K.*).

Editor's Summary

A police officer, with two summonses to serve on one, Mohammed and one, Sultan respectively, entered Mohammed's shop, and on being informed by Mohammed's son Ishmail that his father was not there tendered the summons for Mohammed to Ishmail, and asked him to sign the duplicate in acknowledgment of service upon Mohammed. Ishmail then called Sultan, and the police officer asked Sultan to explain to Ishmail that he wanted him to sign the duplicate, whereupon a protracted conversation took place between Sultan and Ishmail in a language the police officer did not understand. The police officer, concluding that Sultan was not assisting him, told him to shut up, as he wished to speak to Ishmail. Sultan took offence, became excited and shouted, and, when the police officer demanded his name and address, asked why his name and address were wanted. The police officer then arrested Sultan for obstructing him in performance of his duty. Sultan resisted, and a struggle ensued, during which the appellant came up and struck the police officer, who ultimately succeeded in taking Sultan and the appellant into custody. Until the struggle ended the police officer did not produce the other summons, or realise that Sultan was the person named in it. Both the appellant and Sultan were charged in the magistrate's court at Meru with assaulting a police officer in the due execution of his duty. Sultan was acquitted, but the appellant was convicted of common assault and sentenced to six months' imprisonment. On appeal against conviction and sentence

Held –

(i) since both Sultan and the appellant were acquitted of assaulting the police officer in the execution of his duty, the magistrate must have considered that the police officer was not entitled to arrest Sultan; unless the arrest was lawful and no undue or unreasonable force was used, the appellant was entitled to prevent the police officer from arresting Sultan.

(ii) before attempting to act under s. 93 of the Criminal Procedure Code, the police officer should have made further enquiries; the evidence only established that Mohammed was not at the time in his shop, and did not establish that he could not have been found by the exercise of due diligence; the police officer was not entitled to browbeat Ishmail into signing the duplicate of the summons.

(iii) the appellant was entitled to advise Ishmail, in the circumstances, not to sign the duplicate of the summons, and Sultan was, likewise, entitled to refuse to give his name and address until satisfied it was lawfully required of him.

Appeal allowed. Conviction and sentence set aside.

Judgment

Rudd Ag CJ: read the following judgment of the court: The appellant and his brother Sultan were charged in the court of the resident magistrate, Nanyuki at Meru, with assaulting a police officer in the due execution of his duty contrary to s. 248 (*b*) of the Penal Code.

Sultan was acquitted but the appellant was convicted of common assault, contrary to s. 245 of the Penal Code and sentenced to six months imprisonment. The appellant appeals from this conviction and sentence.

The facts of the case are that a police officer having two summonses to be served on one Mohammed and on Sultan respectively, entered the shop of Mohammed for the purpose of serving one of the summonses on the said Mohammed and on being informed by Mohammed's son Ishmail that Mohammed was not there, tendered the summons for Mohammed to Ishmail and asked him to sign the duplicate in acknowledgment of service upon Mohammed.

Ishmail called Sultan who was on the premises and the police officer then asked Sultan to explain to Ishmail that he wanted him to sign the duplicate of the summons, whereupon a protracted conversation took place between Sultan and Ishmail in a language which the police officer did not understand. The police officer concluded that Sultan was not assisting him to get the duplicate summons signed by Ishmail and told Sultan to "shut up" as he wished to speak to Ishmail. Sultan took offence at this and became excited shouting that the police officer had no right to go into other people's shops to serve summonses or to tell people to "shut up".

The police officer then asked Sultan to give his name and address but Sultan did not do so and asked what the police officer wanted his name and address for. The police officer then put his hand on Sultan and saying, "I am arresting you for obstructing me during performance of my duty" and said further that until he gave his name and address he would arrest him.

Sultan resisted this arrest saying, "I am not a thief I have done nothing wrong. You cannot arrest me". Sultan's shirt was torn in a struggle which ensued between him and the police officer during which the appellant came from behind and struck the police officer. The struggle then became a tripartite one in which the police officer ultimately succeeded in taking Sultan and the appellant into custody. No weapon had been used but the police officer suffered bruises and a slight cut. After the struggle had ended, the police officer produced the other summons and asked Sultan if he was the person named in it and Sultan said that he was. Up to that time the police officer had not produced the other summons or realised that Sultan was the person named in it.

The learned trial magistrate acquitted Sultan because he was not satisfied that he had committed an offence in the presence of the police officer but he held that the appellant had no justification for his attack on the police officer.

It would be possible to dispose of this appeal quite shortly by pointing out that in effect both Sultan and the appellant were acquitted of assaulting the police officer in the execution of his duty from which it necessarily follows, on the facts of this case, that the magistrate did not consider that it had been established that the police officer was entitled to arrest Sultan and by pointing out that in law the appellant was entitled to prevent the police officer from arresting his brother, Sultan, unless that arrest was lawful and provided no undue or unreasonable force was used. In view of the fact that no weapon

was used and that only superficial, trivial hurt was caused to the police officer and the further fact that Sultan and the appellant, notwithstanding their resistance, were unable to prevent the police officer from taking them into custody, it is impossible to hold that undue or unreasonable force was used and therefore appellant should not have been convicted of an offence under s. 245 of the Penal Code.

We consider it desirable however to go into more detail.

In the first place the record does not show sufficient grounds to justify the police officer's demand that Ishmail should sign the duplicate summons for Mohammed. The relevant provision is s. 93 of the Criminal Procedure Code which provides as follows:–

> "Where a person summoned cannot by the exercise of due diligence be found, the summons may be served by leaving one of the duplicates for him with some adult member of his family or with his servant residing with him or with his employer; and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate."

The evidence does not establish that Mohammed could not have been found by the exercise of due diligence. It only establishes that at the particular time in question he was not in his shop. The police officer should have made further enquiries before he attempted to take advantage of the provisions of s. 93 of the Criminal Procedure Code, and he was not entitled to attempt to browbeat Ishmail into signing the duplicate of the summons.

In our opinion the appellant was entitled to advise Ishmail not to sign and the police officer was not correct in thinking that Sultan was obstructing him in the performance of his duty.

The power of arrest without warrant which applies to a person who is actually obstructing a policeman in the execution of his duty is provided by s. 28 (*c*) of the Criminal Procedure Code, which reads as follows:

> "Any police officer may, without an order from a magistrate and without a warrant, arrest–
>
> (*c*) any person who obstructs a police officer while in the execution of his duty or who has escaped or attempts to escape from lawful custody."

In such a case arrest without warrant is not justified unless the police officer has actually been obstructed in the execution of his duty and it is not enough that the police officer should merely conceive that he has been obstructed in the execution of his duty.

In our opinion Sultan was entitled to refuse to give the police officer his name and address until he was satisfied that it was lawfully required of him and so the police officer was not entitled to put his hand upon Sultan to arrest him before he had established and communicated a good reason for insisting on demanding the name and address.

In our opinion the facts of this case as they appear from the record of the evidence are consistent with the fact that the police officer unfortunately and unjustifiably lost his temper because he conceived that Sultan was not advising Ishmail to sign the duplicate summons in accordance with the police officer's desire and that this fact led to the unfortunate mêlée which ensued in which all parties lost control of their tempers and we consider that it has not been established that the arrest of Sultan was lawful or that the appellant's intervention was unlawful.

For these reasons we allow the appeal and set aside the conviction and sentence.

Appeal allowed. Conviction and sentence set aside.

For the appellant:
DN Nene

For the respondent:
DG Charters (Crown Counsel, Kenya)

The Attorney-General, Kenya

For the appellant:
DN Nene, Nairobi

Abdulali Jiwaji & Co (Properties) Limited v JP Pandya
[1958] 1 EA 521 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	4 July 1958
Case Number:	57/1956
Before:	Lewis J
Sourced by:	LawAfrica

[1] Rent restriction – Monthly tenancy – Notice to quit given so as to terminate tenancy the following month – Whether notice valid – No evidence that respondent a statutory tenant – Onus of proof – Rent Restriction Ordinance (*Cap.* 115), *s.* 6 (1) (*b*) (*U.*).

[2] Evidence – Estoppel – Respondent claiming in another case to be statutory tenant – Whether respondent estopped from pleading the contrary – Evidence Ordinance, s. 39, *s.* 40 *and s.* 113 (*U.*).

Editor's Summary

The agent for the predecessors in title of the appellant company had served the respondent on June 10, 1949, with a notice to quit the premises he occupied by July 31, 1949. On November 13, 1953, the Kampala Municipal Council having approved a development scheme involving demolition of the premises, served the respondent, in pursuance of s. 6 (1) (*b*) of the Rent Restriction Ordinance, with a notice to quit the premises by November 30, 1954. On December 7, 1955, the appellant company filed proceedings in the District Court against the respondent for possession of the premises and pleaded that the respondent was a statutory tenant paying a monthly rental of Shs. 100/-. The respondent in his defence denied being a statutory tenant, admitted receipt of the Notice dated November 13, 1953, but contended that he was a contractual tenant and that the appellant company was not entitled to possession. The trial magistrate dismissed the action on the ground that the appellant had failed to prove that the respondent was a statutory tenant. The appellant company appealed on two grounds, namely: (1) that the notice to quit dated June 10, 1949, was valid and that as it was not challenged in the lower court it could not be disputed on appeal, and (2) that the respondent was estopped by an admission he had made in Civil Case No. 680 of 1956 of the District Court from saying that he was not a statutory tenant.

Held –

(i) as the notice in question was never pleaded it was never strictly in issue.

(ii) the respondent's failure to cross-examine the appellant's witness at the trial, who merely proved service, did not amount to an admission that the notice was a legal one.

(iii) the judgment in Civil Case No. 680 of 1956 did not in any way alter the legal character of the respondent in any of the ways mentioned in s. 39 of the Evidence Ordinance, nor was there any evidence that the appellant acted upon the belief that the respondent was a statutory tenant.

Appeal dismissed.

Case referred to in judgment:

(1) *Kampala Municipal Council v. J. P. Pandya,* Uganda District Court Civil Case No. 680 of 1956 (unreported).

(2) *Lemon v. Lardeur*, [1946] 2 All E.R. 329; [1946] K.B. 613.

(3) *Mohmud Duale v. S. R. Kapila* (1952), 25 K.L.R. 112.

(4) *London County Territorial and Auxiliary Forces Association v. Nicholls,* [1948] 2 All E.R. 432; [1949] 1 K.B. 35.

Judgment

Lewis J: This was an appeal from a decree of the District Court of Mengo dismissing the appellant-plaintiff's claim for an ejectment order against the respondent-defendant.

The facts can be shortly stated. On June 10, 1949, the agent for the predecessors in title of the appellants served the respondent with a notice to quit the premises he occupied by July 31, 1949. In November, 1953, the Kampala Municipal Council approved a scheme of development involving demolition of the premises occupied by the respondent. On November 13, 1953, the respondent, in pursuance of s. 6 (1) (*b*) of the Rent Restriction Ordinance, was served with a notice to quit the said premises by November 30, 1954. On December 7, 1955, the appellants filed the plaint herein. By para. 3 of the plaint the appellant pleaded that the respondent was a statutory tenant paying a monthly rental of Shs. 100/-. By para. 3 of the defence the respondent denied being a statutory tenant, and by para. 7 admitted receipt of the said notice dated November 13, 1953, but said that the appellant was not entitled to possession.

The following issues were agreed at the trial:

1. Was the respondent a statutory tenant?
2. Was the notice to quit dated November 13, 1953, a valid one?

The learned magistrate in considering the first issue referred to *Kampala Municipal Council v. J. P. Pandya* (1), Uganda District Court Civil Case No. 680 of 1956 (unreported), in which the respondent was defendant and the Kampala Municipal Council and K. Evans, their clerk, was plaintiff. In that case the respondent argued through the same advocate (C. D. Patel) who appeared for him in this case, that he was a statutory tenant. In deciding this issue the magistrate held that the letter, exhibit A, purporting to terminate the respondent's tenancy on July 31, 1949, was bad. He felt himself bound by the decision in *Lemon v. Lardeur* (2), [1946] K. B. 613 and *Mohmud Duale v. S. R. Kapila* (3) (1952), 25 K.L.R. 112. As a result he dismissed the appellant's claim on the ground that the appellant had failed to prove that the respondent was a statutory tenant.

At the trial the appellant sought to prove the termination of the contractual tenancy by calling Mr. B. K. Verjee, a Kampala advocate, to say that he had served the respondent with exhibit A and the notice dated November 13, 1953 (annexure A). This evidence was never challenged in cross-examination. However, exhibit A was never pleaded by the appellant, and the respondent merely said, in effect, that he was a contractual tenant.

Mr. Verjee, for the appellant, now seeks to distinguish his case from *Lemon v. Lardeur* (2) on the ground that in his case the notice to quit, exhibit A, was never disputed whereas in *Lemon v. Lardeur* (2) it was. He argued that as exhibit A had never been challenged in the lower court it could not now be disputed. He also argued that the respondent was estopped by his admission in *Kampala Municipal Council v. J. P. Pandya* (1) from saying that he was not a statutory tenant.

I deal first with the notice, exhibit A. As this notice was never pleaded it was never strictly in issue. Nevertheless it was put in at the trial. I do not consider that the respondent's failure to cross-examine Mr. B. K. Verjee, who merely proved service, amounted to an admission that the notice was a legal one as between landlord and tenant. It was not disputed that in fact the notice was bad.

As to the question of estoppel. Section 113 of the Evidence Ordinance defines estoppel as follows:

> "When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representatives shall be allowed in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

In *Kampala Municipal Council v. J. P. Pandya* (1), the respondent was sued by the Kampala Municipal Council for site rates. The proceedings were instituted under the Debts (Summary Recovery) Ordinance and so there were no pleadings. The respondent said that as a statutory tenant he did not come within the definition of "owner" in the Local Government (Rating) Ordinance. The District Court held that he did. The respondent successfully appealed. It is clear that in those proceedings the respondent claimed and his advocate argued that he was a statutory tenant. Is he now estopped from denying it?

The appellant contends that the judgment of the District Court was a judgment in rem. A judgment in rem has been defined in England as follows:

> "A judgment in rem, I conceive to be an adjudication pronounced (as indeed the name denotes) upon the status of some particular subject matter, by a tribunal having competent authority for that purpose."

The Uganda Evidence Ordinance, by which I am bound in this matter, contains no such definition. Section 39 of that Ordinance states that a final judgment, order or decree of a competent court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction conferring any legal character on a person shall be conclusive proof that such legal character was conferred, etc., at the time of such judgment. By s. 40 judgments, orders or decrees other than those mentioned in s. 39 are relevant if they relate to matters of a public nature relevant to the inquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

To my mind the provisions of those two sections are fatal to the appellant's submission that the judgment in *Kampala Municipal Council v. J. P. Pandya* (1) was in rem. Furthermore, an examination of the judgment in that case–there was apparently no decree–shows that the res before the court was whether the respondent as a statutory tenant fell within the definition of "owner" under the Local Government (Rating) Ordinance. The court held that he did; the Court of Appeal that he did not. The judgment did not then in any way alter the legal character of the respondent in any of the ways mentioned in s. 39 of the Evidence Ordinance, nor was there any evidence that the appellant acted upon the belief that the respondent was a statutory tenant.

If further authority is required it can be found in the judgment of the Court of Appeal in *London County Territorial and Auxiliary Forces Association v. Nicholls* (4), [1949] 1 K.B. 35 at p. 50, where it was held, on the question of estoppel, that entries in a rent book referring to the Rent Restriction Acts and to the standard rent of premises did not constitute an unambiguous representation of fact giving rise to an estoppel in pais. To quote from the judgment:

> "The view advanced on behalf of the defendant Nicholls was that the statement represented that the premises which were the subject of his tenancy were within the Rent Restriction Acts; in other words, they were controlled premises. That is not a representation of fact; it is a statement of the result obtained by applying the provisions of the Acts to the circumstances of the particular case. It is no easy matter sometimes, as the many decided cases on the subject show, to say whether premises are or are not within the Acts, and a statement to the one effect or the other cannot, in our judgment, be fairly regarded other than as a representation of law."

In my opinion, although the definition of estoppel in our Ordinance differs slightly from the meanings expressed in the judgments referred to in the above quoted case I think we should be guided thereon by the English decisions.

For the reasons I have endeavoured to give I dismiss this appeal with costs.

Appeal dismissed.

For the appellant:
J Verjee
Verjee & Verjee, Kampala

For the respondent:
YV Phadke and *CD Patel*
Patel & Patel, Kampala

Ali Suleman Mandevia v Rungwe African Co-Operative Union Limited

[1958] 1 EA 524 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	10 September 1958
Case Number:	21/1958
Before:	Spry Ag J
Sourced by:	LawAfrica

[1] Poor person – Application for leave to sue in forma pauperis – Breach of contract alleged – Nominal damages likely – Fraud – When permission will be refused – Indian Civil Procedure Rules, O. XXXIII.

Editor's Summary

The applicant whose entire means were less than £50 had entered into a contract with the respondents by which he was to purchase from them over a period of five months 750 tons of rice at a total price of £64,250. A consignment of 100 tons having been delivered to the applicant for which he had not paid in full, the respondent sued and obtained judgment for the balance unpaid. Nevertheless the applicant alleged that the respondents had broken the contract and that he was entitled to damages, and he sought the leave of the court under O. XXXIII of the Indian Civil Procedure Rules to sue the respondents in forma pauperis. For the respondents, who opposed the application, it was submitted that under O. XXXIII r. 1, "pauper", must mean an honest pauper, that the rule was not designed to help the dishonest or the gambler and that in any event the issue was res judicata by virtue of the judgment obtained against the applicant for the balance due upon the consignment already delivered to him.

Held –

(i) permission to sue as a pauper is subject to the terms of O. XXXIII r. 5 a statutory right; but r. 5 entitles the court to reject such an application *inter alia* "(*d*) where his allegations do not show a cause of action".

(ii) even if the applicant had a cause of action but the court was satisfied that he could not recover more than nominal damages, the court might well be justified in refusing permission because it would be unjust to the other party who would have to incur substantial costs which might not be

recoverable.

(iii) by entering into this contract the applicant made an implied representation that he intended to pay for the goods and was reasonably likely to pay; having regard to his means when compared with the value of the contract there was a fraudulent misrepresentation implicit in the conduct of the applicant.

Application refused.

Case referred to:

(1) *In re Shackleton, Ex parte Whittaker* (1875), L.R. 10 Ch. D. 446.

Judgment

Spry Ag J: The applicant, a man whose entire fortune amounted to less than £50, claims to have entered into a contract with the respondent company whereunder he agreed to purchase over a period of five months 750 tons of rice for a total consideration of £64,250. He hoped, of course, to make a substantial profit by selling forward on a favourable market. He was presumably encouraged by the thought that he could not lose, since for all practical purposes he had nothing to lose. He now alleges that the respondent company broke the contract and claims to be entitled to damages, but as he lacks the amount of the fees payable to institute a suit he is seeking the leave of the court to sue in forma pauperis. The application is opposed by the respondent company.

It is not disputed that the applicant is a pauper, in the sense that he cannot pay the fees, but it is argued by learned counsel that for the purposes of O. XXXIII, r. 1, “pauper” must mean an honest pauper and that the rule

was not designed to help dishonest people or gamblers. Mr. Patel cited no authority for this proposition and I know of none. Had the applicant been coming to this court for any equitable relief, as for example for specific performance, I should not have hesitated to refuse it but it appears to me that permission to sue as a pauper is a statutory right subject only to the terms of O. XXXIII, r.5.

Secondly, it is argued that the matter is res judicata. One consignment of 100 tons of rice was delivered and it has not yet been fully paid for. The respondent company sued the applicant for the unpaid balance during 1957 and obtained judgment. Although the two issues arise out of the same contract, they are quite distinct. The present claim could not have been advanced as a set-off under O. VIII, r. 6, because it is not a claim for an "ascertained sum". The applicant could have proceeded by way of cross-suit but there was no obligation on him to do so.

Of the five reasons appearing in O. XXXIII, r. 5, for rejecting an application only one needs to be considered, that is para. (*d*) "where his allegations do not show a cause of action". The allegations in the present case are that there was an oral agreement for the sale of goods and that when part only of the contract had been performed, the respondent company refused to supply the balance of the goods except at a price higher than that stipulated in the contract. Those allegations, if true, and for the purposes of this application I must assume them to be true, clearly disclose a cause of action. Even supposing that the conduct of the applicant amounted to fraud, a question with which I shall deal later, such fraud would not itself avoid the contract but merely render it avoidable. Again, the respondent company may have had the right to withhold delivery under s. 41 (2) of the Sale of Goods Ordinance, but that would not in itself determine the contract. It appears to me that a person may be in breach of a contract even though he has the right to avoid that contract, if instead of exercising his lawful powers he acts wrongly under the contract or repudiates it on any ground which is not open to him.

There is, however, another approach to the question which I think I may and indeed must take. If the applicant has a right of action but the court is satisfied that even if he succeeds he cannot receive more than nominal damages, the court should, I think, refuse permission to sue as a pauper because it would be unjust in such circumstances for the other party to have to incur substantial costs which on the face of the application could not be recovered.

From this viewpoint, it is necessary to consider more closely the questions of fraud and non-payment.

There is no evidence before the court of any express representations by the applicant but there is, I think, the question whether any representation should be implied. The English case of *In re Shackleton, Ex parte Whittaker* (1) (1875), L.R. 10 Ch.D. 446 concerned a man who bought goods on credit on the eve of his adjudication as a bankrupt. Sir W. M. James, L.J., said:

> "This is a hard case, but it would be carrying the rule against fraud too far to extend it to this case. A man buying is not bound to tell all his affairs to those with whom he deals, though he must not say anything which amounts to a misrepresentation. I cannot say that Shackleton bought these goods without any intention of paying for them. He might suppose that he had a chance of paying Ragg's small debt and stopping the bankrupcy proceedings."

Sir G. Mellish, L.J., agreed and went rather further. He said:

> "We need not go into the question whether mere silence may not in some cases amount to a misrepresentation. It would be outrageous to hold that Shackleton, when he purchased, was bound to make any statement to the vendor as to his pecuniary circumstances, so there is nothing to affect the validity of the contract. It is true, indeed, that a party must not

> make any representation express or implied, and as at present advised, I think that Shackleton when he went for the goods must be taken to have made an implied representation that he intended to pay for them, and if it were clearly made out that time he did not intend to pay for them, I should consider that a case of fraudulent misrepresentation was shown."

The present case may be distinguished from *In re Shackleton, Ex parte Whittaker* (1) in two main respects. In the first place, there is no reason to suppose that the applicant had the intention of not paying, although that is not the same as saying that he had the intention of paying. I have no doubt that he did intend to pay, if, but only if, he could resell forward at a sufficient price. Secondly, the debtor in *In re Shackleton, Ex parte Whittaker* (1), a wool manufacturer, incurred only a small debt and the court was not prepared to say that he might not genuinely have believed he could pay it. In the present case the contractual amount is very large and it is abundantly clear that the applicant could not have paid if the market had fallen even slightly.

I think, following *In re Shackleton, Ex parte Whittaker* (1), that the applicant when he entered into the contract, assuming that there was a contract as averred, must be taken to have made an implied representation that he intended to pay for the goods and I would go further and say that I think there must be taken to have been an implied representation that he was reasonably likely to be able to pay for them. It is, of course, common knowledge and within the judicial knowledge of the court that produce dealers, like stock brokers and others, commonly contract to buy goods for which they cannot pay in full but if they are honest they only do so where the goods are of such a nature that there is a ready market for them and where they know that they can pay out of their own resources the greatest deficiency that is to be anticipated on any resale within the contractual period. I do not know how constant is the demand for rice or what fluctuations in price are to be anticipated but I am in no doubt that £50 is totally inadequate cover when entering into a contract of nearly £65,000. I think, therefore, that there was fraudulent misrepresentation implicit in the conduct of the applicant.

Secondly, there is the question of payment. According to the applicant the goods were to be paid for as to 80 per cent. by sight draft against the railway waybill and as to the balance after the quality and weight had been verified by the applicant. A delivery was made in September, 1957: the payment of 80 per cent. was effected but it is admitted that the balance was not paid and is indeed still outstanding. The goods are unascertained goods for the purposes of the Sale of Goods Ordinance and having regard to the provisions of s. 41 (2) and s. 43 of that Ordinance the respondent company would appear to have been entitled to withhold further deliveries until the balance of the price for the first delivery was paid. It is apparent that the applicant could not pay that balance, since he has consented to judgment in respect of it and failed to satisfy that judgment.

If the contract was based on a fraudulent misrepresentation which would be grounds entitling the respondent company to determine the contract, and if the applicant himself was in breach of the contract, so that the respondent company could rescind the contract or at least withhold further deliveries, and if the applicant was not in a position to fulfil his part of the contract, I cannot see that he could possibly be awarded more than nominal damages. I do not consider that such a bare right of action can justify permission to sue as a pauper. The application is refused.

Application refused.

For the applicant:
NS Patel

Patel, Desai & Jhaveri, Dar-es-Salaam

For the respondents:
NM Patel
NM Patel, Dar-es-Salaam

Shah Devsi Vardhaman v Thakkar Chatrabhuj Naranji Haridas and others
[1958] 1 EA 527 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	12 September 1958
Case Number:	40/1956
Before:	Spry Ag J
Sourced by:	LawAfrica

[1] Conflict of laws – Foreign judgment – Cause of action – judgment of District and Sessions Court for Cutch, India – Indian Code of Civil Procedure, 1908, *s.* 13 *– Foreign Judgments* (*Reciprocal Enforcement*) *Ordinance* (*Cap.* 8), *s.* 3, *s.* 8 *and s.* 9 (*T.*) *– Foreign Judgments* (*Reciprocal Enforcement*) (*General Application*) *Order* (*T.*) *– Foreign Judgments* (*Reciprocal Enforcement*) *Act,* 1933 *– Reciprocal Enforcement of Judgments* (*General Application to His Majesty's Dominions*) *Order,* 1933.

Editor's Summary

The plaintiff, relying on s. 13 of the Code of Civil Procedure, sued the defendants for the unsatisfied balance of a sum awarded to him by a judgment of the District and Sessions Court for Cutch in the Republic of India. The defendants in their defence pleaded that the judgment could not be enforced by reason of s. 8 of the Foreign Judgments (Reciprocal Enforcement) Ordinance which reads:

> "No proceedings for the recovery of a sum payable under a foreign judgment, being a judgment to which Part I applies, other than proceedings by way of registration of the judgment shall be entertained by any court in the Territory."

Held –

(i) judgments of the courts of India cannot be registered under the Foreign Judgments (Reciprocal Enforcement) Ordinance as no specific order relating to India has been made under s. 3; therefore,

(ii) s. 8 of the Ordinance was no bar to these proceedings.

Order accordingly.

Case referred to in judgment:

(1) *Re an application by Dady Rustomji Bonaji*, Tanganyika High Court Miscellaneous Application No. 30 of 1954 (unreported).

(2) *Yukon Consolidated Gold Corporation Ltd. v. Clark*, [1937] 2 All E.R. 343 (K.B.D.); [1938] 1 All E.R. 366 (C.A.).

Judgment

Spry Ag J: The plaintiff in these proceedings is suing for the unsatisfied balance of a sum awarded to him by a judgment of the District and Sessions Court for Cutch in the Republic of India, relying on s. 13 of the Code of Civil Procedure. In the written statement of defence it was asserted, *inter alia*, that the judgment could not be enforced by reason of the provisions of s. 8 of the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 8). At the first hearing, Mr. Vellani, for the defendants, said that he did not intend to rely on that defence. As I was aware of the unreported order dated April 3, 1954, of Lowe, J., in *Re an application by Dady Rustomji Bonaji* (1), Tanganyika High Court Miscellaneous Application No. 30 of 1954 (an order of which learned counsel were not at that time aware), I said that I wished to hear argument on the point, since it concerns the jurisdiction of the court.

Mr. Jhaveri, to whom I am obliged for his very able argument, relied in the main on the English case of *Yukon Consolidated Gold Corporation v. Clark* (2), [1937] 2 All E.R. 343 and [1938] 1 All E.R. 366. As a subsidiary point, he

argued that there is no reciprocity between Tanganyika and the Republic of India and produced a letter to that effect which purports to be signed by an Under Secretary to the Government of India. He originally argued also that the District and Sessions Court for Cutch is not a superior court but if I understood him correctly he later withdrew this contention.

In the *Yukon Gold Corporation* case (2), it was held that the Reciprocal Enforcement of Judgments (General Application to His Majesty's Dominions) Order, 1933, did not in itself do more than put the courts of the Dominions in the same position as those of foreign countries and that before a judgment of any such court could be registered a specific order in council was needed applying the provisions of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, to the particular territory concerned. The Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 8) corresponds with the Foreign Judgments (Reciprocal Enforcement) Act, 1933, and the Foreign Judgments (Reciprocal Enforcement) (General Application) Order with the Reciprocal Enforcement of Judgments (General Application to His Majesty's Dominions) Order, 1933.

Lowe, J., when he decided the application to which I have referred above, was, I think, concerned only with the question whether the fact that India had become a republic excluded her from the provisions of the Foreign Judgments (Reciprocal Enforcement) (General Application) Order and he held that by virtue of the India (Consequential Provisions) Act, 1949, India is still, for the purposes of the Order, one of Her Majesty's Dominions. He heard no argument on the need for a specific order made under s. 3 of the Foreign Judgments (Reciprocal Enforcement) Ordinance and presumably did not apply his mind to that question, since it is not dealt with in his order. I do not, therefore, consider myself bound to follow that order.

I have no hesitation in holding, following and adopting the reasoning of the *Yukon Gold Corporation* case (2), that the effect of the general order made under s. 9 of the Foreign Judgments (Reciprocal Enforcement) Ordinance was merely to bring Her Majesty's Dominions within the scope of s. 3 and that an order under s. 3 is required specifically applying Part I of the Ordinance to a particular territory before judgments of the courts of that territory can be registered under the Ordinance. Only one specific order under s. 3 has been made, the Foreign Judgments (Reciprocal Enforcement) (Extension of Part I) Order, and that Order does not relate to any part of the Republic of India or to any of the courts of India.

For the sake of completeness, I should perhaps add one observation. On the making of the Foreign Judgments (Reciprocal Enforcement) (General Application) Order, the British Judgments Ordinance (No. 37 of 1921) ceased to apply but there was a saving provision as regards those parts of Her Majesty's Dominions to which that Ordinance then applied. These were in fact those territories that were included in the Foreign Judgments (Reciprocal Enforcement) (Extension of Part I) Order and the saving is therefore obsolete. The British Judgments Ordinance was never extended to India.

Since, as I have held, judgments of the courts of India cannot be registered under the provisions of Part I of the Foreign Judgments (Reciprocal Enforcement) Ordinance, it follows that s. 8 of that Ordinance is no bar to these proceedings.

Order accordingly.

For the plaintiff:
KL Jhaveri
Patel, Desai & Jhaveri, Dar-es-Salaam

For the defendants:
RB Vellani
Vellani & Co, Dar-es-Salaam

Re an Application by the Attorney-General of Kenya

[1958] 1 EA 529 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	15 July 1958
Case Number:	61/1958
Before:	Sir Ronald Sinclair CJ and MacDuff J
Sourced by:	LawAfrica

[1] Rates and rating – Assessment – Objection to proposed assessment – Hearing – Duties of Municipal Valuation Committee – Power to call witnesses and reopen proceedings – Municipalities Ordinance (*Cap.* 136), *s.* 3, *s.* 30 *and s.* 96 (*K.*) *– Valuation of Crown Property Rules,* 1953, *r.* 2, *r.* 3, *r.* 4 *and r.* 5 (*K.*) *– Local Government* (*Rating*) *Ordinance* (*Cap.* 137), *s.* 3, *s.* 6 *and s.* 30 (*K.*).

[2] Prohibition – Rates and Rating – Hearing of objections by Municipal Valuation Committee – Committee directing re-appraisal by municipal valuer without giving notice to parties – Whether procedure contrary to natural justice.

Editor's Summary

By s. 96 (2) of the Municipalities Ordinance (Cap. 136) the Crown is liable to pay to the Municipal Board of Mombasa in respect of Crown land a contribution in lieu of rates, such contribution being calculated on the valuation of Crown land in the same manner as rates on private land. The municipal authorities assessed the undeveloped site value of the sea bed within the Municipality of Mombasa, which is vested in the Crown, at Shs. 12,000,000/-. The Crown objected to that valuation on the grounds that the sea bed was not rateable at all and that if it were rateable, it had no value. At the hearing of the objections by the Mombasa Crown Property Valuation Committee, the municipal valuer said in evidence that in view of the figures produced by the Crown he could not substantiate the valuation of Shs. 12,000,000/- but that he could work out another valuation on a different basis if he were given time. The valuation committee decided that the land was rateable and that as the evidence might be insufficient for a proper and correct rateable value to be made, the committee desired the municipal valuer to make a re-appraisal of the situation for its benefit. The secretary to the valuation committee accordingly wrote to the municipal valuer requesting a re-appraisal but did not inform the Crown of his action. The attorney-general thereupon applied to the Supreme Court for an order prohibiting the Mombasa Crown Property Valuation Committee from receiving a further valuation, re-appraisal or other opinion from the municipal valuer, on the following grounds, namely (*a*) that "the committee exceeded its jurisdiction and had no power to invite or to order the municipal valuer to submit a further valuation, re-appraisal or other opinion in respect of the sea bed"; and (*b*) that "the committee's action in seeking a re-appraisal from the

Mombasa municipal valuer was in the circumstances a departure from the fundamental principles of justice.

Held –

(i) it is clear from the Valuation Rules that the duty of the valuation committee is to consider the completed valuation referred to in r. 3, and that once the municipal valuer has completed his valuation he has no power to amend it; nor has the valuation committee jurisdiction to direct or permit a valuer to amend his completed valuation; but,

(ii) the valuation committee did not intend, by its request, that the municipal valuer should substitute an amended valuation for that contained in the valuation list, but it wished to obtain further information which might be taken into consideration in arriving at its eventual decision and it was entitled to do so.

(iii) it was the duty of the valuation committee to endeavour to arrive at a correct valuation and for that purpose it was entitled to call witnesses of its own motion, to recall witnesses and, if thought fit, to reopen the proceedings; it was not bound to act only on the evidence adduced by the rating authority and the Crown, if it considered that evidence insufficient to arrive at a satisfactory determination.

(iv) the valuation committee intended to afford both the rating authority and the Crown the opportunity of making further submissions in the event of the committee deciding that the re-appraisal by the municipal valuer, when made, was of use to it.

(v) in the circumstances, the failure of the valuation committee to notify the rating authority as such and the objector of its decision to request the municipal valuer for a re-appraisal, did not violate any principle of natural justice, nor was the objector thereby prejudiced.

Order for prohibition refused.

Case referred to in judgment:

(1) *R. v. Westminster Assessment Committee, Ex parte Grosvenor House* (*Park Lane*) *Ltd*., [1940] 4 All E.R. 132.

(2) *Jashbhai C. Patel v. B. D. Joshi* (1952), 19 E.A.C.A. 42.

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court: This is an application by the attorney-general for an order of prohibition directed to the Mombasa Crown Property Valuation Committee to prohibit that committee from receiving or considering a further valuation, re-appraisal or other opinion from the municipal valuer, Mombasa, in respect of the sea bed within the Municipality of Mombasa (Entry No. 8621 in the Mombasa Valuation List 1956-1959).

By s. 96 (2) of the Municipalities Ordinance (Cap. 136) the Crown agrees to pay to the Municipal Board of Mombasa in respect of Crown land a contribution in lieu of rates, such contribution being calculated on the valuation of Crown land in the same manner as rates on private land. Section 30 of the Local Government (Rating) Ordinance (Cap. 137) (hereinafter referred to as “the Ordinance”), provides that for the purpose of assessing the contribution payable by the Crown in lieu of rates, Crown land shall be valued in accordance with the principles laid down in that Ordinance, subject to such exceptions and in such manner as may be prescribed by rules made by the Governor in Council. The basis of valuation to be followed by the valuer appointed by the Municipal Board under s. (3) (2) to value rateable property, is laid down in s. 6 of the Ordinance; it is, roughly, the fair market value. Rule 2 (1) of the Valuation of Crown Property Rules, 1953, made under s. 30 of the Ordinance (Government Notice No. 1455 of 1953) (hereinafter referred to as “the Rules”), provides that for the purpose of assessing the contribution in lieu of rates payable by the Crown, the valuation of Crown property shall be made by the person appointed to prepare a valuation roll of rateable property, that is to say, the valuer appointed under s. 3 (2) of the Ordinance. The Rules establish valuation committees for the purpose of hearing objections to the valuation of Crown property.

The sea bed within the Municipality of Mombasa is vested in the Crown, and the following entry

appeared in the 1956-1959 Valuation List of the Municipality:

> "Entry: 8261:
>
> Description–sea bed within the Municipality:
>
> Freehold area–4,992 acres:
>
> Undeveloped site value–Shs. 12,000,000/-."

The Crown objected to that valuation on two grounds, first, that the sea bed was not rateable at all and, secondly, that, if it were rateable, it had no value.

The Mombasa Crown Property Valuation Committee sat to hear the Crown's objection on January 8, 9 and 23, 1958. The hearing of the objection was conducted as if it were a trial, evidence being taken on oath and counsel heard. During the hearing Mr. Shore, the municipal valuer who had made the valuation which was the subject of the objection, gave evidence. He said that he had based his valuation on the net profit of the port which he had calculated form figures given in the annual report for 1954 of the East African Railways and Harbours Administration. He admitted that on the figures produced by the Crown, he could not put any value on the land on the basis on which he had made his valuation. He agreed that he could not substantiate the valuation of £600,000, but said that he could work out another valuation on another basis if he were given time.

At the close of the hearing on January 23 the committee intimated that it would reserve its decision. On January 25, 1958, the committee recorded the following decision on the objection:

> "The valuation committee is unanimously of the opinion that the land in question is rateable. The valuation committee, again, is unanimously of the opinion that the evidence before it may be insufficient to enable the committee to formulate a proper and correct rateable value and accordingly desires that the municipal valuer should make a re-appraisal of the situation for the benefit of the committee."

On the same day the secretary to the committee, who was also the town clerk of the Municipal Board of Mombasa, wrote a letter to Mr. Shore advising him of the committee's decision and stating:

> "I should be glad, therefore, if you would let me have such a re-appraisal as soon as possible and let me know how soon you estimate it will be available."

On February 19, Crown counsel wrote to the secretary to the committee as follows:

> "I write to you now in your capacity as clerk to the above committee.
>
> "2. I have heard unofficially that the committee has instructed the municipal valuer to prepare a fresh valuation in respect of the land under the sea within the municipality of Mombasa.
>
> "3. As the Crown is a party to the proceedings before the committee, I should be glad if you would let me know whether the committee has in fact instructed the other party to these proceedings to prepare a fresh valuation after its case has been closed before the committee. If so, I should also be glad to know why this order has been made without notification to me, and without the opportunity being given to the Crown to object to this proceeding."

No reply was received to this letter and on March 11 Crown counsel wrote again asking for an early. On March 19 the secretary replied:

> "I apologise for the delay in replying to your letter of February 19, 1958, and your reminder of March 11.
>
> "I have sent you today a copy of the minute of the valuation committee of January 28, 1958, from which you will see that what the committee

> decided was to request the municipal valuer to make a re-appraisal of the situation for the benefit of the committee. The committee has not instructed either party to the proceedings to prepare a fresh valuation (the parties being the Crown and the Municipal Board of Mombasa) but having decided that the property is rateable and that there was insufficient evidence to enable them to formulate a proper and correct rateable value they have asked the municipal valuer in his capacity as a valuer to make a re-appraisal.
>
> "This re-appraisal has not yet been made and owing to the fact that the president and one member of the committee are shortly going on leave it may not be possible for the committee to give the matter further consideration for some time. If any new matter arises, which has not been the subject of evidence on which either party had not had an opportunity of making a submission, I have no doubt that the committee will afford such an opportunity to both parties."

It is common ground that an order of prohibition will lie against a Crown property valuation committee if it exceeds its jurisdiction or acts contrary to the rules of natural justice. The grounds on which the Crown seeks an order of prohibition in the present case are:

(*a*) The committee exceeded its jurisdiction and had no power to invite or to order the municipal valuer to submit a further valuation, re-appraisal or other opinion in respect of the sea bed; and

(*b*) The committee's action in seeking a re-appraisal from the Mombasa municipal valuer was in the circumstances a departure from the fundamental principles of justice.

With regard to the first ground it was submitted for the Crown that the re-appraisal directed could only amount to one of three things. It would be a revaluation which the valuer, having completed his valuation and a copy thereof having been furnished by the local authority to the Crown in accordance with the provisions of r. 3, had no power to make and the committee had no power to order. In the alternative it would amount to a fresh calculation by the valuer with the object of supporting his valuation, which the valuation committee had no power to direct since the valuer had admitted that he was unable to sustain his valuation. In the further alternative it would amount to a direction by the valuation committee to the valuer to perform the function of the Committee itself that is, on the evidence before it, to consider the valuation and to confirm, reduce or increase it and certify the same. In any one of these events it was contended that the committee had no power to make this direction to the valuer.

Rule 3, r. 4 and r. 5 read:

> "3. When the valuation of Crown property has been completed by the valuer, the local authority shall notify in writing the Commissioner of Lands, the Commissioner for Transport, the Postmaster-General and the Administrator of the East Africa High Commission accordingly and shall furnish them each with a copy of the aforesaid valuation. Such valuation shall thereafter be submitted to a valuation committee consisting of the following members–
>
> (*a*) a magistrate of the first or second class having jurisdiction in the area of the local authority to be chairman;
>
> (*b*) one member together with one alternate member to be nominated by the Governor;
>
> (*c*) one member together with one alternate member to be nominated by the local authority.

> "4. The valuation committee shall, at meetings called by the chairman, consider the valuation of Crown property and any objections made thereto by or on behalf of the Government of the Colony, the Commissioner for Transport, the Postmaster-General, the Administrator of the East Africa High Commission, or the local authority, and shall be entitled to make such alterations or amendments to such valuation, either by way of reduction, increase, addition or omission, as to it may seem expedient.
>
> "5. When the valuation committee has completed its examination of the valuation of Crown property and has made such alterations and amendments as it may deem necessary, the chairman shall sign and certify the same."

It is clear from the Rules that the duty of the Crown Property Valuation Committee is to consider the completed valuation referred to in r. 3 and that, once the valuer has completed his valuation, he has no power to amend it. It is equally clear that a Crown Property Valuation Committee has no jurisdiction to direct or permit a valuer to amend his completed valuation. That valuation stands until it is altered or amended by the Committee under the powers conferred upon it by r. 4. But we are not satisfied that the Mombasa Crown Property Valuation Committee, by its request of January 25, 1958, did intend that the valuer, Mr. Shore, should substitute an amended valuation for the valuation in the valuation list, the objection to which the committee was then considering. The request or, as it was interpreted by the clerk to the committee in his letter to Mr. Shore of January 25, 1958, the direction, could have more clearly expressed the type of information, evidence or calculation the committee required of the valuer to enable it to come to a decision as to the proper rateable value. In view of Mr. Shore's statement in evidence we think that the request, contained in the minute of the committee's decision, and the subsequent direction to Mr. Shore, could quite properly be interpreted to indicate an intention only to obtain from Mr. Shore further information as to a different method of calculation of rateable value in the light of the evidence which had been placed before the committee by the Crown, which information might be taken into consideration by the committee in arriving at its eventual decision. This, in our view, the committee was entitled to do, even though, in the event, it would mean the reopening of the objection proceedings.

In *R. v. Westminster Assessment Committee, Ex parte Grosvenor House* (*Park Lane*), *Ltd*. (1), [1940] 4 All E.R. 132, where the Court of Appeal was considering the duties of an assessment committee under the Union Assessment Committee Act, 1864, Scott, L.J., observed that there was no lis inter partes between the objector and the rating authority. In the same case Du Parcq, L.J., said at p. 142 of the report:

> ". . . it must always be borne in mind that the paramount duty of the assessment committee is to make such order as it thinks just, and that, if it should arrive at too low a figure, other ratepayers will suffer, even if the rating authority does not complain."

We think that similar principles should be applied to the hearing of objections by a Crown Property Valuation Committee which by r. 4 of the Rules is

> "entitled to make such alterations or amendments to such valuation, either by way of reduction, increase, addition or omission, as it may deem expedient."

It is the duty of the committee to endeavour to arrive at a correct valuation and for that purpose we think it is entitled to call witnesses on its own motion, to recall witnesses and, if it thinks fit, to reopen the proceedings. It is not bound to act only on the evidence adduced by the rating authority and the

Crown, if it considers that evidence insufficient to arrive at a satisfactory determination.

The Crown Property Valuation Committee is not a court of law and is not bound to exercise its functions as if it were a court of law. Even if it were, in Kenya a court may, in a civil case, call a witness of its own motion: *Jashbhai C. Patel v. B. D. Joshi* (2) (1952), 19 E.A.C.A. 42.

Following these principles, therefore, in our opinion, if a valuer finds that his valuation has been shown to be erroneous, whether because it had been based on incorrect facts or on an incorrect premise, the committee is still entitled to seek his aid, in the same manner as that of any other witness, in supplying it with a more correct set of figures or calculations. Furthermore in arriving at those calculations we see no reason why he should not adopt a different method of valuing the property to be rated, provided the basis of his valuation is still the fair market value as prescribed by s. 6 of the Ordinance.

In our view the first ground advanced by the Crown is based on two fallacies. The first is that the request and subsequent direction of the committee to the valuer was, in fact, a direction to make a revaluation, which we have held not to be the case, and the second is that the proceedings before the committee were in the nature of a trial when in fact they were an inquiry of a judicial character. Taking the view we do of the meaning to be attached to the minute of the decision of the committee, and of the subsequent direction to the valuer of January 25, 1958, we are of opinion that the committee did not exceed its jurisdiction in coming to the decision it made or in issuing its direction to the valuer.

We turn now to the contention of the Crown that the action of the committee violated the fundamental principles of natural justice. That contention was based on the following grounds:

(1) The direction of the committee was known solely to one party when it was made; it was not conveyed to the other party for seven weeks and it had then to be extracted.

(2) The Crown had no opportunity to object to the proposed action; the action was taken in secret after the hearing was closed.

(3) The direction suggests that the re-appraisal was to be made without the knowledge of the Crown and that the resultant decision as to rateable value would be reached by the committee with the aid of such re-appraisal without the Crown, as objector, being given the opportunity either of considering, or of calling evidence controverting such re-appraisal.

It was urged that the court should consider what might have happened if the Crown had not known of the committee's decision and taken the action it did.

It follows from what we have said that as the committee was of the opinion that

> "the evidence before it may be insufficient to formulate a proper and correct rateable value",

it was entitled to reopen the proceedings and to hear further evidence. We are, at this stage of the proceedings, entitled to presume that when Mr. Shore's re-appraisal was available, the committee would have continued its inquiry in proper form. That this would be so would appear from the letter of the secretary of the committee to Crown counsel dated March 19, 1958, albeit extracted after some delay, that the committee intended to afford both the rating authority and the Crown the opportunity of making further submissions in the event of the committee deciding that the re-appraisal by Mr. Shore, when made, was of use to it. But even without this letter we are certainly not entitled to assume, to the contrary, that the committee may eventually violate a fundamental

principle of natural justice and deprive either the rating authority or the objector of their rights to consider, and, if necessary, call evidence to controvert, any further evidence which may be called by the committee.

Nor do we think that the decision of the committee was made known only to one of the parties. Undoubtedly the decision of the committee was known to the secretary to the committee who was also town clerk to the rating authority, but there is nothing before this court to show that the decision of the committee was made known to the rating authority as such. Again, in our view, it was entirely within the discretion of the committee whether or not it decided to call for further evidence and to issue the direction it did, and neither the rating authority nor the objector had a right to be heard by the committee as to whether or not any such direction should be given.

Du Parcq, L.J., said in *R. v. Westminster Assessment Committee, Ex parte Grosvenor House* (*Park Lane*), *Ltd*. (1), where the assessment committee had obtained a report which was not seen by the parties (p. 142):

> "We are clearly of opinion, however, that, having obtained the report, the committee was bound to communicate to the rating authority and to the objectors such parts of it as were relevant to the inquiry. It is obvious from the reference to the report in Giles' affidavit that at least some parts of it were so relevant. We are well content to adopt and apply to this case language used by Lord Loreburn with regard to any inquiry by the Board of Education, when he said, in *Board of Education v. Rice*, that the Board must always give:
>
> > '. . . a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view'.
>
> "Those words may properly be applied, in our opinion, to any inquiry of a judicial character."

With those statements we would respectfully agree.

We think, then, that both the rating authority and the objector should have been notified of the decision of the committee as soon as possible after it had been made, and an indication given by the committee of the procedure it proposed to adopt in respect of the circulation in advance of such re-appraisal, the re-calling of Mr. Shore to put such re-appraisal in evidence, and the opportunity to be given to the rating authority and to the objector to controvert it. It is possibly the failure of the committee to have done so, coupled with the facts that the secretary of the committee is also town clerk to the rating authority while the valuer is also an employee of the rating authority, that has led the objector to suspect that a failure of justice may occur. But we do not think that the failure of the committee so to notify the rating authority, and the objector has violated any principle of natural justice or that the objector, at this stage, has been thereby prejudiced.

For these reasons, in our view, there is no merit in the Crown's contentions in support of either of the grounds on which it seeks to support this application. The order prayed will be refused.

Order for prohibition refused.

For the applicant:
DW Conroy QC (Solicitor-General, Kenya), and *JS Rumbold* (Crown Counsel, Kenya)
The Attorney-General, Kenya

For the valuation committee:
AV Ratcliff (Town Clerk, Mombasa Municipal Board)

For the Mombasa Municipal Board:
RP Cleasby
Atkinson, Cleasby & Co, Mombasa

BP Bhatt and another v Habib Versi Rajani

[1958] 1 EA 536 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	26 August 1958
Case Number:	1/1958
Before:	Law J
Sourced by:	LawAfrica

[1] Rent Restriction – Recovery of possession – Possession claimed by landlord for reconstructing dwelling into commercial building – Whether purpose of recovery of possession in the public interest – Meaning of "purpose in the public interest" – Rent Restriction Ordinance (*Cap.* 301), *s.* 19 (1) (*f*) *and* (*i*) (*T.*).

Editor's Summary

The landlord of an exclusively residential building, situated in an area which had been zoned as "commercial" by the local authority, applied to the Rent Restriction Board for recovery of possession so that he could demolish it and build exclusively commercial premises thereon. The Board granted possession of the premises under para. (*f*) and para. (*i*) of s. 19 (1) of the Rent Restriction Ordinance. The appellants who were tenants appealed mainly on the grounds: (1) that the landlord's application was such as to deprive the board of its power to include in any ejectment order a requirement that the landlord should grant to the tenants a tenancy in the reconstructed premises; (2) that the board erred in holding that s. 19 (1) (*i*) or s. 19 (1) (*f*) allowed the landlord to convert residential premises which are protected by the Rent Restriction Ordinance into business premises and thereby become decontrolled; and (3) that the board erred in making the order for possession also under s. 19 (1) (*f*) without any evidence whatsoever of public interest. By virtue of s. 19 (1) (*f*) the board may order the recovery of possession of any premises "reasonably required for the purposes of the execution of the statutory duties or powers of a local authority or statutory undertaking, or for any purpose which, in the opinion of the board . . . is in the public interest". Section 19 (1) (*i*) also empowers the board to order recovery of possession where "the landlord requires possession of the premises to enable the reconstruction or rebuilding thereof to be carried out", but in both cases the board may order the landlord to grant to the tenant a new tenancy of the new, reconstructed or rebuilt premises, as the case may be, on such terms as may be reasonably equivalent to the old tenancy and, further, by sub-s. (2) of s. 19 "no order for the recovery of possession of premises . . . shall be made unless the board . . . considers it reasonable to make such an order".

Held –

(i) the words “reconstruct or rebuild” in para. (*i*) of s. 19 (1) relate back to the original building and thus preclude a complete change in the nature of the user of the building;

(ii) to bring an application for recovery of possession for a purpose “in the public interest” within para. (*f*) of s. 19 (1), it is not sufficient that public interest may benefit indirectly or incidentally, if the primary purpose of the application is to benefit the landlord’s interest and not that of the public;

(iii) the application was clearly not made “for a purpose in the public interest”.

Appeal allowed with costs.

Case referred to in judgment:

(1) *Feyereisel v. Turnidge*, [1952] 2 Q.B.29; sub nom. *Feyereisel v. Parry*, [1952] 1 All E.R. 728.

(2) *Somers v. Hutchinson* (1930), 64 I.L.T. 162.

(3) *Solle v. Butcher*, [1949] 2 All E.R. 1107; [1950] 1 K.B. 671.

(4) *Hamabai Framjee Petit v. Secretary of State for India* (1915), 39 Bom. 279.

Judgment

Law J: This is an appeal by two tenants occupying residential accommodation in house No. 723/11, Suleman Street, Dar-es-Salaam, against a decision of the Dar-es-Salaam Rent Restriction Board, dated April 14, 1958, in Applications Nos. 547 and 552 of 1957, which were consolidated, whereby the board ordered that the landlord, the present respondent, should have vacant possession of that part of the said house which is in the occupation of the two appellants.

Although one of the grounds upon which possession was sought by the landlord was that the tenants were in arrears with their rent, under s. 19 (1) (*a*) of the Rent Restriction Ordinance (Cap. 301), possession was not decreed on this ground as it transpired in the course of the hearing before the board that the landlord had over-estimated the standard rent and that the tenants were not in fact in arrears with their rent. The landlord succeeded in obtaining an order for the recovery of possession under para. (*f*) and para. (*i*) of s. 19 (1). By para. (*f*) the board may order the recovery of possession of any premises

> "reasonably required for the purposes of the execution of the statutory duties or powers of a local authority or statutory undertaking, or for any purpose which, in the opinion of the board, . . . is in the public interest."

By para. (*i*) possession may be ordered where

> "the landlord requires possession of the premises to enable the reconstruction or rebuilding thereof to be carried out".

In both cases, the board has power to include in any ejectment order an order requiring the landlord to grant to the tenant a new tenancy of the new, reconstructed or rebuilt premises, as the case may be, on such terms as may be reasonably equivalent to the old tenancy.

By sub-s. (2) of s. 19,

> "no order for the recovery of possession of premises . . . shall be made unless the board . . . considers it reasonable to make such an order."

In the case now under appeal the following facts are not in dispute:

(*a*) the two appellants occupy residential accommodation on the ground floor of the house;

(*b*) the area of Suleman Street has been zoned as "commercial" by the local authority and is in fact a commercial area;

(*c*) house No. 723/11 is the only exclusively residential house left in Suleman Street;

(*d*) if reconstructed, the house would be required to consist of commercial premises, at least on the ground floor, although there would be no objection to residential accommodation on the first or higher floors.

The landlord requires possession of the house so that he can demolish it and rebuild exclusively commercial premises on the same foundations. It is admitted by the parties that his would amount to "reconstruction or rebuilding" within the meaning of para. (*f*) and para. (*i*) of s. 19 (1). The reconstructed building according to the approved plans, would consist entirely of shops and offices and would contain no residential element whatsoever. It follows therefore that when the landlord was given possession of this residential house for the

purpose of erecting a commercial building on the site, the board was unable to make any order requiring the landlord to grant to his tenants a new tenancy of part of the reconstructed building on terms reasonably equivalent to the old tenancy. This state of affairs gives rise to the first five grounds of appeal, which are:

(1) that the landlord's application was such as to deprive the board of its power to include in any ejectment order a requirement that the landlord should grant to the tenants in the reconstructed premises;

(2) that the board's order was consequently contrary to the requirements of para. (*i*) and para. (*f*) of s. 19 (1);

(3) that the board failed to apply its mind to the making of such an order of requirement;

(4) that it failed to make such an order or, alternatively

(5) exercised its power on wrong grounds.

As regards grounds (2) to (5) respectively, the question arises whether it is necessary for a board to go into the question of the grant of a tenancy in the reconstructed building, having regard to the fact that the nature of the rebuilding makes such a course impracticable. I think not. Assuming for the sake of argument that the order for possession was properly made, it is absurd to expect the board to consider the question of ordering the landlord to grant a tenancy of part of the reconstructed building, because the reconstructed building will contain no residential element whatsoever and any new tenancy granted could not therefore be "reasonably equivalent" to the old tenancy. The board's action is not ordering the grant of a new tenancy was not contrary to the requirements of para. (*i*) and para. (*f*) as alleged in the second ground of appeal, because those paragraphs give the board a discretion whether or not to make such an order, and accordingly grounds of appeal (2) to (5) must fail. But there remains ground of appeal (1), which should be read in conjunction with ground of appeal (9), which reads as follows:

"(9) The board erred in holding that s. 19 (1) (*i*) or s. 19 (1) (*f*) allowed the landlord to convert residential premises which are subject of protection by the Rent Restriction Ordinance into business premises and thereby becoming decontrolled."

Here is what, in my opinion, is the substantial ground of appeal. A landlord owns a residential house in an admittedly commercial area. Can he obtain an order for possession against the tenants by deciding to reconstruct the house as entirely commercial premises? If he can, then the board cannot exercise the power conferred upon it of requiring the landlord to grant new leases in the reconstructed building, because no part of it will be residential and capable of forming the subject of a new lease. As Denning, L.J., said in *Feyereisel v. Turnidge* (1), [1952] 2 Q.B. 29 at p. 37,

"The guiding light through the darkness of the Rent Acts is to remember that they confer personal security on a tenant in respect of his home."

The decision of the board now appealed against has the effect of depriving two tenants of their homes without making any alternative provision. Such a state of affairs cannot be condoned by this court unless it is clearly sanctioned by the legislature. Mr. Rattansey for the appellants argues that, reading s. 19 (1) (*i*) and s. 19 (2) as a whole, s. 19 (1) (*i*) has the effect of debarring a landlord from transforming the user of a house from exclusively residential to exclusively commercial. Mr. Sayani for the respondent argues that if the legislature had intended to prevent such a change of user, it would have made express provision to that effect. After very careful consideration I have come

to the conclusion that the appellants' contention must prevail. In my opinion the words "reconstruction or rebuilding" in s. 19 (1) (*i*) relate back to the original building on the site, in this case a dwelling house. As was said in the Irish case of *Somers v. Hutchinson* (2) (1930), 64 I.L.T. 103,

> "The term 'reconstruction' relates back to a former dwelling-house, whereas the term 'erection' is appropriate not only to a new building, but also to the substantial adaptation to residential use of premises previously used for other purposes e.g. business or industry."

By analogy I hold that where a landlord applies for possession of premises under para. (*i*) of s. 19 (1) "to enable the reconstruction or rebuilding thereof", the words "reconstruction or rebuilding" relate back to the original building and its original user; whereas if the legislature had intended to allow a change of user they would have chosen different words. I find support for this view in the wording of para. (*f*) of s. 19 (1), which speaks of any "new, reconstructed or rebuilt premises". Why has the word "new" been omitted from the corresponding part of para. (*i*) which speaks only of "reconstructed or rebuilt" premises, as distinct from "new" premises? The reason is, in my view, because para (*i*) is intended to apply to the reconstruction or rebuilding of premises without changing their nature by turning them into something "new", and thereby shedding all the attributes of the "old". Reconstructed and rebuilt premises preserve their former attributes (*Solle v. Butcher* (3), [1950] 1 K.B. 671 at p. 680).

Grounds (1) and (9) of appeal accordingly succeed. This is not however sufficient to dispose of this appeal, as the board in its decision further stated:

> "It is not necessary in these circumstances to consider s. 19 (1) (*f*) but it will be as well if I say that, as already indicated, the board consider the new development in the public interest and their finding of reasonableness would have been the same under that sub-section. It was suggested for the respondents (i.e. the tenants) that for an application to succeed under this sub-section there had to be some statutory force applied to the owner by a public undertaking or local authority. The board sees no merit in this interpretation of the sub-section which clearly envisages premises being taken over by a statutory undertaking or local authority for statutory purposes on the one hand, or the use of the premises for some other purpose in the public interest on the other, whether in their present form or reconstructed.
>
> "In the opinion of the board therefore the application would succeed under this sub-section also."

Grounds of appeal (7) and (8) are directed against this part of the board's decision. They read as follows:

> "(7) The board erred in making the order for possession also under s. 19 (1) (*f*) without any evidence whatsoever of public interest.
>
> "(8) The board erred as it failed to apply its mind to its powers under s. 19 (1) (*f*) and if it did so it misapplied it on grounds."

I have already pointed out that para. (*f*) differs from para. (*i*) in that it allows an order for possession to be made for the purpose of erecting new premises as well as reconstructing or rebuilding existing premises. This would allow the board to grant possession to erect a new building involving a change of user, if to do so would be for a purpose in the public interest, and in such a case the board would be unable to make an order requiring the granting of a tenancy in the new premises reasonably equivalent to the old tenancy as such a course would be impossible of performance. The 8th ground of appeal therefore fails, but the 7th ground remains for consideration. Did the landlord

in this case "reasonably require" the premises "for any purpose . . . which is in the public interest"?

Can it be said that the landlord in this case requires possession of the house for a purpose which is in the public interest? It is not disputed that the house is an "eyesore", as the board put it, and in need of repair, and I do not doubt that it would be in the public interest for it to be replaced by a modern block of shops and offices. The board found that the erection of such a new building would be in the public interest, and I see no reason to differ from this finding. But that is not in itself sufficient to bring the landlord's application within the scope of para. (*f*). The board must also be satisfied that the purpose for which the landlord seeks possession is in the public interest, that is to say, the primary purpose. In this case it is clear that the benefit to the public is merely incidental to the primary purpose, which is the landlord's desire to reconstruct in a manner which will be more profitable to himself. Nowhere in his evidence does the landlord pretend that his primary purpose is to benefit the public at large. Naturally his primary purpose is to benefit himself, by getting rid of an old and unsuitable residential house and at the same time a number of tenants whom he considers unsatisfactory, and by erecting instead a modern block of six shops and six offices, at considerable cost to himself, and to secure a suitable return on this investment. The ensuing benefit to the public would be purely incidental. As was said in *Hamabai Framjee Petit v. Secretary of State for India* (4) (1915), 39 Bom. 279, when dealing with the meaning of the phrase "public purpose", which in my view means much the same as "purpose in the public interest":

> ". . . the phrase, whatever else it may mean, must include a purpose, that is to say an aim or object, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned."

In this case there can be no doubt that the aim or object of the landlord is his particular interest, and not the general interest of the community, as might be the case if the purpose of the landlord's application had been to obtain possession in order to erect a public library or a community hall. The board in my opinion misdirected itself in holding that an application which, if granted, would have as one of its results an effect beneficial to the public interest, necessarily comes within the scope of para. (*f*). What is necessary to bring an application within the scope of that paragraph is that the aim or object of the application should be to benefit the public interest, and this was not the landlord's aim or object in this particular case.

It follows that in my view this appeal must be allowed:

(*a*) insofar as the respondent landlord's application for possession was granted under s. 19 (1) (*i*), because the words "reconstruct or rebuild" in that section must, in my opinion, relate back to the original building and thus preclude a complete change in the nature of the user of that building, and

(*b*) insofar as the application was granted under s. 19 (1) (*f*), because it was clearly not made "for a purpose in the public interest".

The appeal is accordingly allowed with costs.

Appeal allowed with costs.

For the appellants:
MN Rattansey
Mahmud N Rattansey & Co, Dar-es-Salaam

For the respondents:

NR Sayani
Sayani & Co, Dar-es-Salaam

Sheikh Mohamed Bashir v The City Council of Nairobi

[1958] 1 EA 541 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	14 July 1958
Case Number:	60/1957
Before:	MacDuff J
Sourced by:	LawAfrica

[1] Legislation – Retrospective effect – Pending proceedings – Local Government (*Rating*) *Ordinance* (*Cap.* 137), *s.* 12 (*K.*) – *Local Government* (*Valuation and Rating*) *Ordinance*, 1956, *s.* 13, *s.* 14, *s.* 20 (*K.*) – *Local Government* (*Valuation and Rating*) (*Amendment*) *Ordinance*, 1957, *s.* 2, *s.* 4, *s.* 6 *and s.* 20 (*K.*).

Editor's Summary

The appellant being aggrieved by the value put upon his plot by the city valuer and also by the decision of the valuation court, appealed to the magistrate's court by virtue of s. 12 of the Local Government (Rating) Ordinance (Cap. 137). When this appeal was dismissed, he appealed again. The respondent raised a preliminary point, submitting that the appeal was incompetent. The appeal before the magistrate was in respect of a valuation on the 1954 Roll and though filed on September 10, 1956, was not heard until September 25, 1957. Under the Local Government (Rating) Ordinance (Cap. 137) a decision of the magistrate's court was "final and conclusive". On May 11, 1956, the Local Government (Valuation and Rating) Ordinance, 1956, came into force, repealing the previous Ordinance, and the relevant provisions of the 1956 Ordinance were in turn replaced by the Local Government (Valuation and Rating) (Amendment) Ordinance on May 14, 1957. The respondent's contention was that whilst both the subsequent Ordinances contained provisions different from the original Ordinance and the decisions of both courts having jurisdiction under the 1956 Ordinance were to be final and conclusive, neither of the appeals provided for in the 1957 Ordinance were expressed to be so, and that (*a*) the provisions as to appeal under the Local Government (Valuation and Rating) (Amendment) Ordinance, 1957, were not retrospective so as to enable an appeal under its provisions in this case, and (*b*) no appeal lay under the provisions of the Local Government (Valuation and Rating) Ordinance, 1956. For the appellant, on the other hand, it was contended that s. 5 of the 1957 Ordinance, which, in effect, provided for the right of appeal from the decision of a magistrate, should be interpreted to have a retrospective effect for two reasons, namely: (1) that the right of appeal which now accrued as a result of the alteration to the existing law made by the 1957 Ordinance, was an alteration in procedural and not in substantive law and (2) that the whole intendment of the 1957 Ordinance was that s. 20 (*b*), which gave a right of appeal to the magistrate's court, should have retrospective effect and that it should be applied to pending causes.

Held –

(i) the alteration effected by the 1957 Ordinance was an alternation in substantive and not in procedural law.

(ii) the court could find no necessary intendment that the right of appeal resultant from the re-wording of s. 20 (*b*) of the 1957 Ordinance should be given retrospective operation; and therefore,

(iii) an appeal did not lie from the decision of the magistrate.

Preliminary objection upheld. Appeal dismissed as incompetent.

Case referred to:

(1) *Hutchinson v. Jauncey*, [1950] 1 All E.R. 165.

Judgment

MacDuff J: The appellant being aggrieved by the value put on a plot, of which he was the leaseholder, by the city valuer, stated his objections before the valuation court, and being further aggrieved by the decision of that

court by virtue of the provisions of s. 12 of the Local Government (Rating) Ordinance (Cap. 137), he appealed to the court of the resident magistrate, Nairobi. The court affirmed the valuation and dismissed that appeal. The appellant now seeks to appeal to this court against the decision of the learned senior resident magistrate, Nairobi. As a preliminary question for decision the respondent submits that no appeals lies.

The appeal before the learned senior resident magistrate was in respect of a valuation on the 1954 Roll, and was filed on September 10, 1956, although it was not heard until September 25, 1957. By that time the Local Government (Rating) Ordinance (Cap. 137) had been repealed and replaced but both parties to the appeal before the learned senior resident magistrate agreed that that Ordinance still governed the court's decision. The provisions enabling a person to appeal under that Ordinance were:

> "12(1) It shall be lawful for any person who has appeared before or who has submitted his objections in writing to a valuation court pursuant to sub-s. (7) of s. 9 of this Ordinance who feels himself aggrieved by the value put upon any property owned or occupied by him to appeal within one month against such valuation from the decision of the valuation court to the court of a magistrate of the first class and such last-mentioned court shall inquire into such valuation, and its decision shall be final and conclusive."

That Ordinance was repealed and replaced by the Local Government (Valuation and Rating) Ordinance, No. 18 of 1956, which, I am informed, came into force on May 11, 1956. This Ordinance replaced the valuation court established under s. 10 of the former Ordinance with two types of valuation court, one established under s. 13 under the presidency of a magistrate of the first class and the second established under s. 14 more of the nature envisaged by the former Ordinance. As a result different provisions were required to be made which, so far as are relevant, were:

> "20(1) The decision of a valuation court appointed under s. 13 of this Ordinance upon any objection shall, subject to the provisions of s. 21 of this Ordinance, be final and conclusive.
>
> "(2) Any person who has appeared before a valuation court appointed under s. 14 of this Ordinance on the consideration of an objection made before such court under this part of this Ordinance, or who has submitted an objection in writing to such valuation court, who is aggrieved by the decision of such valuation court on the objection, may appeal against the decision of such valuation court within one month from the date of the notice referred to in sub-s. (4) of s. 18 of this Ordinance to a subordinate court of the first class, and the decision of such last-mentioned court shall, subject to the provisions of s. 21 of this Ordinance, be final and conclusive."

These provisions, however, were repealed by the Local Government (Valuation and Rating) (Amendment) Ordinance, No. 7 of 1957, the date of commencement of the new sections being May 14, 1957. As far as is relevant to the present question the provisions now read:

> "20. Any person who has appeared before a valuation court on the consideration of an objection made before such court under this part of this Ordinance, or who has submitted an objection in writing to such valuation court, and who is aggrieved by the decision of such valuation court on the objection, may appeal against the decision of such valuation court within one month from the date of the notice referred to in sub-s. (4) of s. 18 of this Ordinance–
>
> (*a*) to the Supreme Court, if such valuation court was appointed under s. 13 of this Ordinance; or

(*b*) to a subordinate court held by a senior resident magistrate or a resident magistrate, if such valuation court was appointed under s. 14 of this Ordinance."

It will be remarked that while the decision of the court of a magistrate of the first class under the former Ordinance was final and conclusive, and while the decision of both the valuation court established under s. 13 of the 1956 Ordinance, and of the court of a magistrate of the first class on appeal from a valuation court established under s. 14 of the 1956 Ordinance, were final and conclusive, neither of the appeals provided for in the 1957 Ordinance are expressed to be final and conclusive.

The contention of the respondent is that:

(*a*) The provisions as to appeal under the Local Government (Valuation and Rating) (Amendment) Ordinance, No. 7 of 1957, are not retrospective to enable an appeal under its provisions; and

(*b*) No appeal lay under the provisions of the Local Government (Valuation and Rating) Ordinance, 1956.

It is conceded for the respondent that under the 1957 Ordinance an appeal will lie in respect of the decision of a magistrate by virtue of the provisions of the Civil Procedure Code. Nor do I think it was contended for the appellant that any right of appeal existed under the 1956 Ordinance.

Mr. Bechgaard, for the appellant, has addressed his argument entirely to his contention that s. 5 of the 1957 Ordinance, which provides, in effect, for the present right of appeal from the decision of a magistrate, should be interpreted to have retrospective effect. Since it is a fundamental rule of English law that no Statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct application, I propose to examine this question in the light of the contentions by which the appellant submits that this section should be taken out of the scope of the general rule.

For the appellant it was submitted that there are two reasons why the section should be held to have retrospective operation. The first is based on the proposition that the right of appeal, which now accrues as a result of the alteration to the existing law made by the 1957 Ordinance, is an alteration in procedural and not in substantive law. If this be so then the alteration would come within what may be termed an exception to the general rule. The general principle of interpretation seems to be that alterations in procedure are retrospective unless there is some good reason against it (Maxwell on the Interpretation of Statutes (10th Edn.) at p. 226). I think that as a general rule the creation of a right of appeal, being dependent on the Statute which creates it, must be held to be a matter of substantive and not procedural law. Probably for that reason Mr. Bechgaard was compelled to argue that in this instance the restoration of a right which the subject ordinarily enjoys, after it has been taken away, is a matter of procedure. Following on that submission he claims that as the original Ordinance gave a right of appeal, which was taken away by the 1956 Ordinance, and restored by the 1957 Ordinance, the right of appeal should be held to be a matter of procedural law and retrospective in effect. I find myself unable to accept the premise on which this submission is based. I am not satisfied that any remedy, by way of a right of appeal, was taken away by the 1956 Ordinance. It appears to me that the original Ordinance, Cap. 137, by its use of the words "final and conclusive" in s. 12, which same words were retained in the s. 20 by which the 1956 Ordinance replaced the previous s. 12, specifically deprived the ratepayer of any appeal from a magistrate, who himself was sitting as an appellate court. What I think the legislature has done is for the first time to provide, in effect, that the provisions of s. 65 of the Civil Procedure Ordinance may take effect

in respect of the order or decree of a magistrate made under s. 20 (*b*) of the present Ordinance. For that reason I would hold it to be an alteration in substantive, not in procedural law.

The second reason advanced for the appellant was that the whole intendment of the 1957 Ordinance was that the new s. 20 (*b*) should have retrospective effect and that it should be applied to pending causes. Reliance was placed on the decision in *Hutchinson v. Jauncey* (1), [1950] 1 All E.R. 165, where it was held that if the necessary intendment of an Act is to affect pending causes of actions then the court will give effect to the intention of the legislature even though there is no express reference to pending actions. In that case Sir Raymond Evershed, M.R., approved a statement of the general principle set out in Maxwell on the Interpretation of Statutes (9th Edn.) at page 229 as follows:

> "In general, when the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new Statute shows a clear intention to very such rights."

He then went on to hold that such intention did not require to be found only in express reference to causes of action pending but could be ascertained from the necessary intendment of the Act. However, at page 167 he is reported as saying–

> ". . . the principle is not in dispute, and I assume in counsel's favour that the onus . . . lies on those who so assert. It would be an onus not lightly to be discharged."

There being no express reference to causes of action pending in the 1957 Ordinance, has the appellant established that the necessary intendment of that Ordinance is that the newly created right of appeal should apply in respect of proceedings by way of appeal before a magistrate? Section 2, s. 4 and s. 6 of this Ordinance are expressly provided to be deemed to have come into operation at the same time as the principal Ordinance, that is to have retrospective effect. I cannot find anything in those sections which would require as a necessary intendment that the new s. 20 be also given retrospective effect. Having applied its mind to the necessity for giving some provisions of the 1957 Ordinance retrospective effect, one must ordinarily presume that like consideration was given to the necessity or desirability of other provisions being given the same effect with the result that if the legislature has deliberately not done so it must be presumed to have intended not to do so. I have been referred to s. 11 of the 1957 Ordinance which deals with transitional provisions and from the fact that there is no reference to pending causes therein I am asked to draw an inference that such exclusion is indicative of the legislature's intendment that s. 20 should be given retrospective effect. I am unable to do so. To my mind any inference to be drawn would be to the contrary. On a reading of the 1957 Ordinance I can find no necessary intendment that the right of appeal resultant from the re-wording of s. 20 (*b*) should be given retrospective operation.

In the result, therefore, the appellant having failed to rebut the general rule of interpretation, that rule must hold and s. 20 (*b*) be held to come into operation as at May 14, 1957. I accordingly hold that an appeal does not lie in respect of the decision of the learned resident magistrate. This appeal is therefore dismissed with costs.

Preliminary objection upheld. Appeal dismissed as incompetent.

For the appellant:
K Bechgaard
K Bechgaard, Nairobi

For the respondent:
JA Mackie-Robertson
Kaplan & Stratton, Nairobi

Sheikh Mohamed Bashir v The Commissioner of Lands
[1958] 1 EA 545 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	27 October 1958
Case Number:	1/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Sir Owen Corrie Ag JA
Sourced by:	LawAfrica

[1] Practice – Leave to appeal to Privy Council – Order for conditional leave granted and conditions fulfilled – Application for final leave made but not pursued – Meaning of "apply with due diligence" – When court will rescind order for conditional leave to appeal – East African (*Appeal to Privy Council*) *Order in Council*, 1951, *s.* 6 *and s.* 11.

Editor's Summary

The applicant had obtained, on April 22, 1958, a conditional order, giving him leave to appeal as of right to the Privy Council, and having complied with the conditions of the order, filed his application for final leave to appeal on June 18. On July 7, when the application came before a single judge, the applicant's advocate stated that he was unable to contact the applicant, and asked for a few days' adjournment, to which there was no objection, and the hearing was then adjourned sine die. On August 22, the counsel for the respondent wrote to the applicant's advocate, intimating that unless the application was made before September 6, 1958, he would apply for the order granting conditional leave to be rescinded. No action having been taken, following this intimation, the respondent had the application listed for hearing on September 24, when the applicant's counsel stated to the judge that he had that morning received instructions to proceed, and on his application, a further adjournment for seven days was granted, the respondent having made it clear that the application would be opposed. On September 29, the respondent applied for an order under s. 11 of the East African (Appeal to Privy Council) Order in Council, 1951, to rescind the order for conditional leave to appeal, and consequential orders. On October 2 both applications were heard by a single judge, who refused final leave to appeal and made an order in terms of the respondent's application, whereupon the applicant, on October 9, applied for a reference to the full court.

Held –

(i) it is doubtful whether a single judge of the Court of Appeal has power either to make an order bringing an intended appeal to an end under s. 6 (*b*) of the Order in Council, or, under s. 11, to

rescind an order granting conditional leave to appeal; such application should normally be heard by the full court.

(ii) the words "apply with due diligence" in s. 11 of the Order in Council mean "to apply and prosecute the application", or "to take all necessary steps to obtain an order"; it is unreasonable that an appellant, having filed an application for final leave, should then be able, by able, by dilatoriness, to hold up the appeal; due diligence would have demanded that the application for final leave be heard before September 6, and whilst the court would hesitate to shut out an appellant, the interests of the respondent deserved consideration also, and in all the circumstances, no case for indulgence had been shown.

Order that the grant of conditional leave to appeal be rescinded.

[**Editorial Note**: See also *The Commissioner for Lands v. Sheikh Mohamed Bashir*, reported at p. 45.]

Judgment

Briggs V-P: read the following judgment of the court: This matter comes before us as a reference to the full court under the proviso to s. 6 of the East African (Appeal to Privy Council) Order in Council, 1951, on a decision made by a single judge of the court.

The intending appellant obtained on April 22, 1958, conditional leave as of right to appeal to her Majesty in Council from a judgment of this court dated March 24, 1958. He complied with the conditions of the order and filed his application for final leave to appeal on June 18. Such applications are usually allowed without argument, and are in practice set down before a single judge. On July 7 the application came before Forbes, J.A. Mr. Gledhill, for the appellant, said that he was unable to get in contact with his client and asked for "a few days' adjournment". The respondent did not object and the hearing was adjourned sine die. Applications of this kind can always be fixed for hearing at a very early date, and one would have expected the matter to come up again in, say, a week. Such applications are regularly heard at any time in the summer vacation, during which time runs for all purposes of this court. The appellant, however, did not apply for an appointment. On August 22 the respondent's counsel wrote to the appellant's advocate as follows:

> "You will remember that at your request your application for final leave to appeal was adjourned on July 7, until a day to be fixed, so that you could take your client's instructions. I have to inform you that I shall oppose the grant of final leave on the ground that the delay of six weeks has been wholly unnecessary, and that unless you apply for final leave before September 6, I shall apply for the order granting conditional leave to appeal to be rescinded."

The appellant took no action and on the application of the respondent the matter was placed in the list for hearing by Gould, J.A., on September 24. The appellant's counsel then said that "within the last half-hour" he had received instructions that his client wished to go on, and it was later stated by him before us, though it does not appear in the learned judge's note, that he applied for seven days' adjournment. An adjournment was granted to October 2, the respondent having made it clear that the application was opposed.

We would state at this point, though the matter was not argued before us, that we are inclined to think it might have been more correct at that stage to adjourn the matter for hearing by the full court. We feel doubt whether the terms of s. 6 (*b*) of the Order in Council empower a single judge to make an order which has the effect of bringing the intended appeal to an end. We think the paragraph is designed to cover applications which are in the ordinary sense interlocutory.

On September 29 the respondent filed an application for an order under s. 11 to rescind the conditional leave to appeal and for consequential orders. The remarks in the preceding paragraph apply equally to this application. We think it should preferably have been heard by the full court.

The two applications were heard together on October 2 by Gould, J.A. No point of jurisdiction was taken, and since the same applications are now before the full court and were reheard by us de novo we think that the error, if error it was, is cured. The learned judge refused final leave to appeal and made an order in terms of the respondent's application. On October 9 the appellant applied to refer to the full court and on October 22 an affidavit by him was sworn and filed. It exhibited a so-called "agreement" between himself and a company called Mulji Jetha Ltd., said to be "a well-known company of considerable wealth" and "well able to provide the necessary finance" to build the proposed hotel. No

objection was taken to the reading of this affidavit when the matter came before us on October 24.

Mr. Gledhill, in opening the reference, dealt very shortly with the delay since June 18, 1958. He conceded that an application for final leave does not ordinarily require any express instructions from the client, but said that he was not then authorised to proceed with the application, since his client was waiting for an opinion from London. He also said that his client had been out of Nairobi and, for a period of four or five days, had been ill. It is clear that the appellant deliberately withheld instructions to proceed in spite of the respondent's warning, until September 24, that is for over three months.

Mr. Gledhill spent a good deal more time in describing the earlier history of the whole matter, and sought to show that the appellant had a good case on the merits. He claimed that all tenants of similar land had received indulgence by extension of time to comply with building conditions, and only the appellant had been refused such indulgence; that the respondent's real objection to the appellant was based on a belief that he was financially unable to build the hotel; that the Supreme Court considered that relief should be granted, and this court had expressed no contrary view, but held only that in law it could not be granted; that now, thanks to the agreement with Mulji Jetha Ltd., the appellant was financially able to proceed and would start building within ten days of receiving permission to do so; and finally, that he could build an hotel on the site in issue much more quickly than anyone else could.

Some of this may be conceded, but it is also relevant to say that the appellant was for a long time financially unable to do what he had undertaken to do, that the hotel should have been completed in 1955 and has not been started, and that there was no firm prospect of starting it even when Gould, J.A., made his order. This may be of importance if one has to consider why the appellant delayed asking for final leave. As regards the "agreement" with Mulji Jetha Ltd., one has only to read it to feel the gravest doubts whether it is enforceable at all.

Mr. Marnan for the respondent submitted that the words "apply with due diligence . . . for an order granting him final leave" in s. 11 of the Order are not satisfied by merely filing an application. Their meaning is "apply and prosecute the application" or "take all necessary steps to obtain an order". We think that the context shows this to be correct. It would be quite unreasonable that having filed his application an appellant should be able to hold matters up indefinitely. We think the first question to be answered is,

> "Did the appellant in this case prosecute his application for final leave with due diligence?"

And we think the only possible answer is "No". Due diligence would have required instructions, express or implied, to his advocate to proceed with the application in the ordinary way, in which case final leave would undoubtedly have been granted on July 7. At the very least due diligence would have demanded that the application for final leave be brought on for hearing before September 6, the date mentioned in the letter of the respondent's counsel after which an application for rescission of the conditional leave to appeal would be made. In the result it was left to the respondent to proceed. To leave his advocate without instructions for three months was not merely a lack of all diligence on the part of the appellant; it was an improper dilatoriness for which no reasonable excuse has been offered.

There is, however, a further question which must be answered. Assuming that the appellant is within the wording of s. 11 and that it is competent to make orders refusing final leave and rescinding the conditional leave, should the court in its discretion make such orders? In other words, should indulgence be granted? We think that at this stage we have ourselves a free discretion, and should not be confined to considering whether there were proper grounds on which Gould, J.A., could act. This question is less easy than the other.

The appeal involves substantial points of law, and large financial and other interests. One hesitates long before shutting an appellant out at this stage. But we are bound to consider the interests of the respondent as well as those of the appellant. It has at all times been clear that unnecessary delay in this matter must be gravely prejudicial to the respondent's interests. The appellant's delay in prosecuting his appeal has been not merely unjustified, but also, we think, was deliberate and proceeded from motives which cannot be supported. For this purpose it is legitimate to consider the earlier course of the proceedings, and both parties invited us to look at the record. Having carefully considered the matters to which our attention has been directed, the view which we have formed is that the appellant, well knowing that he had no means to comply with the terms which, at best, were bound to be imposed upon him, as a condition of relief against forfeiture if such relief was to be granted, deliberately delayed matters in order to retain some hold, albeit a tenuous one, on a valuable asset, the land, in the hope that he might be able to obtain some collateral advantage. Neither the desire to obtain counsel's opinion from London, nor absence from Nairobi, nor illness, need in any way have delayed the application for final leave, a merely formal proceeding which would in no way commit the appellant to proceed further.

Finally, although this is not a substantial ground of our decision, we are far from satisfied that even now the appellant could carry out any terms likely to be imposed on him if he succeeded in the appeal. We think that this is not a case for indulgence, and if we were to say that due diligence had been shown by the appellant in this case, we should be establishing an unjustifiable precedent.

We confirm the order made by Gould, J.A., in general, but vary it by striking out para. 6, which ordered suspension for seven days. The appellant must pay the respondent's costs of the abortive appeal including the costs of this reference.

We certify for costs of two counsel on this reference.

Order that the grant of conditional leave to appeal be rescinded.

For the applicant:
J Gledhill and *SC Gautama*
Gledhill & Oulton, Nairobi

For the respondent:
JF Marnan QC and *JS Rumbold* (Crown Counsel, Kenya)
The Attorney-General, Kenya

Gasston and Harbour v Bwavu Mpologoma Growers Co-Operative Union Limited and others

[1958] 1 EA 549 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	19 November 1958
Case Number:	241/1958
Before:	Sheridan J

Sourced by: LawAfrica

[1] Copyright – Infringement – Plans of consulting engineers for factory copied by unqualified architects – Liability in damages of persons employing unqualified architects – Whether unqualified architects innocently infringing copyright in plans exempted from liability in damages – How damages assessed – Copyright Act, 1911 *– Copyright Ordinance* (*Cap.* 220), *s.* 1 *and s.* 35 (*U.*).

Editor's Summary

The plaintiffs, a firm of consulting engineers, claimed damages for infringement of copyright, and an injunction to restrain the defendants from making use of plans relating to the layout and installation of machinery in a coffee factory which the defendants erected. it was not disputed that these plans were traced copies of drawings which the plaintiffs had previously prepared for a similar coffee factory which had been built for N. and the traced copies were done by Willy & Paul, a firm of unqualified African architects whom the defendants had joined as third parties and from whom they sought an indemnity, and who were unaware of any copyright of the plaintiffs subsisting in the plans, and believed them to be the property of N. The defendants, despite being warned by the plaintiffs against the use of the plans, used copies of these plans during the erection of their factory.

Held –

(i) the Copyright Act, 1911, has been applied to Uganda by the Copyright Ordinance (Cap. 220), of which s. 1 provides that copyright shall subsist in original literary work, which, by s. 35, includes *inter alia* plans.

(ii) as copyright existed in the plaintiffs' plans, the defendants had infringed the property of the plaintiffs, who could proceed for recovery of the plans, or sue the defendants for conversion.

(iii) the third parties had innocently infringed the plaintiffs copyright, and were protected by s. 8 of the Act, which exempts the innocent infringer from liability to pay damages.

(iv) the plaintiffs were entitled to be compensated by the amount which they would have earned if they had been in charge of the work, with their own plans.

Judgment for the plaintiffs for £2,000. Order for delivery of all copies of the plans to the plaintiffs. Order for an injunction to restrain the defendants and third parties from making further use of the plans.

Case referred to in judgment:

(1) *Chabot v. Davies and Another*, [1936] 3 All E.R. 221.

(2) *Meikle and Others v. Maufe and Others*, [1941] 3 All E.R. 144.

Judgment

Sheridan J: The plaintiffs, a firm of consulting engineers, claim damages for infringement of copyright and an injunction to restrain the defendants from making use of their plans. The defendants are an African co-operative union and the plans (exhibit A) related to the layout and installation of machinery in the coffee factory which they erected in 1957-1958

in the Masaka district. It is not disputed that these plans are copies of drawings (exhibit B) which the plaintiffs had previously prepared for a similar coffee factory which had been built for the Nkoba Za Mbogo Farmers' Co-operative Association Ltd. (hereinafter referred to as Nkoba) and that the copying was done by Willy & Paul, a firm of unqualified African architects, whom the defendants have joined as third parties and from whom they seek an indemnity.

Mr. Willy Sekatawa (D.W. 4) gave evidence that in 1956 his firm prepared plans for the building of the Nkoba factory. He was not concerned with the installation of the machinery. In the same year the defendants approached him and he designed a similar coffee factory for them. These plans were submitted to the Protectorate agent, Masaka, for approval. On August 8, 1956, the executive engineer, P.W.D., Masaka, wrote to the defendants (exhibit N) stating the plans could not be approved as they did not show the layout of the machinery. There followed an interview between Mr. Willy and Mr. Mwanje (D.W. 1), the president of the defendant union, at which the latter stated that they wanted a similar design of machinery to that at Nkoba. Mr. Willy pro-cured the plans (exhibit B) from Nkoba and made copies of them by tracing. He admits that he saw the names of Nkoba and the plaintiffs, as consulting engineers, on them and that he erased them and substituted the defendants' and his firm's name. He states that he was unaware of any copyright subsisting in them and he believed them to be the property of Nkoba. He submitted copies to the Protectorate agent, Masaka, who approved them by his letter dated October 6, 1956 (exhibit O). The plans were then handed to the defendants. Mr. Willy did not inform the defendants that he had copied the Nkoba plans.

On October 22, 1956, the defendants wrote to Mr. Robertson (P.W. 2), the plaintiffs' Kampala representative (exhibit H.1), requesting them to give quotations for machinery needed for the factory. On October 25, 1956, the plaintiffs replied (exhibit H.2) explaining that they were not agents or suppliers of machinery and that their function was to draw plans, make estimates and supervise the building and installation of works. On January 4, 1957, they wrote (exhibit I), offering to undertake the work and quoted their fees at £2,400. In April, 1957, Mr. Mwanje and Mr. Nakikubye (D.W. 2), the defendants' secretary, saw Mr. Gasston (P.W. 3), a partner in the plaintiffs' firm, and Mr. Robertson. They brought with them the plans (exhibit A) which were immediately identified as copies of the plaintiffs' plans for the Nkoba factory. I accept the evidence of Mr. Gasston and Mr. Robertson, and it accords with the probabilities, that they went to considerable lengths to explain that the plans could not be used without their permission. It may be that the full significance of what they said did not penetrate to Mr. Mwanje and Mr. Nakikubye, due to their faulty knowledge of English, but the interview was followed by a letter dated April 12, 1957 (exhibit C), which contained an implied warning about the plaintiffs' copyright in the plans and referred to their unsuitability for the defendants' purposes. The dimensions of their factory were to be wider than those of the Nkoba factory. The defendants were asked to pay Shs. 12,000/- on account. This is important because the defendants deny that they ever received the letter and yet Mr. Mwanje admits that he brought a cheque for Shs. 12,000/- to the plaintiffs. It was never cashed, either because it was not properly signed as the plaintiffs say, or because of disagreement between the parties, as the defendants say. This letter was referred to in the plaintiffs' advocate's letter dated March 12, 1958 (exhibit D.5), and its receipt was not queried in the defendants' advocate's reply dated March 28, 1958 (exhibit D.6). I believe that this letter was received. It follows that thereafter the defendants used copies of the plaintiffs' plans at their peril.

The plaintiffs and defendants fell out. It is not material in this suit to go

into the reasons for this. Later in 1957 the defendants approached Mr. Bird (D.W. 3), who holds a Board of Trade chief engineer's power certificate, to install the machinery. He identified the plans as the plaintiffs' and in or about November, 1957, he took the precaution of showing them to Mr. Robertson, who expressed himself as being unable to prevent their user. Mr. Bird stated that he had to scrap the plans but it is clear from his evidence that they were of some use to him in the preparation of his own plans (exhibit M) and in one instance he used the plaintiffs' plans (exhibits E.1-3) when he asked Mr. Parkinson (P.W. 5), the managing director of a plumbing and engineering contractors' company, for a quotation for the articles shown in the plans. Mr. Parkinson passed on the news to Mr. Robertson. The same thing happened in regard to a plan for a weighing hopper (exhibit G) which Mr. Bird showed to Mr. Smithers (P.W. 4). Finally, the plans (exhibit A) were produced to Mr. Boothroyd (P.W. 1), acting on behalf of the Director of Agriculture in January, for his approval in accordance with s. 9 (3) (*b*) of the Coffee Industry Ordinance, 1953.

The Copyright Act, 1911, has been applied to Uganda: See the Copyright Ordinance (Cap. 220), s. 1. Section 1 of the Act provides that copyright shall subsist in original literary work and in s. 35 literary work is defined to include maps, charts, plans, tables and computations. In *Chabot v. Davies and Another* (1), [1936] 3 All E.R. 221, the plaintiff sent to the defendants a blueprint, plans and elevation of a shopfront. The shopfront was erected for the defendants by a firm which worked on a tracing of the plaintiff's plan and elevation. It was held that the shopfront was a reproduction of the plan, and as the plan was an original literary work, the defendants, by authorising the reproduction, had infringed the plaintiff's copyright in the plan. Section 2 (2) (*b*) of the Act provided that copyright in a work shall be deemed to be infringed by any person who distributes either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright. Section 7 of the Act provides that all infringing copies of any work in which copyright exists shall be deemed to be the property of the owner of the copyright, who may take proceedings for the recovery of possession thereof or in respect of the conversion thereof. On the evidence I am satisfied that the plaintiffs have copyright of the plans (exhibits A and B) and that by submitting them to the Director of Agriculture the defendants infringed that copyright and converted them to their own use. The defendants cannot rely on s. 8 of the Act which exempts the innocent infringer from liability to pay damages. From April, 1957, up to the filing of the plaint on April 1, 1958, they continued to use the plans although they had been made aware that they had no right to do so.

Can s. 8 of the Act avail the third party? At first sight it seems improbable that a man who poses as an architect can innocently copy another man's plans but, having listened to Mr. Willy's evidence, and he was quite frank about it, I am by no means certain that he fully appreciated that he was doing anything wrong. This view is fortified by his reply to the defendants' advocate's letter dated April 14, 1958 (exhibit P), asking for an assurance that the plans were his firm's original plans. This was the first intimation to Mr. Willy that he might be infringing the plaintiffs' copyright. The reply (exhibit R) states that there is no such thing as trademark (sic) in plans so that they should not be copied and that an examination of these plans did not show any restriction on having them copied. This situation could hardly have arisen in a country where the qualification and practice of architects are controlled by legislation. Mr. Willy was certainly ingenuous, but, with some hesitation, I give him the benefit of s. 8 of the Act. The third party will be restrained only by an injunction.

There remains the difficult question of the quantum of damages. On the face of it and without authority I would say that the plaintiffs are entitled to be compensated by the amount which they would have earned if they had been

in charge of the work with their own plans. In *Chabot v. Davies* (1), Crossman, J., awarded the plaintiff one hundred guineas, which was twice the remuneration which he would have received under the R.I.B.A. scale, if he had done the work. This decision was considered by Uthwatt, J., in *Meikle and Others v. Maufe and Others* (2), [1941] 3 All E.R. 144, where he approved, as a sound basis from which to begin, the consideration of what sum might fairly have been charged for a licence to use the copyright for the purpose for which it is used; but he went on to say that one is entitled to take into account all the surrounding circumstances in the same way as one is entitled to do in the case of the invasion of the common law right of property. The profit which the plaintiffs would have made if they had been employed as architects for the infringing building was considered. Unfortunately the figure is not given so I am unable to say how it stands in relation to the actual award of £150. While this profit may be taken into account, among the other circumstances, in assessing damages, it was stated that it does not provide either a mathematical measure of damages or a basis on which to estimate damages. To quote the learned judge, "Copyright is not the sickle which reaps an architect's profits". He went on to point out that a practising architect would not repeat the design of an important building in another building. This is a material distinction from the present case because plans for the layout and installation of machinery in coffee factories do not exhaust their value once they are used. Although the plaintiffs' plans could not have been used for the defendants' factory owing to its different dimensions from the Nkoba factory, the plans would be repetitive and, as Mr. Gasston put it, after use they are of value as a record of what has been done in the past and on which they can improve. Counsel have been unable to find any precedent for estimating damages for the infringement of copyright in this type of plan. There were other special features in *Meikle's* case (2), including the fact that the plaintiffs were merely assignees of the copyright, that limit its usefulness as a guide in assessing damages–nevertheless I find it difficult to reconcile with *Chabot's* case (1) on this issue. In the instant case there is no evidence that the plaintiff's reputation has been adversely affected as I understand that the defendants' factory is operating satisfactorily. They estimate their fees at £2,400. Mr. Gasston calculated that the increased expenses, for which they could not charge, would be not more than £10. They have received £50 on account. Obviously the damages must be substantial and bear some relation to what the plaintiffs would have earned, or it would pay people in the position of the defendants to infringe subsisting copyright. I repeat the statement of Crossman, J., in *Chabot's* case (1) that presumably damages are to a certain extent at large, and doing the best I can on the material available and not very clear authorities, I fix the plaintiffs' damages at £2,000. In the result there will be judgment for the plaintiffs against the defendants for £2,000 with interest and costs and an order to deliver up all copies to the plaintiffs and a further order for an injunction to restrain the defendants and the third party from making any further use of the plans. The defendants will pay the third parties' costs.

Judgment for the plaintiffs for £2,000. *Order for delivery of all copies of the plans to the plaintiffs. Order for an injunction to restrain the defendants and third parties from making further use of the plans.*

For the plaintiffs:
JFG Troughton
Hunter & Greig, Kampala

For the defendants:
BKM Kiwanuka
BKM Kiwanuka, Kampala

For the third parties:
SV Pandit
SV Pandit, Kampala

Suleiman Bin Abdulla Bin Mohamed El Kiyumi v Azzan Bin Zahor El Ruwehi and Said Bin Azzan Bin Zahor El Ruwehi

[1958] 1 EA 553 (SCZ)

Division:	HH The Sultan's Court for Zanzibar
Date of judgment:	21 November 1958
Case Number:	57/1958
Before:	Windham CJ
Sourced by:	LawAfrica

*[1] Fraud – Transfer of land – Conspiracy to defeat claim of creditor – Whether transaction void or voidable – Transfer of Property Decree, s.*6 *and s.* 53 (*Z*) *– Contract Decree, s.* 23 (*Z*).

Editor's Summary

The plaintiff, a judgment creditor, sought to set aside as fraudulent and, therefore, null and void, a conveyance of land by the first defendant, the judgment debtor, to his son, the second defendant. The conveyance was made three days after judgment against the first defendant in favour of the plaintiff had been given for Shs. 6,388/- and costs, and the plaintiff claimed that the conveyance was intended to defeat his claim. There was no direct evidence of fraud and the plaintiff's case against both defendants was based on circumstantial evidence only.

Held –

(i) following *Elliahoo M. Cohen v. Syed Ali Abdulla el-Saffi & Bros' and Others* (1956), 23 E.A.C.A. 161, the cause of action fell under s. 6 (*h*) (ii) of the Transfer of Property Decree read together with s. 23 of the Contract Decree, the joint effect thereof being that if the plaintiff proved that the transfer by the first to the second defendant was fraudulent in that it was a conspiracy between them to defeat the plaintiff's claim as judgment creditor, then it was void.

(ii) circumstantial evidence suffices to prove fraud; the first defendant's admissions coupled with the timing of the transfer clearly established that the first defendant's object was to put the property out of the reach of his creditor, the plaintiff; such an object is "unlawful" for the purpose of s. 23 of the Contract Decree, both as being "fraudulent" and as being of "such a nature that, if permitted, it would defeat the provisions of any law".

(iii) in deciding whether the second defendant had been shown to have been a party to the fraudulent intentions of the first defendant, i.e. whether he conspired with him, there need not be direct evidence, but again circumstantial evidence suffices (*Mathoora v. Ram* (1869), 11 W.R. 482).

(iv) in the light of all the circumstantial and other evidence, the first and second defendants had conspired together to defeat the plaintiff's claim by a transfer of the land to the second defendant with the object of preventing the plaintiff from attaching it, and the transfer was accordingly void.

Declaration accordingly.

Case referred to in judgment:

(1) *Elliahoo M. Cohen v. Syed Ali Abdulla el-Saffi & Bros. and Others* (1956), 23 E.A.C.A. 161.

(2) *Mathoora v. Ram* (1869), 11 W.R. 482.

Judgment

Windham CJ: I have already dealt, in my decision in my decision in limine dated August 23, 1957, with the question whether the plaint in this case disclosed any cause of action, and in holding that it did I examined what

would be the legal position if the facts alleged in the plaint were proved. I will not go over again in detail what I dealt with in that decision, but will merely set out briefly the conclusions at which I arrived. I held that the facts (if proved) and the legal position were very similar to those set out and expounded by the East African Court of appeal in *Elliahoo M. Cohen v. Syed Ali Abdulla el-Saffi & Bros. and Others* (1), now reported in (1956), 23 E.A.C.A. 161. The plaintiff, a judgment creditor, seeks to set aside as being null and void a conveyance of a shamba by the first defendant, the judgment debtor, to his son, the second defendant, made three days after the judgment against him in the plaintiff's favour, as being fraudulent and intended to defeat the plaintiff's claim. The cause of action falls not under s. 53 of the Transfer of Property Decree, under which a transaction is voidable and which requires an intention to defeat or delay all creditors, but under s. 6 (*h*) (ii) of that Decree read together with s. 23 of the Contract Decree, the joint effect of these two sections being that if the plaintiff can prove that the transfer by the first to the second defendant was fraudulent, in that it was a conspiracy between them to defeat the claim of the plaintiff as a judgment creditor, then it was void.

Section 6 (*h*) (ii) provides that

> "no transfer can be made for an unlawful object or consideration within the meaning of s. 23 of the Contract Decree".

Section 23 provides that

> "the consideration or object of an agreement is lawful unless it is for-bidden by law"

Or

> "is of such a nature that, if permitted, it would defeat the provisions of any law"

or "is fraudulent"; and it goes on to provide that

> "every agreement of which the object or consideration is unlawful is void".

I would by way of clarification stress two points, both of them clearly laid down in the *Elliahoo* case (1), namely first, that the plaintiff need under those two sections only show an intent to defeat his own claim as creditor, and not an intent to defeat the claims of all the first defendant's creditors; secondly, that the cause of action being founded on the tort of conspiracy, he must in order to render the transaction void prove a fraudulent intent on the part of both defendants and not only on that of the first defendant, the transferor.

That being so, the only question remaining for determination, now that the evidence has been heard, is whether the plaintiff has succeeded in proving fraud. There is an alternative prayer for damages, which will fall to be considered only if the fraud has not been proved.

There is no direct evidence, as indeed there seldom is in such cases, in proof of fraud in either defendant, and the plaintiff's case is based on circumstantial evidence, fortified by one or two statements in evidence by the first defendant himself. First and foremost, there is the highly significant fact of the respective dates of the judgment against the first defendant and of his transfer of the property to his son. On August 15, 1955, judgment was given in Civil Case No. 38 of 1955 by this court *ex parte* in the plaintiff's favour against him for Shs. 6,388/-and costs. It is admitted by the first defendant that he knew he owed the plaintiff this sum and had received a copy of the plaint. He did not trouble to attend at the hearing of the case, and hence judgment was given against him *ex parte*. He says in evidence–

> "I did not attend court when judgment was given. I arrived when it had just been read and they were leaving the court. I didn't ask anyone how the judgment had gone . . . I did not know I could ask what had happened

about the case.”

Pausing at this point I would say that the first defendant's suggestion in this evidence that he did not know or find out on that day that judgment had been entered against him in the plaintiff's favour for the sum claimed is too incredible for acceptance. Why did he go to court at all except to find out the result? And in any case he must have known that judgment would go against him if he did not attend the trial. The only reasonably possible inference is that the first defendant, having on his own admission arrived at the court when the judgment had just been read, became aware on that day, August 15, that he had become a judgment debtor to the plaintiff in an amount of upwards of Shs. 6,300/-.

And this inference is fortified by what he then hastily did. As long ago as October 24, 1954, the first defendant had obtained the written approval of the Land Alienation Board (exhibit B) to sell the disputed shamba to the plaintiff. The price inserted was Shs. 20,000/-; but I am satisfied on the plaintiff's evidence that the plaintiff would not agree to so high a figure, so the transaction never went through, and for nearly ten months nothing was done. Then, on August 17, 1955, two days after the judgment against him, the first defendant obtained from the Land Alienation Board a renewal of their permit to sell the shamba, but this time in open terms without naming the plaintiff as the alienee, and next day he sold the shamba to his son, the second defendant, for Shs. 12,000/-.

Leaving aside for the moment the question of the second defendant's complicity in this transaction, this is a case where, in my view, the first defendant's intention in the circumstances speaks for itself, namely an intent to defeat the claim of the plaintiff for Shs. 6,388/-, which the latter might now execute by attachment of the shamba, by putting the shamba out of the plaintiff's reach. The coincidence of the proximity of the date of the judgment, August 15, to that of the transfer, August 18, is too great to bear any other reasonable interpretation. Moreover it is borne out by the first defendant's own admissions in evidence. He has stated in evidence that the Shs. 12,000/- purchase money which his son paid him (not all at once, it is to be noted) was used by him to pay off other creditors but not the plaintiff. With the legal aspect of this fact, if such it be, I will deal presently. But the following passages from his evidence are at least indicative of his intention to defeat, by the transfer, the claim of the plaintiff. He said–

> "The reason why I paid the other creditors and not plaintiff was that the other debts of mine were friendly loans, granted out of kindness, whereas plaintiff's was just a loss suffered from an undertaking. I used the whole of the Shs. 12,000/- to pay my other creditors in full."

Elsewhere in his evidence he had said that he had no money with which to pay his creditors except for the shamba. And in conclusion he said–

> "I agree that by selling the shamba to my son I prevented plaintiff from attaching it."

These admissions, coupled with the timing of the transfer, establish clearly that the first defendant's object was to put the property out of the reach of his creditor, the plaintiff. Such an object is "unlawful" for the purpose of s. 23 of the Contract Decree, both as being "fraudulent" (an expression omitted from the corresponding s. 25 of the Aden Contract Ordinance with which the *Elliahoo* case (1) was concerned) and as being of

> "such a nature that, if permitted, it would defeat the provisions of any law",

which words are contained both in s. 23 of the Contract Decree and in s. 25 of the Aden Contract Ordinance. Briggs, J.A., in his judgment in the *Elliahoo* case (1) at p. 164 held–

> "I am of opinion that a conspiracy to defeat the just claim of a creditor and thereby to pervert the course of justice must be 'of such a nature that, if permitted, it would defeat the provisions' of the laws in force relating to the administration of justice generally."

It remains to decide, then, whether the second defendant has been shown to have been a party to this fraudulent intention on his father's part; in short whether he conspired with his father. Here again, the evidence is purely circumstantial, and the second defendant, unlike his father, was careful enough not to make so many unguarded admissions. The first and second defendants had been living together on this same shamba for some years. Latterly, the first defendant having become an old man, he lived in a shed in front of his son's house and the latter supported him. The second defendant, in his evidence, professed to be illiterate. That may be so, but on his own evidence he was acute enough, in plying his trade of taking shambas on lease and buying and selling cattle, to have accumulated Shs. 4,000/- of earnings by the time he was about twenty-two years old. The second defendant admitted in evidence that when his father suddenly transferred the shamba to him in August, 1955, he knew there was a case pending by the plaintiff against his father. When the question was put directly to him he said he was not aware that plaintiff had just obtained judgment in that case. But here again, in my view, the circumstances indicate that he must have known. His father lived at his doorstep, and it is not to be credited that he did not ask his father the reason, even if he did not already know it, why he should suddenly want to transfer the shamba to him, particularly as this entailed, as he says it did, paying over on the spot Shs. 8,000/- which his (the second defendant's) grandfather had given him several years before and which (he says) he had kept until then untouched in a box. Moreover, the second defendant admits that he went his father to (though not into) the office of the Land Alienation Board on the day before the transfer to obtain the renewal of the board's consent to the transfer. The only reasonable conclusion is that he knew that the judgment in the plaintiff's favour had just been entered and that this was the real object of the sudden transfer of the shamba to himself, to prevent the plaintiff's attaching it; in short that he conspired with his father with that object. The circumstances, in my view, prove this beyond a mere suspicion.

In this connection I would refer to a relevant passage in the judgment in *Mathoora v. Ram* (2) (1869), 11 W.R. 482:

> "It is truth confirmed by all experience that in the great majority of cases fraud is not capable of being established by positive and express proofs. It is by its very nature secret in its movements; … in the generality of cases, circumstantial evidence is our only resource in dealing with questions of fraud, and if this evidence is sufficient to overcome the natural presumption of honesty and fair dealing and to satisfy a reasonable mind of the existence of fraud by raising a counter presumption, there is no reason whatever why we should not act on it."

One other piece of evidence I would refer to which further points to the conclusion that, while the second defendant may have paid his father the Shs. 12,000/- purchase price for the shamba, the transaction was not the genuine one which it purported to be, namely that since the transfer, according to the plaintiff's witness, Juma bin Harun, which I preferred to that of the defendant's witness, Abdulla bin Said, the first defendant has continued to treat the shamba as if it were still his.

Lastly, if the only object of the defendants in effecting the transfer was to provide the first defendant with Shs. 12,000/- with which to pay off his other creditors, without at the same time defeating the plaintiff's claim, then this object could equally well have been achieved by the second defendant lending

him the money for that purpose, which would not have defeated the plaintiff's right to attach the shamba in execution of his own judgment debt. The second defendant's reply to the question why this could not have been done was more than unconvincing.

In the light of all this circumstantial and other evidence I accordingly hold that the first and second defendant conspired together to defeat the just claim of the plaintiff by a transfer of the shamba to the second defendant with the object of preventing the plaintiff from attaching it. That being so, then by reason of the joint operation of s. 6 (*h*) (ii) of the Transfer of Property Decree and s. 23 of the Contract Decree, the transfer is void.

One further point remains to be considered. On the evidence adduced for the defendants I am prepared to accept their evidence that the Shs. 12,000/- purchase price was paid by the second defendant, and that the first defendant did use it to pay off four other creditors of his whose receipts have been produced in evidence, these creditors, three of whom have given evidence, being those unsecured ones whose "friendly loans" the first defendant admittedly preferred to repay in full before paying anything to the plaintiff. The evidence as to the genuineness of the raising of the Shs. 12,000/- and as to these repayments was not very convincing, but I am not prepared to hold that it was untrue. That being so, it has been contended that the repayment of those other creditors negatives any fraudulent intent on the part of the defendants or any intention to "defeat the provisions of any law". But I cannot hold this to be the case. As was laid down in the *Elliahoo* case (1) in a passage from the judgment which I have already cited, a conspiracy to defeat the just claim of one creditor is sufficient. The plaintiff's just claim, secured to him by the provisions of the law, was to be paid his debt, not to have the claims of other creditors preferred to his, particularly unsecured ones, and to retain his right to attach his debtor's property. All these rights were deliberately defeated, or at least defeated for the time, by the transfer of the shamba; and they were defeated just as much upon the unsecured creditors being paid in preference to him as they would have been if the first defendant had spent the Shs. 12,000/- on himself. All that was necessary was a fraudulent intent as against the plaintiff, and this was quite compatible with a genuine desire to repay other debts. Such a fraudulent intent has been established.

I therefore make a declaration as prayed that the transfer of the shamba by the first to the second defendant dated August 18, 1955, was and is null and void, and must be set aside. The plaintiff will have his costs, for which the defendants will be jointly and severally liable.

Declaration accordingly.

For the plaintiff:
Dinshaw Karai
DF Karai, Zanzibar

For the defendant:
Abdulrasul Lakha
Lakha & Co, Zanzibar

Abdulla Jaffer Dewji v Ali Raza Mohamedali Sheriff Dewji

[1958] 1 EA 558 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	21 October 1958
Case Number:	51/1958
Before:	Briggs V-P, Gould JA and Pelly Murphy J
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Mayers, J

[1] Practice – Application for review of judgment – Judgment for plaintiff following hearing ex parte after defence struck out for default in giving particulars and discovery – Whether plaintiff entitled to go to trial ex parte – Kenya Civil Procedure (*Revised*) *Rules,* 1948*, O. VI, r.* 2*, and O. XIX, r.* 1 *and r.* 2 *– English Rules of the Supreme Court, O. XV and O. XIX, r.* 6 (1).

Editor's Summary

The respondent, as the administrator of the estate of one S. deceased, had sued the appellant. The respondent alleged that the appellant, who was the brother of S., had for some twenty years prior to the death of S. acted as her agent and trustee, and had possession of all her property, moveable and immoveable, but had never accounted to S. in respect thereof, either during her lifetime or after her death in 1953, and had intermeddled since her death, and as executor de son tort retained possession of it. Several instances of breach of trust or wilful default were alleged in the plaint, including negligence in calling in or enforcing a registered charge to which the deceased was entitled over the properties of one J.D., who became bankrupt, and the appellant's failure to give notice to the trustee in bankruptcy whereby the security had been imperilled. The property had subsequently been transferred by the official receiver to the deceased's estate, but the appellant was still in possession of it. It was also alleged that the appellant had failed to hand over the deceased's property, moveable and immoveable, to the respondent. The appellant filed a defence which denied almost every allegation in the plaint, alleged that S. at her death owed him some Shs. 22,000/-, and that on payment of this amount he was, and always had been, willing to hand over the title deeds in respect of the only property comprised in the estate. This defence was struck out on October 31, 1957, for default in giving particulars and discovery, and the suit was set down *ex parte* for hearing in November, 1957. Judgment was given for the respondent including an order for possession of the land comprised in the charge. In February, 1958, the appellant moved for a review of judgment on the grounds that he had not been given notice that the respondent would "move the court to give judgment", and that the respondent's procedure had been wrong, in that he should have applied under O. XIX, r. 1 and r. 2, and should have served the appellant. It was also argued that the court had no power to make an order for possession of the land in question, or in such proceedings, as no plots of land had been specifically mentioned in the plaint. The respondent's advocate objected that the motion was time-barred and it was dismissed on this ground. On appeal by leave the appellant's advocate was invited to attempt to satisfy the court that the motion should have been allowed apart from the question of limitation.

Held –

(i) O. XIX has no application where a plaintiff seeks an account on the basis of wilful default and he must prove such default at the trial in order to obtain his preliminary decree.

(ii) once a defence is struck out a plaintiff is entitled to go to trial *ex parte* and have his suit heard.

(iii) as the appellant himself had executed the charge, he was well aware what the land there referred to was; had he wished to limit the scope of the respondent's case on default, he might have obtained further and better particulars.

(iv) the order for possession merely gave the respondent something which was claimed in the plaint and to which he was clearly entitled.

(v) review is a matter of discretion, and in the circumstances the court would probably have refused a review even if the respondent's procedure had been incorrect.

Appeal dismissed.

Case referred to in judgment:

(1) *Re Gyhon* (1885), 29 Ch.D. 834.

(2) *Sharer v. Wallace*, [1950] 2 All E.R. 463.

(3) *Re Anstice* (1885), 33 W.R. 557.

(4) *Re Wrightson*, [1908] 1 Ch. 789.

(5) *Smith v. Armitage* (1883), 24 Ch.D. 727.

(6) *Bennett v. Stone*, [1902] 1 Ch. 226; [1903] 1 Ch. 509.

Judgment

October 21. The following judgment was read by direction of the court: This was an appeal by leave from an order of the Supreme Court of Kenya dismissing an application for review of judgment. We dismissed the appeal with costs and now give our reasons.

The respondent sued as administrator of the estate of one Sakinabai deceased, and raised by his plaint a large number of claims against the appellant. The gist of the allegations was that the appellant, who was Sakinabai's brother, had for some twenty years prior to her death acted as her agent and trustee, that she, as a purdanashin lady, had entrusted to him all her property, moveable and immoveable, that he had never accounted for his management of the property, either to her in her lifetime, or to the respondent since her death in 1953, that since the death he had intermeddled in her estate and as executor de son tort retained possession of the whole of it, and that he had refused to hand over the assets or account to the respondent. Several specific instances of breach of trust or wilful default were alleged, the most important of which for present purposes is set out in para. 9 (ii) of the plaint, which is as follows:

> "He has been negligent in failing to get in, call in, convert, or realise or enforce the registered charge to which the said Sakinabai was entitled in the sum of £1,640 over the properties of Jaffer Dewji who became bankrupt and of whose estate the said defendant was the executor. The defendant could have elected to rely on the security of the said Sakinabai and given notice to the trustee in bankruptcy under the Bankruptcy Ordinance, 1930, to elect whether he will or will not exercise his power of redeeming the security or requiring it to be realised, and on the trustee's failure to exercise the option within six months after receiving the notice the trustee would have been disentitled to exercise it and the equity of redemption, or any other interest in the property which was vested in him would have become vested in the estate of the said Sakinabai. As a result of the defendant's failure the said security and property has been imperilled and the estate might lose the same. In the alternative if the said Sakinabai or the defendant did exercise the said power of election, then the

defendant has been negligent in failing to get the necessary transfer from the trustee in bankruptcy, that is the official receiver, of the equity of redemption in the said property and in failing to register the same at the Land Office, Mombasa, against the title of the property."

Paragraph 9 (iii) and para. 9 (v) may also be quoted:

> "He has failed to hand over the property of the said Sakinabai, whether moveable or immoveable inclusive of title deeds, cash and securities, and which is in his possession, to the … plaintiff."
>
> "He has failed to make proper use of the immoveable property of the said Sakinabai which is in his hands by letting it or otherwise."

The relief claimed is mainly for various accounts and inquiries on a footing of wilful default, but includes also a claim for possession of all immoveable property of the estate now in the appellant's possession, and for delivery of cash, title deeds and securities. This is in addition to the usual claim for payment of balances to be found due on taking the accounts.

The appellant filed a defence which denied almost every allegation in the plaint, alleged that Sakinabai at her death owed him some Shs. 22,000/- and asked that the suit be dismissed with costs. Paragraph 11 reads:

> "The defendant is and always was willing to hand over the title deeds in respect of the only property comprising the deceased's estate on payment to him of the money due and owing to him more particularly specified in para. 9 above."

This defence was struck out on October 31, 1957, for default in giving particulars and discovery, and the suit was set down *ex parte* for hearing on November 18, 1957. Evidence was called to prove the various allegations in the plaint. As regards the allegations in para. 9 (ii), the evidence included particulars of the half share of land charged by the appellant as executor of Jaffer Dewji deceased, and went on to show that the official receiver, in the course of winding up that estate in insolvency, had on July 3, 1957, transferred the land to Sakinabai's estate, but that the appellant was still in possession thereof. The plaint was filed in May, 1957, before the transfer.

The learned trial judge accepted the evidence and gave judgment as prayed. Under the claim for possession of land he ordered possession of the land referred to in para. 9 (ii) of the plaint, which, as we have said, had been proved at the trial to be the property of the estate of Sakinabai and in the possession of the appellant.

In February, 1958, the appellant moved for a review of judgment. The motion in form asked for review

> "by directing the plaintiff herein to proceed under O. XIX . . . or as this honourable court shall think fit on the grounds set out in the accompanying affidavit . . ."

The affidavit, which is sworn, not by the appellant, but by his advocate, complains that the appellant had not been given notice that the respondent would "move the court to give judgment", and that the respondent's procedure had been wrong, in that he should have applied under O. XIX, r. 1 and r. 2 and should have served the appellant. These were the only grounds raised. At the hearing, however, Mr. Cleasby sought to raise another ground, namely, that the decree was defective in that it was not competent for the court to order possession of the land referred to at that stage, or in that sort of proceedings, since no plots of land had been specifically mentioned in the plaint. Some objection was taken before the learned judge to this new ground, but it is not clear how he treated that objection, since the respondent's advocate also objected that the motion was time-barred. On this issue there was a lengthy argument, and the learned judge dismissed the motion on this ground, delivering a lengthy written judgment on the point.

On the hearing of the appeal we invited Mr. Cleasby to defer argument on the point of limitation, and to attempt to satisfy us that the motion should have

been allowed on what we may call the technical merits (as opposed to the substantial merits). He did not seriously press the point that the respondent should have made application under O. XIX. In view of the English authorities on O. XV of the English rules, from which the Kenya O. XIX is adapted, this is easily understood. It is elementary that O. XIX has no application where the plaintiff seeks accounts on a basis of wilful default and must prove such default at the trial in order to obtain his preliminary decree. *Re Gyhon* (1) (1885), 29 Ch.D. 834. When this was accepted, it was impossible for Mr. Cleasby to make anything of his other original point, that the appellant had had no notice of the hearing when judgment was given. The defence having been struck out, the respondent was entitled to go to trial *ex parte*. We would, however, make two comments on this issue. The phrase used in Mr. Cleasby's affidavit about "moving the court to give judgment" may be misleading. There was no motion for judgment. The suit was set down for trial and was tried. Also we disapprove of the following phrase in the same affidavit:

> "The defendant will allege that he and his advocates were unaware at the time of the said judgment that the plaintiff would move this honourable court to give judgment herein and discovered this matter after judgment had been delivered."

Without suggestion that this was intentionally "tricky", it is obviously not a statement on oath that the appellant was unaware that the trial was taking, or was about to take place, and such a statement on oath would have been essential before the appellant could succeed on this point.

The third point on which Mr. Cleasby relied was the one concerning the order for possession of land. Mr. Hassan for the respondent repeated the objection raised in the Supreme Court, and we might have been obliged to give effect to that objection. But we heard Mr. Cleasby's argument. He submitted first that no plaintiff, and least of all a plaintiff proceeding *ex parte*, can obtain relief not asked for in his plaint. This, of course, is correct. He then submitted that this was a suit for accounts and inquiries and that no practical relief could be obtained by the respondent until after certificate, before which the appellant would have had the opportunity to be heard. Also, he said, no specific lands were mentioned in the plaint in relation to the claim for possession, and therefore no order for possession could be made concerning any particular land, at least until after certificate. He referred to *Sharer v. Wallace* (2), [1950] 2 All E.R. 463, generally on the restrictions concerning particulars in suits for accounts. That case, however, is quite irrelevant. The action there was for a common account, and it was premature for the defendant to seek before trial particulars of payments alleged to have been made to him. The situation is completely different where wilful default is alleged. The plaintiff is obliged to give full particulars of the alleged defaults. English O. XIX, r. 6 (1); Kenya O. VI, r. 2; *Re Anstice* (3) (1885), 33 W.R. 557. Some particulars were given in this case, and if the appellant had wanted to limit the scope of the respondent's case on default, he might have obtained further and better particulars. In fact, however, when it is remembered that the appellant himself executed the charge referred to in para. 9 (ii) of the plaint, it is obvious that he knew exactly what land was there referred to. Mr. Cleasby made much of the argument that it is unreasonable that a plaintiff proceeding *ex parte* should be able to claim any asset of the defendant which he may choose, without any notice that he is going to do so. Nothing of the kind happened in this case, or could happen in any case where the defendant took the elementary precaution of obtaining particulars. So far from effecting any injustice, the order for possession of land has merely given the respondent something which was claimed in the plaint and to which he was clearly entitled. Mr. Cleasby did not even suggest, and there is no allegation on affidavit, that the respondent was not entitled to

possession of this land. In the circumstances, review being a matter of discretion, the court would probably have refused a review, even if the respondent's procedure had been incorrect. But in our view it was entirely correct. Order XIX being inapplicable, it was correct to proceed to trial *ex parte*, and on the pleadings and evidence it would have been a denial of justice to refuse the order for possession which was made. See also *Re Wrightson* (4), [1908] 1 Ch. 789; *Smith v. Armitage* (5) (1883), 24 Ch.D. 727; *Bennett v. Stone* (6), [1902] 1 Ch. 226; [1903] 1 Ch. 509.

For these reasons we were satisfied that, even if the motion for review was filed within due time, a matter on which we express no opinion, it could never have been allowed, and the appeal failed.

Appeal dismissed.

For the appellant:
RP Cleasby and *Subodh Inamdar*
Atkinson, Cleasby & Co, Mombasa

For the respondent:
SF Hassan
O'Brien Kelly & Hassan, Mombasa

Re an Application by the Attorney-General of Tanganyika
[1958] 1 EA 562 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	9 December 1958
Case Number:	9/1958
Before:	Sir Ronald Sinclair CJ
Sourced by:	LawAfrica

[1] Criminal law – Case stated – Application to make absolute a rule nisi to show cause why a case should not be stated – Magistrate's refusal to state case – Child alleged to have been kidnapped from Tanganyika by own mother – Mother later granted custody of child in Kenya – Whether rule should be made absolute – Fugitive Offenders Act, 1881, *s.* 19 *– Criminal Procedure Code, s.* 367 *and s.* 370 (*K*).

Editor's Summary

An application was made by the attorney-general of Tanganyika under s. 370 of the Criminal Procedure Code to make absolute a rule nisi calling on a magistrate and the respondent to show cause why a case should not be stated in respect of the magistrate's decision to discharge the respondent under the provisions of s. 19 of the Fugitive Offenders Act, 1881. A magistrate in Tanganyika had issued under the

provisions of the Fugitive Offenders Act, 1881, a warrant for the apprehension of the respondent in Kenya on charges of kidnapping a person (her child) from Tanganyika, and kidnapping a person from lawful guardianship contrary to s. 247 of the Tanganyika Penal Code. The warrant was duly authenticated by the acting chief secretary to the Government of Tanganyika. It was addressed to the "Officer-in-Charge, Police, Tanga District" and was endorsed to be executed by an assistant superintendent of the Tanganyika Police. By the East Africa Fugitive Offenders Order in Council, 1920, Part II of the Act which relates to the inter-colonial backing of warrants, was applied *inter alia* to Kenya and Tanganyika. When the warrant was presented to a magistrate in Kenya he backed it under the provisions of s. 13 of the Act, and the warrant having then been executed by an assistant superintendent of the Kenya Police, the respondent was brought before a magistrate in Kenya. The respondent then applied for relief under s. 19 of the Act. After

hearing argument by both sides the magistrate decided that to return the respondent to Tanganyika would be oppressive and discharged her absolutely. The attorney-general of Tanganyika then applied to the magistrate under s. 367 of the Criminal Procedure Code to state a case for the opinion of the Supreme Court, which he refused to do, on the ground that the attorney-general of Tanganyika was not a party to the proceedings. Subsequently by affidavit filed in the Supreme Court the magistrate said his refusal was also based on the ground that the application was merely frivolous. An application of the attorney-general of Tanganyika to the Supreme Court for leave to apply for an order of mandamus to compel the magistrate to state a case was dismissed on the ground that the applicant's remedy was to apply for a rule under s. 370 of the Criminal Procedure Code, which was done.

Held –

(i) s. 19 of the Fugitive Offenders Act provides for an appeal to a superior court against any order or refusal to make an order of discharge by a magistrate under the section; in Kenya the "superior court" is the Supreme Court, vide s. 39 of the Act.

(ii) there is no provision in the Act as to how an appeal is to be brought but, as proceedings under the Act are criminal proceedings, the Criminal Procedure Code should first be looked at to see whether the procedure prescribed by the Code for appeal from the determination of the magistrate can be applied, and that procedure must, in this instance, serve as a guide to the procedure to be adopted on an appeal under s. 19 of the Act.

(iii) where, as in this case, an appellant desires to appeal on a point of law only, it is, at the least, not improper for him to do so by case stated in accordance with the procedure laid down by the Code so far as is practicable; once that course is adopted, the procedure prescribed by s. 370 of the Code on the refusal of a subordinate court to state a case applies.

(iv) the requesting or requisitioning Government has a right of appeal against an order of discharge as it is clearly an interested party in proceedings under the Act, and it is aggrieved if an order of discharge is made, for the intention of the legislature was to give that Government a right to appeal against such an order whether or not it is represented in the proceedings before the Kenya magistrate.

(v) as subsequently the Kenya magistrate had made an order for separation in favour of the respondent and granted her the legal custody of the child whom she was charged with kidnapping, the position had materially changed, and as the court would be bound to come to a decision on the appeal in the light of the existing circumstances, no useful purpose would be served in determining whether the Kenya magistrate was wrong in law in making the order of discharge without considering subsequent events.

(vi) considering all the circumstances and especially since the respondent now had the legal custody of the child, the possibility of an order being made for the return of the respondent was so remote that it would not be in the interests of justice to permit proceedings under the Act to proceed.

Order that the rule be discharged.

[**Editorial Note**: See also *Re an Application by the Attorney-General of Tanganyika*, reported at p. 482.]

Case referred to in judgment:

(1) *Henderson v. Secretary of State for Home Affairs and Another*, [1950] 1 All E.R. 283.

(2) *R. v. Secretary of State for India in Council and Others, Ex parte Ezekiel*, [1941] 2 All E.R. 546.

(3) *R. v. Brixton Prison* (*Governor*), *Ex parte Minervini*, [1958] 3 All E.R. 318.

Judgment

Sir Ronald Sinclair CJ: This is an application by the attorney-general of Tanganyika under s. 370 of the Criminal Procedure Code to make absolute a rule nisi calling upon the resident magistrate, Nakuru, and Mrs. Anna Marcandonatos (hereinafter referred to as "the respondent") to show cause why a case should not be stated in respect of the resident magistrate's decision to discharge the respondent under the provisions of s. 19 of the Fugitive Offenders Act, 1881.

On July 4, 1958, the resident magistrate at Tanga in Tanganyika issued under the provisions of the Fugitive Offenders Act, 1881 (hereinafter referred to as "the Act") a warrant for the apprehension of the respondent in Kenya on charges of kidnapping a person from Tanganyika Territory and kidnapping a person from lawful guardianship contrary to s. 247 of the Tanganyika Penal Code. The warrant was duly authenticated by the acting chief secretary to the Government of Tanganyika. It was addressed to the "officer-in-charge, Police, Tanga District", and was endorsed to be executed by Mr. Das, an assistant superintendent of the Tanganyika Police.

By the East Africa Fugitive Offenders Order in Council, 1920, Part II of the Act which relates to the Inter-Colonial backing of warrants was applied to a group of possessions which includes Kenya and Tanganyika Territory. When the warrant was presented to the resident magistrate, Nakuru, he, quite properly, backed it under the provisions of s. 13 of the Act.

The warrant was executed by Mr. Mainprice, an assistant superintendent of the Kenya Police, on July 9, 1958, and the respondent was brought before the resident magistrate, Nakuru, on the same day. The respondent then applied for relief under s. 19 of the Act. That section reads:

> "Where the return of a prisoner is sought or ordered under this part of this Act, and it is made to appear to a magistrate or to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of such prisoner not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities of communication, and to all the circumstances of the case, be unjust or oppressive, or too severe a punishment, to return the prisoner either at all or until the expiration of a certain period, the court or magistrate may discharge the prisoner either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the magistrate or court seems just.
>
> "Any order or refusal to make an order of discharge by a magistrate under this section shall be subject to an appeal to a superior court."

After hearing argument by the respondent's advocate and Mr. Mainprice, the magistrate came to the conclusion that to return the respondent to Tanganyika would be oppressive and discharged her absolutely.

On July 23, 1958, the attorney-general of Tanganyika, by his advocate, Mr. Bechgaard, applied to the magistrate under s. 367 of the Criminal Procedure Code to state a case for the opinion of this court. The learned magistrate by letter dated August 23 refused to state a case on the ground that the attorney-general of Tanganyika was not a party to the proceedings. Subsequently, in an affidavit filed in these proceedings he said that his refusal was also based on the ground that the application was merely frivolous.

The attorney-general of Tanganyika then applied to this court for leave to apply for an order of mandamus to compel the magistrate to state a case. The application was dismissed on the ground that the

applicant’s remedy was

to apply for a rule under s. 370 of the Criminal Procedure Code. The attorney-general accordingly applied for a rule under that section.

On behalf of the respondent it was submitted that an appeal by case stated under s. 367 of the Criminal Procedure Code is not competent, since there was no determination by the magistrate of any "summons, charge, information or complaint" as provided by that section. It was argued that an appeal might lie under s. 347 of the Criminal Procedure Code, but not under s. 367 which is exhaustive.

Section 19 of the Act provides for an appeal to a superior court against any order or refusal to make an order of discharge by a magistrate under the section. In Kenya the "superior court" is the Supreme Court: see s. 39 of the Act. There is no provision in the Act as to how an appeal is to be brought but, as proceedings under the Act are criminal proceedings, I think the Criminal Procedure Code should first be looked at to see whether the procedure prescribed by the Code for appeal from the determination of a magistrate can be applied.

Section 347 of the Code gives a right of appeal on a matter of fact as well as on a matter of law to any person convicted on a trial held by a subordinate court. Section 367 gives to either party to proceedings before a subordinate court a right of appeal (by case stated) on a point of law against the determination by the subordinate court of "any summons, charge, information or complaint". Those provisions cannot, of course, limit the full appeal given by s. 19 of the Act, but, in my view, the procedure laid down in the Code for appeal from the determination of a subordinate court can serve as a guide to the procedure to be adopted on an appeal under s. 19 of the Act. Where, as in this case, an appellant desires to appeal on a point of law only, I think it is, at the least, not improper for him to do so by case stated in accordance with the procedure laid down by the Code so far as is practicable. In my view, it follows that once procedure by case stated is adopted, the procedure prescribed by s. 370 of the Code on the refusal of a subordinate court to state a case is applicable.

The next question for decision is whether the attorney-general of Tanganyika has any right of appeal. For the respondent it was contended that s. 367 of the Code gives a right of appeal only to a party to the proceedings before the magistrate and that the attorney-general of Tanganyika was not a party to, or represented at, the proceedings before the resident magistrate, Nakuru.

As I have already stated, the Criminal Procedure Code cannot limit the right of appeal given by s. 19 of the Act, and the provisions of the Code are to be used solely for the purpose of determining the procedure to be adopted when an appeal is brought by way of case stated. There appears to be no decision directly in point as to whether the requesting or requisitioning Government has a right of appeal against an order of discharge. In my opinion, however, the requesting Government is clearly an interested party in proceedings under the Act, it is aggrieved if an order of discharge is made and I think the intention of the legislature was to give that Government a right of appeal against such an order whether or not it is represented in the proceedings before the magistrate. Some support for the view I have taken is to be found in *Henderson v. Secretary of State for Home Affairs and Another* (1), [1950] 1 All E.R. 283. In that case the prisoner was arrested in England on a warrant for his arrest issued in India. He was committed to prison by the metropolitan magistrate at Bow Street, under s. 5 of the Act, to await his return to India. He then applied to the Court of Appeal for relief under s. 10 of the Act. Section 10 provides for relief similar to that given by s. 19 when the prisoner has been arrested under the provisions of Part I of the Act. In addition to the Secretary of State for Home Affairs, the High Commissioner for India was a respondent to the application. The implication is that the Government of India

was considered to be an interested party in the proceedings. Similarly, in *R. v. Secretary of State for India in Council and Others, Ex parte Ezekiel* (2), [1941] 2 All E.R. 546, the Secretary of State for India in Council was made a respondent to an application for a writ of habeas corpus by a prisoner who had been arrested in England on a provision warrant issued under the Act on the application of the Government of India. In that case the court was asked to exercise its discretion under s. 10 of the Act to discharge the prisoner. Since the court can, under s. 19, discharge a prisoner on the ground that the application for his return is not made in good faith or that his return would be unjust or oppressive, it would be unfortunate if the requesting Government had no right to be heard in the proceedings before the magistrate or no right of appeal against an adverse decision. Furthermore, it seems that, when a person has been detained under the Extradition Acts, it is common for the requesting Government to be represented on an application for a writ of habeas corpus. In *R. v. Governor of H.M. Prison, Brixton, Ex parte Minervini* (3), [1958] 3 All E.R. 318, the question arose whether the requisitioning power, in that case the Norwegian Government, had a right to be represented in habeas corpus proceedings where the applicant for the writ had been detained under the Extradition Acts. The Divisional Court found it unnecessary to decide the point, but stated that the court had power under O. 59, r. 17 to direct that notice of motion be served on the requisitioning Government, that it would have been proper in that case to give such a direction and that, although no such direction had been given, Sir Frank Soskice was in court representing the Norwegian Government and they would hear him should the occasion arise. During the course of the argument Lord Goddard, L.C.J., observed that the Norwegian Government was an interested party. My conclusion is, therefore, that the Government of Tanganyika is an interested and aggrieved party which has a right of appeal under s. 19 of the Act.

I turn now to the question whether the learned magistrate was right in refusing to state a case on the ground that the application was merely frivolous. It appears from the affidavit filed by him that he considered the application to be frivolous for two reasons, first, because the alleged questions of law given as reasons for stating a case were questions of fact and not of law and, second, because the charges of kidnapping could not possibly succeed.

It is necessary to make brief reference to the facts. The child who the respondent was charged with kidnapping is the child of herself and her husband. In May, 1957, the respondent applied under the Subordinate Courts (Separation and Maintenance) Ordinance (Cap. 6) for an order of separation and other relief including the granting of the legal custody of the child of the marriage to herself. On November 6, 1957, the application was dismissed. The respondent's appeal to this court was dismissed on March 6, 1958. That appeal was pending when the respondent was apprehended under the provisions of the Act on July 9, 1958. The appeal was allowed on October 27, 1958. The Court of Appeal for Eastern Africa considered that the respondent was entitled to an order of separation and remitted the case to the trial court to hear any necessary evidence on the issues of maintenance and custody of the child and thereafter to grant any relief to which she might be entitled. On November 14, 1958, the resident magistrate's court at Nakuru made an order of separation in favour of the respondent and granted her the legal custody of the child.

As the respondent now has the legal custody of the child which she is charged with kidnapping, the position has materially changed since the decision of the learned magistrate in these proceedings. It is common ground that on this application this court is entitled to take into consideration the circumstances existing at the present time and not merely the position when the magistrate made his order of discharge. Even if I held that the magistrate was wrong in refusing to state a case on the ground that the application was frivolous, I think

that the court would be bound to come to a decision on the appeal in the light of the existing circumstances. In my view, therefore, no useful purpose would be served in determining whether the magistrate was wrong in law in making the order of discharge without considering subsequent events. Taking into consideration all the circumstances and, in particular, the fact that the respondent now has the legal custody of the child, I am of opinion that the possibility of an order being made for the return of the respondent is so remote that it would not be in the interests of justice to permit proceedings under the Act to proceed. My own view is that it would now be at the least too severe a punishment to order her return.

For those reasons I order that the rule be discharged.

Order that the rule be discharged.

For the appellant:
K Bechgaard
K Bechgaard, Nairobi

For the respondent:
LE Long
Lawrence Long & Tod, Nakuru

Karmali Tarmohamed and another v IH Lakhani & Company
[1958] 1 EA 567 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	23 October 1958
Case Number:	41/1958
Before:	Sir Kenneth O'Connor P, Gould JA and Sir Owen Corrie Ag JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court for Uganda–Sheridan, J

[1] Appeal – Fresh evidence – Application to admit – Principles which appellate court will apply.

[2] Contract – Contract made by correspondence – Date for completion not fixed and bargain to be incorporated in formal document – Whether enforceable contract between parties – Indian Contract Act, 1872, *s.* 46 *and s.* 55.

Editor's Summary

The appellants appealed from a judgment and decree of the High Court decreeing specific performance

of a contract for the sale of land, the contract having been affected by correspondence. Their defence in the High Court was that the contract documents were in fact bogus and had been made in pursuance of a conspiracy between the respondents and themselves to fabricate false evidence for the purpose of proceedings which the respondents had said that they intended to bring against a third party. On appeal the appellants applied to admit fresh evidence in support of their defence. The court considered the affidavits in support of the application and concluded that the appellants had failed to establish that the evidence sought to be adduced could not with reasonable diligence have been made available at the trial, and dismissed the application. The appellant's counsel thereupon withdrew all the grounds of appeal, except one, which alleged that there had never been a complete or finally concluded agreement of which specific performance could have been decreed. It was argued (*a*) that the use of the words ". . . Please contact our Mombasa office for preparation of formal documents . . ." in the telegram accepting the appellant's offer indicated that it was not a final acceptance and

(*b*) that the expression ". . . payment to be effected within seven months . . ." in the appellant's offer indicated further that no concluded agreement had been reached, as it left both the date of completion and the method of payment open.

Held –

(i) except on grounds of fraud or surprise, the general rule is that an appellate court will not admit fresh evidence, unless it was not available to the party seeking to use it at the trial, or that reasonable diligence would not have made it so available.

(ii) if a contract depends on a series of letters or other documents, and it appears from them that the drawing up of a formal instrument is contemplated, it is a question of construction whether the letters or other documents constitute a binding agreement or whether there is no binding agreement until the instrument has been drawn up; the whole of the correspondence or documents must be considered, and a document which, taken alone, appears to be an absolute acceptance of a previous offer does not make the contract binding if, in fact, it does not extend to all the terms under negotiation, including matters appearing from oral communications.

(iii) the correspondence, in the present case, amounted to a complete offer and acceptance and the fact that the respondents desired it to be put into more formal legal shape did not make the contract conditional or relieve either party from liability under it.

(iv) even if the completion date was unspecified or uncertain, this would not render the contract unenforceable.

Appeal dismissed.

Case referred to in judgment:

(1) *Ladd v. Marshall*, [1954] 3 All E.R. 745; [1954] 1 W.L.R. 1489.

(2) *Corbett v. Corbett*, [1953] 2 All E.R. 69.

(3) *Andrew v. Andrew*, [1953] 1 W.L.R. 1453.

(4) *Hip Foong Hong v. H. Neotia & Co*., [1918] A.C. 888.

(5) *Lockett v. Norman-Wright*, [1925] Ch. 56.

(6) *Hussey v. Horne-Payne* (1879), 4 App. Cas. 311.

(7) *Bennett v. Garvie* (1917), 7 E.A.L.R. 48.

(8) *Bristol, Cardiff and Swansea Aerated Bread Co. v. Maggs* (1890), 44 Ch.D. 616.

(9) *Bellamy v. Debenham* (1890), 45 Ch.D. 481; [1891] 1 Ch. 412.

(10) *Perry v. Suffield Ltd*., [1916] 2 Ch. 187.

(11) *Simpson v. Hughes* (1897), 76 L.T. 237; 13 T.L.R. 271.

(12) *Jamsed v. Burjorji* (1916), 40 Bom. 289.

(13) *Rustomji v. Dhairyawan* (1930), A.I.R. P.C. 165.

(14) *Johnson v. Humphrey*, [1946] 1 All E.R. 460.

(15) *Rossiter v. Miller* (1878), 3 App. Cas. 1124.

(16) *Gray v. Smith* (1889), 43 Ch.D. 208.

October 23. The following judgments were read by direction of the court:

Judgment

Sir Kenneth O'Connor P: This is an appeal from a judgment and decree of the High Court of Uganda decreeing specific performance of a contract between the appellants and the respondents. It was alleged that, by this contract, the appellants offered to purchase, and the respondents agreed to sell, land at Kawempe (Freehold Register Vol. 64, Folio 7), measuring 4.30 acres, for Shs. 126,000/-. The contract for sale and purchase is alleged to have been effected by correspondence. The following are the relevant documents.

On February 6, 1956, the appellants, who carry on business at Mombasa, Kenya, wrote to the respondents, who carry on business in Kampala, Uganda, and Mombasa, a letter as follows:

"From: Karmali Tarmohamed,
Kassamali Tarmohamed,
P.O. Box 630,
Mombasa.

6th February, 1956.

Messrs. I. H. Lakhani & Co.,
P.O. Box 1956,
Kampala.

Dear Sirs,

Re: Kawempe Freehold Register Volume 64, Folio 7.
Measuring 4.30 acres of land.

We hereby offer to purchase from you the above piece of land, sold by you to Mr. Abdul Aziz R. Lalani of Nabingola on 6th December, 1955, for Shs. 130,000/-, on the following conditions and terms.

Price: Shs. 126,000/-.

Payment: To be effected within seven months.

Validity of the Offer: The above offer is valid for your confirmation latest by 20th February, 1956.

Awaiting your confirmation of the above, we remain,

Yours faithfully,
Sd. Karmali Tarmohamed.
Sd. Kassamali Tarmohamed."

I will refer hereinafter to this letter as document "A".

On February 16, 1956, the respondents replied by telegram as follows:

"F L G S TM2 4.30 64 7

SSA45 1022AM 31 KAMPALA 16th 36

TM2 KENLAKCO MOMBASA

Your offer sixth instant regarding 4.30 acre Kawempe land volume 64 folio 7 accepted please contact our Mombasa office for preparation formal documents.

KAMPLAKCO."

I will refer to this telegram as document "B"

On February 18, 1956, the respondents addressed the following letter to the appellants:

"I. H. Lakhani & Co.,
Edward Avenue,
P.O. Box 29,
Masaka, Uganda.

P.O. Box 1956,
Kampala.

18th February, 1956.

REGISTERED
EXPRESS DELIVERY.
Mr. Karmali Tarmohamed,
Mr. Kassamali Tarmohamed,
P.O. Box 620,
Mombasa.

"Dear Sirs,

re: Kawempe Freehold Reg. Vol. 64
Folio 7 – 4.30 acre.

We thank you for your offer dated 6th instant which we have had the pleasure to confirm as per our following telegram sent to you on the 16th instant.

Karmali Tarmohamed and Kassamali Tarmohamed,

Care East Africa Sundries,

Mombasa.

TM2

'Your offer sixth instant regarding 4.30 acre Kawempe land volume 64 Folio 7 accepted please contact our Mombasa office for preparation formal documents' – Kamplakco.

It is therefore clear that your offer contained in your letter of the 6th instant has been duly accepted by us.

We shall be grateful if you would contact our Mombasa Office and conclude with them an agreement for effecting the payment of the purchase price of the plot within seven months, and ensure preparation of necessary legal documents. The transfer of the plot will no doubt follow the payment by you of the final instalment to us.

Wishing you all the good luck, We are,

Yours faithfully,

I. H. Lakhani & Company

(Sd.)?

Partner.

c.c. Mombasa Office."

I will refer to this letter as document "C".

On April 21, 1956, Mr. Dossa, a Mombasa advocate, who was then acting for the respondents, sent to the appellants the following letter with which was enclosed a draft agreement for sale:

"S.N. Dossa
LL.B. (London).
Advocate.

Legal Mansion,
Fort Jesus Road,
P.O. Box 497,
Mombasa (Kenya).

21st April, 1956.

Messrs. Karmali Tarmohamed and Kassamali Tarmohamed,

c/o E.A. Sundries Ltd.,

P.O. Box 620,

Princess Marie Louise Road,

Mombasa.

Dear Sirs,

Re: Kawempe Freehold Reg. Vol. 64 Folio 7 – 4.30 acres.

My clients Messrs. I. H. Lakhani & Company of Mombasa have handed to me your letter dated 6th February, 1956, addressed to their Kampala Branch together with the relevant correspondence and under their

instructions, I enclose herewith 2 copies of the Agreement of Sale for favour of your execution before an Advocate and return to me together with your Cheque for Shs. 100/-.

You will be pleased to note from the Agreement that the balance of purchase price of the said property, namely, Shs. 125,900/- is payable by you in September 1956 on a day to be inserted by you.

Please let me have the Agreement duly executed at your earliest and oblige.

Yours faithfully,

(Sd.) S. N. Dossa.

cc. Messrs. I. H. Lakhani & Co.,

Regal Chambers,

Kilindini Road,

Mombasa."

On April 24, 1956, the appellants' advocates replied as follows:

"Doshi & Chohan, Fort Jesus Road,

P.O. Box 549,

Mombasa,

(Kenya Colony)

24th April, 1956.

To:

S. N. Dossa, Esq.,

Advocate,

Mombasa.

Dear Sir,

Re: Kawempe Freehold Reg. Vol. 64 Folio 7 – 4.30 acres.

Our clients, Messrs. Karmali Tarmohamed and Kassamali Tarmohamed have placed in our hands your letter of 21st instant, together with enclosures, with instructions to reply.

Your clients are well aware that there never was a concluded contract between the parties, and that, in any event, subsequent to the receipt by our clients of the letter of 18th February from your clients, they, by mutual consent, cancelled the bargain. It is strange for your client now to change their mind.

The Agreement is therefore returned herewith unexecuted.

Yours faithfully,

for Doshi & Chohan,

(Sgd.) K. K. Chohan.

Encls: 1 Agreement."

The respondents (original plaintiffs) in their plaint set out the offer of February 6 (document "A") which they averred had been accepted on February 12 by telegram. (Apparently the telegram of February 16 (document "B") is meant). They pleaded that that acceptance had been confirmed by the letter of February 18 (document "C"); that they had always been ready, willing and able to perform their part of the agreement and transfer the land to the appellants but that the appellants, by their advocates' letter of April 24, had wrongfully repudiated the agreement and refused to perform it: and the respondents claimed specific performance of the agreement for sale and interest on the purchase price, i.e. Shs. 126,000/-.

The appellants set up a remarkable defence. They said that a partner in the respondents' firm, one Hassanali Lakhani who resides at Mombasa, had represented to the appellants that his firm intended to file an action in Uganda claiming damages against one Lalani (a resident of Uganda) for breach of a contract to purchase land at Kawempe belonging to the respondents, and that,

for the purpose of proving their damages in this proposed suit it would be necessary to produce to the court in Uganda written proof of any offer to purchase the said land received by the respondents subsequently to the breach of contract by Lalani. The appellants pleaded further that Hassanali Lakhani had persuaded them to assist him in obtaining such written proof and that, being on very friendly terms, the defendants, relying on Hassanali Lakhani's representation, had acceded to his request and signed the letter of February 6 (document "A"). They also pleaded that Hassanali Lakhani had told them that for the purpose of proving the genuineness of document "A" the respondents would confirm their acceptance of the offer therein contained; and that, relying on these representations by Hassanali Lakhani, they, the appellants, had not challenged the telegram and the confirmation of acceptance when received. The appellants pleaded that, prior to the date of Mr. Dossa's letter, Hassanali Lakhani had made an oral demand based on the legal effect of the letters and telegram, whereupon the appellant had protested ant it had then been mutually agreed between the parties that any ostensible legal effect of those documents was cancelled and was to be of no effect. The appellants accordingly averred that there was not, and never had been, any binding contract between the parties.

In effect, therefore, the defence was that the contract documents were, so far as the appellants knew, bogus and had been made in furtherance of a conspiracy between them and the respondents to fabricate false evidence in an action which the respondents had said that they intended to bring against Lalani.

The case went to trial on these pleadings. The onus of proof was held to be on the defence and the first appellant gave evidence in support of the above-mentioned allegations in the written statement of defence.

For the plaintiffs, Ibrahim Lakhani and Hassanali Lakhani, partners in the respondent firm, then gave evidence. They testified, *inter alia*, that the land had first been sold to Lalani, payment to be made by instalments, that Lalani had not paid his first instalment, that Hassanali Lakhani had then telephoned to the second appellant and told him the position. A discussion had ensued between Hassanali Lakhani and the appellants: the appellants had decided to buy the land: Hassanli Lakhani had said that he would give Lalani a final chance to pay and, subject to that, would re-sell the land to the appellants: accordingly it had been agreed that the appellants would make Hassanali Lakhani a firm offer to be accepted within fourteen days and the price, after negotiation, had been fixed at Shs. 126,000/-, that is Shs. 4,000/- less than the price to have been paid by Lalani. Hassanali Lakhani testified further that the appellants had made it clear that they could not pay cash at that time, that they had a big building under construction and could not raise a further loan: later, in April, the second appellant had telephoned to him (Hassanali Lakhani) and had said that the appellants wanted to get out of the deal as they could not raise any money after the big building owing to the Barclays Bank credit squeeze and they could not pay in time. The witness said that he had not agree to this. He denied that he had asked for document "A" for the purpose of taking legal proceedings against Lalani. He agreed in cross-examination that he had drafted that document but said that he had done so because the appellant did not know English very well. The first appellant said that, after receipt of Mr. Dossa's letter, he had had discussions with Hassanali Lakhani who had said that he would write to his Kampala office to set aside the letter.

The learned judge, for the reasons he gave and which it is unnecessary to review in detail, disbelieved the defence story that the contract documents were colourable only. He took the view that the appellants, having found themselves financially embarrassed by their commitment for a new building and the credit squeeze, had seized on the reference to Lalani in the letter of

April 6 as a method of resiling from their contract. It seems that he also disbelieved the first appellant's story that after the receipt of Mr. Dossa's letter Hassanali Lakhani had agreed to have the matter set aside. The judge held that the defendants had failed to discharge the onus which was upon them and that the claim succeeded. As already mentioned, he decreed specific performance of the contract.

The first matter falling to be dealt with on the appeal was an application by the appellants to amend their memorandum of appeal by adding a seventh ground of appeal. This ground, which will be considered later, raised a point of law not argued in the High Court. After hearing argument, we allowed the memorandum to be amended by adding this ground of appeal.

The next matter was an application by the appellants to be permitted to adduce further evidence which had not been adduced in the High Court, as set out in affidavits by (1) Lalani, the alleged previous purchaser of the land, (2) the attorney of the Netherlands Trading Society in Mombasa, (3) the second appellant and (4) Mr. Heymann, a surveyor and valuer.

The evidence by Lalani which was sought to be adduced was, briefly, to the effect that one of the partners in the respondent firm, Ibrahim Lakhani, had attempted to swindle him by getting him to agree to purchase land near the main road at Kawempe and to sign a document providing for payment for this land by instalments by bills to be drawn at specified dates: that Ibrahim Lakhani had represented this to be freehold land belonging to him, whereas subsequent investigations had disclosed that the land shown to Lalani was mailo land and that the land owned by Ibrahim Lakhani at Kawempe was different plot situate for from the plot shown to Lalani and on a by-pass some distance from the main road.

The evidence that Mr. Heymann was to give related to the value of the latter piece of land at various dates. In his affidavit he gave it as his opinion that the value of that land between December, 1955, and February, 1956, would not have exceeded £2,285, i.e. Shs. 45,700/-, which value would, owing to the credit squeeze, have dropped to as little as £715 (Shs. 14,300/-) between December, 1957, and February, 1958. It will be recalled that the date of the offer by the appellants to purchase the land was February 6, 1956, and that the price mentioned was Shs. 126,000/-. Mr. Heymann said in effect that the true market value of the land was nowhere near that figure.

The evidence which the attorney of the Netherlands Trading Society in Mombasa was to give was, briefly, to the effect that in July, 1956, the appellant firm had obtained a loan of Shs. 200,000/- from the Netherlands Trading Society on the security of its building then under construction at Mombasa which was to be of a value of over £40,000, that if the firm had wanted a further loan, he would have recommended one up to Shs. 150,000/-, and that, apart from this, the bank would have favourably considered advancing Shs. 150,000/- to the partners on personal guarantees and bills, that their firm had had financial facilities from the bank and that there had never been any question of stopping these. The object of this evidence was to rebut the view of the learned judge, referred to above, that the appellants had sought to resile from the contract because they found themselves to be financially embarrassed by their building commitments and the credit squeeze.

The evidence sought to be given by the second appellant, Kassamali Tarmohamed was, briefly, to the effect (*a*) that his firm had had financial facilities from the Netherlands Trading Society and were not affected by the credit squeeze; and (*b*) that the reason that he had not given evidence at the trial was that he could not have added anything to the evidence to be given by his co-defendant, Karmali Tarmohamed, that it was Karmali and not Kassamali who had negotiated with Hassanali Lakhani and that Hassanali Lakhani's evidence of important telephone conversations between him and

Kassamali was untrue. It was sought to adduce this evidence because the learned judge had commented adversely on Kassamali's failure to go into the witness-box, in view of Hassanali Lakhani's evidence of important conversations with him, and had drawn the inference that Kassamali was not prepared to support the unusual defence which was being set up.

It should be noted that this was not an application for a new trial upon the ground of fraud or surprise. It was expressed to be an application to adduce fresh evidence at the hearing of the appeal or, alternatively, to have the evidence taken by the High Court or in some other manner and to adduce and read such evidence upon the hearing of the appeal, on the grounds (*a*) that the appellants did not know and could not by the exercise of reasonable care and diligence have discovered the facts now deposed to by Lalani, which evidence if believed would have been conclusive in the appellants' favour, that the case has been decided on insufficient evidence and that a miscarriage of justice has occurred; (*b*) that the facts deposed to by the attorney of the Netherlands Trading Society would contradict any suggestion that the appellants had deliberately sought to repudiate the contract because of financial difficulties and that the appellant's counsel could not by reasonable care and diligence have foreseen the view which the judge would take; (*c*) that counsel could not with reasonable diligence have foreseen the adverse inference which the judge had drawn by reason of the non-appearance of Kassamali; and (*d*) that the evidence of Mr. Heymann would lend substantial support to the appellants' defence and would be important to enable the court to discover the truth.

The principles upon which an appellate court should admit fresh evidence where the application is not made on the grounds of fraud or surprise are not, I think, in doubt. I take the following passage from the judgment of Denning, L.J., in *Ladd v. Marshall* (1), [1954] 1 W.L.R. 1489, at p. 1491:

> "To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

In *Corbett v. Corbett* (2), [1953] 2 All E.R. 69, at p. 72, Birkett, L.J., said:

> "The motion with which we are dealing is for leave to produce and read certain affidavits in addition to the evidence which was given before Collingwood, J., and for leave to adduce the oral evidence of those witnesses who have made affidavits at the hearing of this appeal. But counsel for the husband made it plain that, in his view, the ultimate thing to be achieved was a new trial based largely on the new evidence which he hoped to be able to produce.
>
> "The principles have been enunciated by my lord, but they are conveniently set out in the Annual Practice, 1953, p. 1252:
>
> > 'It is an invariable rule in all the courts . . . that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced, or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting of a new trial.'
>
> "Those were the words of Lord Chelmsford, L.C., in *Shedden v. Patrick and Attorney-General* (L.R. 1 Sc. and Div. 545), cited by Scrutton. L.J., in *Nash v. Rochford Rural Council*, [1917] 1 K.B. 393. Then later (ibid):

> 'The new evidence is admissible if it would have formed a determining factor in or an important influence on the result . . . A fortiori where it would be conclusive . . . Sed quaere if it is admissible if there is only a reasonable probability that, if it were given, a different decision would be reached'
>
> (Birkett, L.J., considered the contents of the affidavits and continued:)
>
> "I say no more than that, so far as this motion is concerned, I am content to put reliance on the first ground, namely, that it is not shown here on behalf of the husband that this evidence was not available at the time of the trial or could not by reasonable diligence have been procured."

Corbett's case (2) was approved by the Privy Council in *Andrew v. Andrew* (3), [1953] 1 W.L.R. 1453 (P.C.). *Hip Foong Hong v. H. Neotia & Co.* (4), [1918] A.C. 888, cited to us was an application for a new trial based on allegations of perjury and bribery and is not, I think, precisely in point.

We refused the application on the same ground as that relied upon by Birkett, L.J., in *Corbett's* case (2), namely, that it was not shown that the evidence was not available at the time of the trial or could not with reasonable diligence have been procured. With regard to the evidence of Lalani and Mr. Heymann, the appellants, on their own showing, knew before they made the offer to purchase the land that there had been a previous contract of sale to Lalani for Shs. 130,000/- and that Lalani had declined to proceed with the purchase: they knew before the trial that the respondents were holding them to a contract of purchase and sale of the land for Shs. 126,000/-which, according to the appellants' version, was not a genuine contract at all. This, if substantiated, was most inequitable conduct on the part of the respondents. Clearly, if the appellants could show that the respondents had behaved in this inequitable manner towards them, the respondents would have failed to obtain the equitable remedy which they sought. The appellants sought by the proposed evidence to show an inequitable course of conduct by the respondents vis-à-vis Lalani with regard to the same piece of land. They argued that this would strengthen the appellant' allegations that the respondents were behaving inequitably also towards them. Such evidence if admissible (a point which it is now unnecessary to decide) was obviously important and, if the appellants had been reasonably diligent, there was nothing to prevent them approaching Lalani before the trial and obtaining it. There is nothing in the affidavits now sought to be filed on their behalf to show that this could not have been done. It is scarcely credible that an Indian business firm, faced with an action for specific performance of a contract to buy land for Shs. 126,000/-, which contract they said they had been fraudulently inveigled into making on the pretext that it was wanted to establish the damages in the proposed suit against Lalani, would not have inquired before the trial of the action against them, what was the value of the land, whether there ever had been a contract by Lalani to buy it, and if so, whether he had repudiated it and on what grounds;, and whether in fact any steps had been taken by the respondents to commence a suit against him. In particular it is almost impossible to believe that the appellants would not have ascertained by the time the trial came on in December, 1957, that the true value of the land was not Shs. 126,000/- or Shs. 130,000/- in February, 1956, but only about one-third of that sum. This would be a cogent indication of the bogus nature of the contract upon which the respondents sought to sue the appellants. It was not shown that the appellants could not have procured Lalani's and Heymann's evidence before the hearing had they tried. If they did not try, they were grossly lacking in that reasonable diligence which should have enabled them to produce this evidence at the trial.

Regarding the proposed evidence of the attorney of the Netherlands Trading Society, it was not alleged that this evidence could not, with reasonable care

and diligence, have been adduced at the trial: it was alleged that the respondents could not, with reasonable care and diligence have anticipated that the judge would take the view that the appellants had sought to resile from the contract because of financial stringency. But this suggestion was clearly put to the first appellant in cross-examination and he could have applied to call a witness from the Netherlands Trading Society to contradict the suggestion and establish the appellants' financial position before the close of the appellants' case in the court below. If the first appellant was taken by surprise by Hassanali Lakhani's evidence that his partner Kassamali had telephoned and said that the appellants wanted to get out of the deal because of financial stringency, he could and should have applied to call Kassamali to rebut this.

Regarding the application to permit Kassamali's evidence to be given on the appeal, it was not suggested that he could not have been called at the trial, but it was suggested that the inference which the judge drew from the failure to call him could not reasonably have been anticipated. We disagreed with that view. If the evidence of Kassamali was not adduced as part of the defendants' case (and it should be remembered that he was a signatory to document "A" upon which they were sued) an application could have been made to adduce his evidence in rebuttal once it had become plain that Hassanali Lakhani was alleging that important conversations had taken place with him. It should have been obvious that if Kassamali was not called and if no application to call him were made, the judge might draw an adverse inference from his failure to appear.

We thought that the applicants had failed to establish the first condition for the success of their application, namely that the evidence now sought to be produced could not with reasonable diligence have been made available at the trial.

Upon our announcing our decision to refuse the application to adduce fresh evidence, Mr. Salter, leading counsel for the appellants, withdraw all the grounds of appeal, except ground 7. That reads:

> "7. There never was a complete or finally concluded agreement of which specific performance could have been decreed."

Mr. Salter argued that the respondents' telegram of February 16 (document "B") was not a final acceptance of the appellants' offer contained in their letter of February 6, 1956, because it was clear from the last sentence of the telegram that certain matters had still to be concluded. (It will be recalled that the last sentence of the telegram is "Please contact our Mombasa office for preparation of formal documents".)

Counsel argued further that the phrase "payment to be effected within seven months" contained in the appellants' offer dated February 6, 1956 (document "A") was uncertain, in that the period of seven months might be seven months from the date of the offer or from the date of acceptance of the offer and he emphasised that this was the respondent's language–Hassanali Lakhani had drafted the letter. In fact, he said, no date for completion was specified. Counsel referred to document "C" and stressed the sentence

> "We shall be glad if you would contact our Mombasa office and conclude with them an agreement for effecting the payment of the purchase price of the plot within seven months, and ensure the preparation of necessary legal documents."

He argued that this showed still more clearly that no concluded agreement had been reached. He said that there had been no hurry for payment; it was realised that cash was not going to be paid; seven months was agreed, but the method of payment still had to be agreed; there was still something more to be done,

namely to arrive with certainty at the method of payment of the

purchase price. He referred to Mr. Dossa's letter dated April 21, 1956 (exhibit "E") and the draft agreement for sale sent therewith which provided for one initial payment of Shs. 100/- and left the date for payment in September of the balance of Shs. 125,900/- blank and he commented on the fact that Mr. Dossa had left the date in September to be inserted by the appellants. He argued further that the words in the telegram (document "B"): "Please contact our Mombasa office for preparation formal documents" and the corresponding words in document "C":

> "We shall be grateful if you would contact our Mombasa office . . . and ensure preparation of necessary legal documents"

brought the case within the line of cases of which *Lockett v. Norman-Wright* (5), [1925] Ch. 56, is an example and prevented the contract from being final. He argued that there had been no unconditional acceptance and contended that until the terms were fixed with the appellants' Mombasa office and put into a formal document, there was no contract.

To summarise Mr. Salter's argument, he submitted that there was no concluded or completed agreement on the correspondence or at all because–

(*a*) no date for completion had been fixed;

(*b*) the date of payment was uncertain and the mode of payment had not been fixed;

(*c*) the agreement was subject to the preparation of formal legal documents.

The law on the subject is, I think, correctly set out in para. 131 on p. 77 of Vol. 8 of Halsbury's Laws of England (3rd. Edn.) as follows:

> **"131. Contracts by correspondence.** If a contract depends on a series of letters or other documents, and it appears from them that the drawing up of a formal instrument is contemplated, it is a question of construction whether the letters or other documents constitute a binding agreement or whether there is no binding agreement until the instrument has been drawn up. The whole of the correspondence or documents must be considered, and a document which, taken alone, appears to be an absolute acceptance of a previous offer does not make the contract binding if, in fact, it does not extend to all the terms under negotiation, including matters appearing from oral communication. Moreover two letters which at first sight appear to be an offer and an acceptance will not constitute a contract if it appears from subsequent negotiations that important terms forming part of the contract were omitted from those letters. When once, however, there has been a definite acceptance of all the terms of an offer and the acceptance was without qualification, further negotiations between the parties cannot, without the consent of both, get rid of the contract which has been made."

Mr. Salter relied upon *Hussey v. Horne-Payne* (6) (1879), 4 App. Cas. 311. In that case it was held that where a court has to find a contract in correspondence, the whole of that which has passed between the parties must be taken into consideration. Applying this rule, though the first two letters of a correspondence seemed to constitute a complete contract, their lordships, upon the whole of what had passed in letters and conversation, came to the conclusion that no complete and concluded contract had been established. The reason was that it had, apparently, been agreed in negotiation between the parties that the purchase price should be paid by instalments, but the number and amount of the instalments had not been agreed. The solicitor to the vendor, however (in the absence of the vendor), had said that he knew of no arrangement for payment by instalments and demanded immediate payment of ten per cent. of the purchase price and the balance within a few months, whereupon the purchaser declined to proceed until the vendor should be

prepared to treat upon the basis of instalments extending over about three years. Upon a suit to obtain specific performance of the contract effected by the first two letters, which did not mention instalments, their lordships held, as already mentioned, (*a*) that the whole of what had passed in correspondence and in conversation must be regarded; (*b*) that the first two letters did not constitute a complete agreement, since, as Earl Cairns, L.C., said, at p. 320 of the report

> "there were to be other terms which at that time had not been agreed upon, that efforts were made afterwards to settle those other terms, and that these efforts did not result in a settlement of these other terms. The consequence, therefore, of the whole is, that it appears to me not only that there is no note in writing, according to the Statute of Frauds, of that which was a completed agreement between the parties, but that there was, in point of fact, no complete agreement between the parties."

That part of the decision in *Hussey's* case (6) which refers to a note or memorandum sufficient to satisfy the Statute of Frauds is inapplicable to the present case, as that provision of the Statute of Frauds does not apply in Uganda: *Bennett v. Garvie* (7) (1917), 7 E.A.L.R. 48. But *Hussey's* case (6) would, upon the other point, be decisive of the present case if it is not distinguishable. In my opinion, it is distinguishable because in *Hussey's* case (6) the agreement was not complete: "there were to be other terms". Apparently before the vendor's solicitor came into the matter it had been agreed and the parties were at one that the purchase price should be paid by instalments, though by what instalments remained to be settled (see p. 319 of the report). In the present case, there is no evidence that there had been any agreement for payment by instalments. The only agreement was for payment within seven months. No doubt, the vendors expected the purchasers to suggest payment by instalments (document "C" makes that plain) and would have been ready to conclude with the purchasers an agreement for payment by instalments. Such an agreement would not, however, have been one of the terms which, in the words of Earl Cairns, "there were to be," but would have been something additional. There is nothing to show that it had ever been agreed in the prior negotiations that there should be payment by instalments or that the contract effected by document "A" and document "B" did not completely represent all the terms under oral negotiation between the parties up to February 16. The fact that the vendors were ready to conclude an additional agreement providing for payment by instalments on agreed dates did not mean that document "A" and document "B" were incomplete. Mr. Dossa, when he wrote in April, suggested one instalment of Shs. 100/- (which would have been in the nature of a small deposit) and the balance in September on a date to be inserted by the purchasers. But that arrangement was never accepted, and the contract was repudiated upon an entirely different ground. Accordingly, as no arrangement for payment by instalments was ever agreed to between the parties, the term as originally negotiated providing for payment within seven months stood simpliciter. This was quite unlike *Hussey's* case (6).

Bristol, Cardiff and Swansea Aerated Bread Co. v. Maggs (8)(1890), 44 Ch. D. 616, is also distinguishable. In that case the contract was shown to be incomplete by the fact that mutual negotiations between the parties had taken place for the insertion of fresh terms in the agreement: the purchasers who sought specific performance had themselves stipulated for an important additional term. In the instant case, the suggestions of the vendors in the penultimate sentence of document "C" are not stipulations for a new term but a new suggestion for carrying out what had been already agreed. The suggestion in the last sentence was not a stipulation but merely an indication that payment by instalments would be accepted if desired. In fact, no further

negotiations took place. In any event the correctness of some of the dicta of Kay, J., in the *Bristol* case (8) was doubted in *Bellamy v. Debenham* (9) (1890), 45 Ch.D. 481; and in *Perry v. Suffield Ltd*. (10), [1916] 2 Ch. 187.

In *Bellamy v. Debenham* (9) it was held that the letters of offer and acceptance contained all the terms agreed on between the parties and that the complete contract thus arrived at could not be affected by subsequent negotiation. North, J., said at p. 493:

> "In *Hussey v. Horne-Payne* there were certain letters which apparently constituted a complete contract: but, on looking into the whole correspondence, it was found that those letters did not contain all the terms of the contract, because the earlier letters showed that there were other terms then in negotiation, and the later letters also showed that those terms were still in negotiation and were not concluded. It was clear, therefore, that the letters which were said to constitute the contract did not contain the whole of it, and, that being so, that which was called a contract was not complete, and could not, therefore, be enforced."

North, J., held that in the *Bellamy* case (9) there was a complete contract on the correspondence and continued:

> "In my opinion, when once it is shown that there is a complete contract, it is impossible that further negotiations between the parties can, without the consent of both, get rid of what I may call the crystallized contract already arrived at, and as, in the present case, contained in the letters. Of course, it may be an open question whether the terms of the contract really were all settled and the fact that further negotiations took place, as well as the language of those negotiations, may be very important as throwing light upon the state of things at the time when the alleged contract was signed by the party to be charged. The question is really one of fact; and if, in considering that question of fact, one should come to the conclusion that the negotiations which subsequently took place related to new matter, started for the first time after the contract was complete, in my opinion they would have no weight in preventing full effect being given to the written contract previously existing."

Bellamy v. Debenham (9) was reversed on appeal: (see the report in [1891] 1 Ch. 412 (C.A.) it being held by the Court of Appeal that the vendor could not enforce specific performance or claim for breach of contract because he was not, at the relevant date, in a position to give a freehold title to the whole of the property. All the learned lord justices also doubted the correctness of the finding of fact of North, J., that there had been a concluded contract on the correspondence in that case; but it does not appear from the report that any of the lord justices differed from the principle enunciated by North, J., in the above-quoted passage. That principle was approved and followed by the Court of Appeal in *Perry v. Suffield Ltd*. (10) where the following extract from Fry on Specific Performance (6th Edn.) at p. 265 was approved:

> "The effect of subsequent letters may perhaps be thus stated. If the sub-sequent correspondence leads to the conclusion that at the date of the letters relied on as the memoranda of the contract there was no contract in fact, then the plaintiff must fail: if, on the other hand, the whole evidence shows that at that date there was a consensus between the parties upon the terms expressed in the letters relied upon, then the subsequent correspondence, unless amounting to a new contract or an agreement for rescission can have no effect upon the existence of the contract."

It was held that if letters of proposal and acceptance in fact contained all the terms agreed on at the time, and were written with the intent of binding the

writers, this complete contract could not be affected by subsequent negotiations not resulting in a new contract.

In the present case, document "A" already provided for payment to be made within seven months. In my view, the invitation contained in document "C" to conclude with the respondents' Mombasa office an agreement for effecting the payment of the purchase price of the plot within the seven months was an invitation to conclude a new and ancillary agreement for effectuating a term which had already been agreed in documents "A" and "B". It was not essential. The contract made by documents "A" and "B" could be performed without any such further and ancillary agreement by payment at any time within seven months. This provision of document "C" therefore, in the words of North, J.,

> "related to new matters, started for the first time after the contract was complete",

and would

> "have no weight in preventing full effect being given to the written contract previously existing".

But it is argued that the contract is not complete because no precise date for payment and no date for completion of the purchase was mentioned. This point was neither pleaded nor argued in the court below. Paragraph 7 of the defence does not raise it. There is an averment there that there never was a valid contract, but that is alleged to be so "by reason of what is hereinbefore stated", i. e. that the whole transaction was bogus, not that the contract was invalid by reason of the absence of a date for payment or completion. I do not think that the point is valid. There is a provision in document "A":– "Payment: To be effected within seven months." In the absence of anything to the contrary I think that the ordinary and grammatical construction of this provision is "Payment to be effected within seven months from this date", i.e. within seven months from February 6, 1956. There is nothing in document "B" or document "C" which either confirms or casts doubt on that interpretation. The only oral evidence that I can find dealing with the matter is the evidence of the first appellant on p. 19: "The letter had to contain the mode of payment. They decided on seven months." And the evidence of Hassanali Lakhani on p. 24:

> "I contacted my lawyer and sent him my file. Mr. Dossa was to contact them. There was nothing in doubt . . . Kassamali told me that they could not raise the money by 8th September when it was due."

("8th September" may be an error for "6th September" or "5th September". The date "8th September" is unexplained.) This matter was not explored in the lower court. It is not mentioned in the judgment. This is not surprising since the point was neither pleaded nor argued. The ordinary practice would be for the transfer of the property to take place contemporaneously with or immediately following completion of payment of the purchase price. The final sentence of document "C" indicates that this was the procedure which the respondents expected would be followed. I do not doubt that if, as found by the learned judge (against whose finding on this point there is now no appeal), the purchase was a genuine purchase, the appellants had a similar intention when they signed document "A" and that they also intended the date of completion to be the date stipulated for final payment of the purchase price, that is to say, within seven months from February 6, 1956. The reason why Mr. Dossa left the date in September to be filled in by the appellants may have been that, under the terms of the contract, the appellants had a right to pay and obtain a transfer "within seven months", i.e. before September 6 if they wished. I do not think that Mr. Dossa's letter necessarily

bears the interpretation that the date of completion could be extended beyond the expiration of seven months. But even if it does, an indulgence proposing an extension of the date for payment and completion to any date before the end of September would not, if not accepted, affect the contract. In truth, consideration of the precise date for payment and completion is not very profitable, since, in the absence of expression to the contrary, time is not of the essence of the contract except where from the nature of the property or surrounding circumstances it must have been intended to be so and a person who promises to purchase cannot get out of his bargain on the plea that the time for completion is unfixed. If authority is needed for this proposition, it can be found in *Simpson v. Hughes* (11) (1897), 76 L.T. 237; 13 T.L.R. 271. The same rule applies to contracts for sale under the Indian Contract Act, s. 46 and s. 55: *Jamsed v. Burjorji* (12)(1916), 40 Bom. 289 (P.C.); *Rustomji v. Dhairyawan* (13) (1930), A.I.R. P.C. 165, 169. There is no such implication arising from the nature of the property or the surrounding circumstances in this case. The ordinary principle of construction is that, where no date is fixed for completion, completion is to take place within a reasonable time and vacant possession is to be given on completion: *Simpson v. Hughes* (11); *Johnson v. Humphrey* (14), [1946] 1 All E.R. 460. In this case, the contract was repudiated on quite another ground. Mr. Salter relied on *Johnson v. Humphrey* (14) for the proposition that a contract is unenforceable if the date for taking possession is omitted. But *Johnson v. Humphrey* (14) does not establish that as a proposition of general application. *Johnson v. Humphrey* (14) was a special case in which the documents contained an express stipulation by the vendor that completion was not to take place until possession could be given by her. That was sufficient to oust the ordinary principle referred to above. There is no such stipulation here. Even if the date for payment and completion was within seven months from the date of acceptance, or was otherwise uncertain, that would not avoid the contract. In my opinion, the ordinary rule would apply here and even if the completion date is unspecified or uncertain this would not render the contract unenforceable. Here the parties have fixed seven months as the outside limit for payment and the reasonable inference is that they intended the transfer to take place on payment being made. Had there been disagreement between the parties as to the date of commencement of the period, the court would, on application, have fixed a reasonable completion date; but absence of, or uncertainty as to, a date for completion is no ground for refusing specific performance: *Simpson v. Hughes* (11).

Dealing now with the third ground upon which it was argued that there was no concluded agreement, I am of opinion that if the correspondence amounted to an otherwise complete offer and acceptance (or, in terms of s. 2 of the Indian Contract Act, an agreement enforceable by law), as I think it did, the mere fact that the respondents desired that the agreement should be put into more formal, legal shape and asked the appellants to get into contact with their Mombasa office for that purpose, would not make the contract conditional or relieve either party from liability under it: *Rossiter v. Miller* (15) (1878), 3 App. Cas. 1124, 1152. I would respectfully adopt the words of Cotton, L.J., in *Gray v. Smith* (16) (1889), 43 Ch.D. 208 at p. 219: “The evidence shows that the parties” (or at least, in the instant case, the vendors)

> “intended to have a formal agreement drawn up, and the drawing it up they would leave to their solicitors. But they did not intend to leave to their solicitors whether they should make an agreement, but only how the agreement they had made should be carried out.”

In my opinion, this case does not fall within the line of cases (which I may term the “subject to contract” or “subject to formal contract” cases) of which *Lockett v. Norman-Wright* (5) is an example. Even if it be assumed in favour

of the appellants that the expressions "formal documents" and "necessary legal documents" include a formal agreement for sale and do not merely refer to a formal document of transfer on completion, the acceptance of the offer is not made subject to, or conditional upon, the preparation of such an agreement. Document "B" accepts the offer unconditionally and document "C" confirms unequivocally that the offer has been accepted. Both merely suggest contact with the respondents' Mombasa office for settling of machinery for carrying out the agreement already made. In my opinion, documents "A" and "B" constitute a completed and concluded contract and document "C" confirms that position.

I would dismiss the appeal with costs.

Gould JA: I concur.

Sir Owen Corrie Ag JA: I concur and have nothing to add.

Appeal dismissed.

For the appellants:
CW Salter QC, *DN Khanna* and *SG Patel*
Verjee & Verjee, Kampala

For the respondents:
PJ Wilkinson and *RA Caldwell*
PJ Wilkinson, Kampala

R v Wallace
[1958] 1 EA 582 (HCT)

Division:	HM High Court for Tanganyika
Date of judgment:	17 December 1958
Case Number:	333/1958
Before:	Law J
Sourced by:	LawAfrica

[1] Street traffic – Driving without due care and attention – Conviction based on principle or rule of general application – Whether conviction must be based on finding of driver's actual negligence – Traffic Ordinance (*Cap.* 168), *s.* 40 (1) (*a*) (*T.*).

Editor's Summary

The accused was charged with driving without due care and attention, contrary to s. 40 (1)(*a*) of the Traffic Ordinance. The trial was conducted in accordance with the procedure laid down for the trial of

minor offences. The magistrate found that the accused drove a motor car which collided with the rear of another vehicle which it was following, and which stopped suddenly and without warning, in the middle of the road, and convicted the accused and fined him for the following reasons:

> "It is a well-known rule of the road that a driver should travel at such a speed and at such a distance that he is able to pull up without colliding with a vehicle ahead of him if it should stop. The fact that this vehicle speeded up and then stopped suddenly does not alter the fact that the accused cannot have been travelling at a safe distance behind the lorry, otherwise he would have managed to pull up without colliding. I therefore find the accused guilty as charged."

The accused having no right of appeal applied to the High Court to review the case in the exercise of its jurisdiction in revision.

Held –

(i) cases of driving without due care and attention involve the decision of questions of fact.

(ii) such cases cannot be decided only by the application of principle, rules or courses of reasoning which have been applied in deciding other cases on other sets of facts.

(iii) a conviction for driving without due care and attention cannot be founded on the mere fact of a collision, but must be based on a finding of fact that the driver charged with the offence was guilty of some act or omission which was negligent, and which was a departure from the standard of driving expected of a reasonably prudent driver.

Conviction quashed and sentence set aside.

Case referred to in judgment:

(1) *Gibbons v. Kahl*, [1955] 3 All E.R. 345.

(2) *Chapman v. Hobrough*, [1955] Crim. Law Rev. 786.

(3) *Baker v. Longhurst* (E.) & Sons Ltd., [1933] 2 K.B. 461; [1932] All E.R. Rep. 102.

(4) *Morris v. Luton Corporation*, [1946]1 All E.R. 1.

(5) *Simpson v. Peat*, [1952]1 All E.R. 447.

(6) *Riddell v. Proctor and Motor Vehicles Registrar* (1955), 14 W.W.R. (N.S.) 288.

(7) *Simoneau v. R.* (1952), 102 Can. C.C. 282.

Judgment

Law J: In Dar-es-Salaam District Court Criminal Case No. 2780/58 the accused, John Wallace, was charged with the offence of driving without due care and attention, contrary to s. 40 (1) (*a*) of the Traffic Ordinance (Cap. 168). The accused, who was represented by an advocate, pleaded not guilty, but after a trial conducted in accordance with the procedure laid down for the trial of minor offences (by s. 195 of the Criminal Procedure Code) he was found guilty, convicted and sentenced to pay a fine of Shs. 40/-. The accused, having no right of appeal, has asked this court to review the proceedings, and as it appeared to me that an important question of law was involved, the matter was duly set down for argument, when Mr. Troup, Crown counsel, appeared in support of the conviction.

The case, having been tried under the summary procedure, contains no record of the evidence adduced at the trial, but the facts are set out in the learned resident magistrate's judgment as follows:

> ". . . the accused's car was being driven by the accused towards town. At the corner of Lahore and Sheffield Roads, a truck coming along Lahore Road nearly collided with a Bedford truck ahead of the accused's vehicle. The Bedford swerved and slowed down. Then they proceeded and after a short distance first the truck turned off and then the Bedford stopped suddenly in the middle of the road and accused's vehicle collided with its rear. The accused was doing 20–25 m.p.h. at the time. The collision occurred in Sheffield Road."

The learned magistrate appeared to accept that the accused was driving at a reasonable speed, behind a Bedford truck and in the same direction, and that the Bedford, after narrowly avoiding a collision with another truck which came out of a side road, accelerated briefly and then stopped "suddenly and without signal" whereupon the accused's car collided with the rear of the Bedford.

In dealing with the question whether, in these circumstances, the accused was driving without due

care and attention, the learned magistrate said:

> "It is a well-known rule of the road that a driver should travel at such a speed and at such a distance that he is able to pull up without colliding with a vehicle ahead of him if it should stop. The fact that this vehicle speeded up and then stopped suddenly does not alter the fact that the accused cannot have been travelling at a safe distance behind the lorry otherwise he would have managed to pull up without collision. I therefore find the accused guilty as charged."

Mr. Troup submits that the above extract shows that the learned magistrate found as a fact that the accused was not travelling at a safe distance from the Bedford truck, and that such a finding of fact by the lower court, which had the advantage of hearing and seeing the witnesses, should not be upset unless shown to be founded on no evidence at all. (*Gibbons v. Kahl* (1), [1955] 3 All E.R. 345, and *Chapman v. Hobrough* (2) reported at p. 786 of the Criminal Law Review 1955.)

If I were satisfied that the learned magistrate had made a finding based on the evidence, that the accused was driving at an unsafe distance from the Bedford, then. I would be in full agreement with Mr. Troup and that would be the end of this matter. As I read the above extract from the learned magistrate's judgment, however, it seems to me that the learned magistrate made no such finding of fact, but inferred that the appellant must have been travelling at an unsafe distance from the Bedford by applying to the facts of this case the "well-known rule of the road" to which he made reference.

Now what is this "well-known rule of the road", and where can it be found? Mr. Troup has been unable to help me in this respect. It may be that the learned magistrate had in mind the proposition that the driver of a vehicle should be able to pull up within the limits of his vision. That proposition found expression particularly in the case of *Baker v. Longhurst* (*E.*) *& Sons, Ltd*. (3), [1933] 2 K.B. 461. Since that case, courts of high authority in England have often warned, in both civil and criminal matters, that no principle or rule of general application can be extracted from *Baker's* case (3), as every collision case involves the decision of questions of facts; and issues of negligence in such cases cannot be decided by the application of a rule or principle laid down in a case involving a different set of facts. For instance, in *Morris v. Luton Corporation* (4) [1946] 1 All E.R. 1, a civil appeal from the King's Bench Division to the Court of Appeal, Lord Greene, M.R., said, with reference to *Baker's* case (3), at p. 3:

> "I need scarcely say that I refer to the well-known passage in the judgment of Scrutton, L.J., in *Baker v. Longhurst* (*E.*) *& Sons, Ltd*., where, interpreting him literally, he appears to lay down a sort of general proposition ([1933] 2 K.B. 461, at p. 468) that a person riding in the dark must be able to pull up within the limits of his vision. I cannot help thinking that the observation turned out in the result to be a very unfortunate one because the question, as has so often been pointed out, is a question of fact. <u>There is sometimes a temptation for judges in dealing with these traffic cases to decide questions of fact in language which appears to lay down some rule which users of the road must observe</u> (Note by court: my underlining) . . . In the hope that this suggested principle may rest peacefully in the grave in future and not be resurrected with the idea that there is still some spark of life in it, I should like to say that I am in agreement with the observation of Lord Wright sitting in this court in *Tidy v. Battman* where he says ([1934] 1 K.B. 319, at p. 322), referring to *Tart v. Chitty* (*G. W.*) *& Co., Ltd*., [1933] 2 K.B. 453, and *Baker v. Longhurst*, that they show:
>
> > '. . . that no one case is exactly like another, and no principle of law can in my opinion be extracted from those cases. It is unfortunate that

> questions of fact alone should be confused by importing into them as principles of law a course of reasoning which has no doubt properly been applied in deciding other cases on other sets of facts.' "

Another case in point is *Simpson v. Peat* (5), [1952] 1 All E.R. 447, and I quote from the judgment of Lord Goddard, C.J., at p. 449:

> "It has often been pointed out that it is unfortunate that questions which are questions of fact alone should be confused by importing into them as principles of law a course of reasoning which has, no doubt, been properly applied in deciding other cases on other sets of facts: see, for instance, *Tidy v. Battman*, and for this purpose there can be no distinction between civil and criminal matters . . . because an accident does occur it does not follow that a person has driven dangerously or without due care and attention. But if he has, it matters not why he did so. Suppose a driver is confronted with a sudden emergency through no fault of his own. In an endeavour to avert a collision he swerves to his right- it is shown that if he had swerved to the left, the accident would not have happened. That is being wise after the event and, if the driver was, in fact, exercising the degree of care and attention which a reasonably prudent driver would exercise, he ought not to be convicted, even through another and, perhaps, more highly skilled driver would have acted differently."

It will be noted from the above extract that the learned chief justice, apart from laying down that every motoring case must be tried with reference to its own peculiar facts, also stresses the point that the standard expected of a motorist is the exercise of the degree of care and attention which a reasonably prudent driver would exercise; the courts do not expect every motorist to be an expert driver. In the case at present under review, the learned magistrate appears to have accepted that the driver of the other vehicle involved stopped suddenly and without signal in the middle of the road, thus confronting Mr. Wallace with a sudden emergency through no fault of his own. In this connection I refer to two Canadian cases, which are not available to me, but which are briefly summarized in the English and Empire Digest, Third Cumulative Supplement 1958, Vol. XLII Street Traffic, in the notes to cases at p. 1267 and p. 1279. Firstly, I refer to *Riddell v. Proctor* (6) (1955), 14 W.W.R. (N.S.) 288, summarised as follows:

> "It is a primary duty of drivers on a highway to keep a reasonable look-out for obstructions or traffic ahead in time to avoid a collision."

I respectfully agree. The duty is to keep a reasonable look-out, and not to have to anticipate unreasonable or dangerous behaviour on the part of other drivers.

Then there is the case of *Simoneau v. R.* (7) (1952), 102 Can. C.C. 282, summarized as follows:

> "It is not the law that the driver of a vehicle who runs into the rear of a preceding vehicle is necessarily guilty of careless driving. To support a conviction for driving without due care and attention there must be evidence of negligence."

With this proposition I again agree. A conviction for driving without due care and attention cannot be founded on the mere fact of a collision but must be based on a finding of fact that the driver charged with the offence was guilty of some act or omission which was negligent and which was a departure from the standard of driving expected of a reasonably prudent driver.

Reverting to the case now under review, I am of opinion that Mr. Wallace's conviction was not based on any finding of negligence, but on the application to his case of a rule or principle or course of reasoning which has in the past been applied to other cases. Nowhere in his judgment did the learned magistrate

say "I find as a fact on the evidence that the accused was negligent"–either because he drove too fast, or too close to the preceding vehicle, or because he was not keeping a reasonably careful look-out, or because he ignored a signal, or for any other reason. What the magistrate did say was to this effect:

> "I find that there is a well-known rule of the road that a driver must drive in such a way as to be able to pull up without colliding with a vehicle ahead of him if it should stop. Mr. Wallace's vehicle collided in this way, therefore he cannot have been travelling at a safe distance behind the other vehicle, therefore I find him guilty."

In my opinion this was a wrong approach. The case against Mr. Wallace should have been decided having regard to the facts peculiar to that case, and he should not have been convicted in the absence of a definite finding of want of due care and attention based on the evidence. Instead he was convicted on an inferential finding that he could not have been travelling at a safe distance behind the other vehicle, this finding not being based on evidence, but on the application to the facts of Mr. Wallace's case of a so-called rule or principle which may have been applicable to the facts of some other case.

It follows that in my opinion the conviction and sentence in Dar-es-Salaam District Court Criminal Case No. 2780 of 1958 must be respectively quashed and set aside, and I order accordingly. The fine if paid must be returned to Mr. Wallace.

Conviction quashed and sentence set aside

For the Crown:
AM Troup (Crown Counsel, Tanganyika)
The Attorney-General, Tanganyika

The accused did not appear and was not represented.

Re an Application by Mulchand Punja Shah

[1958] 1 EA 587 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	3 November 1958
Case Number:	104/1958
Before:	Rudd and Connell JJ
Sourced by:	LawAfrica

[1] Licensing – Certiorari – Licensing court refusing renewal of liquor licence – Applicant not informed that court would object to renewal or grounds of objection – Whether court entitled to refuse application for renewal without hearing applicant regarding grounds of objection – Liquor Licensing Ordinance, 1957, *s.* 11, *s.* 12, *s.* 16 *and s.* 18 (*K.*).

Editor's Summary

The applicant, who held a liquor licence, applied to the licensing court for its renewal, in accordance with s. 8 of the Liquor Licensing Ordinance, 1957. No objection to the application was made under s. 10 of the Ordinance, but the licensing court refused to renew the liquor licence on the ground that the appellant, who was reported to have two convictions unconnected with the Ordinance, was "not a fit and proper person to hold the licence" as provided by s. 16 (*a*). The applicant did not appear at the sessions of the licensing court and the court did not inform the applicant of the nature of the objection which it had taken of its own motion or give him an opportunity of replying to it, as required by s. 12 (2) of the Ordinance. The decision of the court was communicated to the applicant on either the day his right of appeal under s. 18 (1) of the Ordinance expired, or on the day previous. The applicant applied to the Supreme Court for an order of certiorari to quash the order of the licensing court refusing his application, and for an order of mandamus requiring the court to hear and determine the said application according to law.

Held –

(i) although s. 18 (1) of the Liquor Licensing Ordinance, 1957, confers a right of appeal from a decision of the licensing court, the applicant had had no opportunity to appeal, since he was not informed of the decision of the court until it was too late; accordingly the Supreme Court would exercise its discretion to entertain the present application.

(ii) the applicant was not bound to appear in person or by an advocate before the licensing court on the hearing of his application for the renewal of his existing licence unless required to do so under s. 11 (2) which was not the case here.

(iii) the licensing court had no jurisdiction or power to refuse to renew the licence on the ground stated in s. 16(*a*) of the Ordinance without first informing the applicant of its objection and giving him an opportunity to answer it as provided in s. 12 (2).

Order accordingly.

Judgment

Rudd J: read the following judgment of the court: The essential facts that have to be determined for the decision of this application are clear and undisputed. They are as follows:

The applicant, who was the holder of a liquor licence, applied to the Thika Licensing Court for the renewal of the said liquor licence in accordance with s. 8 of the Liquor Licensing Ordinance, 1957. No objection to the application was made under s. 10 of the Ordinance but the licensing court had before it a

report under s. 8 (5) to the effect that the applicant had been convicted of two offences unconnected with the Ordinance. In respect of these convictions, the applicant was not in the words of s. 16 (*c*)

> "sentenced to imprisonment, without the option of a fine, for a period in excess of six months".

The licensing court sat to consider the application at its sessions held on May 13, 1958, when it refused to grant a renewal of the liquor licence on the point which it took of its own motion under s. 12 (1) of the Ordinance that the applicant was not a fit and proper person to hold the licence.

It appears to have reached this conclusion because of the convictions to which we have referred. The applicant did not appear in person or by advocate at the sessions of the licensing court. The licensing court did not inform the applicant of the nature of the objection which it had taken of its own motion or give him an opportunity of replying to it. The decision of the licensing court was communicated to the applicant on either the day upon which his right of appeal under the Ordinance expired or, at the earliest, on the day previous to that. The applicant has applied to this court after the expiration of his right of appeal under the Ordinance for an order of certiorari to quash the order of the licensing court refusing to grant his application for a renewal of his liquor licence and for an order of mandamus requiring the licensing court to hear and determine the said application, according to law.

In the opinion of this court, only two questions arise.

The first is whether or not the application to this court can be entertained in view of the fact that under s. 18 (1) of the Liquor Licensing Ordinance, 1957, there was a right of appeal to the Supreme Court within twenty-one days of the refusal by the licensing court to renew the licence. At the time the application was made to this court there was no right of appeal since the time within which it could be exercised under the Ordinance had already expired. The Ordinance does not itself provide for any extension of the time within which an appeal can be brought. In the circumstances, we are satisfied that this court has a discretion to entertain the application if it thinks fit to do so. In view of the fact that it is clear that the applicant was not informed of the decision of the licensing court until, at the earliest, his right of appeal was on the point of expiring, we have no doubt but that we should entertain the application before us and consider it on its merits.

The second question that calls for decision is whether or not the licensing court was entitled, in the absence of the appellant, to refuse the application for the renewal of the liquor licence on the basis of an objection taken by the licensing court itself without first informing the applicant of the nature of the objection and giving him an opportunity to answer it.

We think that the answer to this question depends upon whether or not the applicant was obliged to appear at the sessions of the licensing court which sat to consider his application.

The power of a licensing court of its own motion to take notice of any matter or thing which, in the opinion of such court constitutes an objection to an application, whether or not any objection has otherwise been lodged under s. 10 of the Ordinance, is provided by s. 12 (1) and is subject to s. 12 (2) of the Ordinance which provides as follows:

> "Where in respect of an application a licensing court acts in pursuance of sub-s. (1) such court shall inform the applicant of the nature of the objection, and shall, if the applicant so requests, adjourn the hearing for such period not being less than seven days, as the licensing court deems necessary to enable the applicant to reply thereto."

If it were the case that the applicant was bound to appear in person or by advocate at the hearing of his application by the licensing court then, if he failed to do so it would be possible to argue that by failing to appear the applicant was himself responsible for the fact that he was not informed of the nature of the objection taken by the licensing court, since he had not appeared when he was bound to do so at the material and proper time for the licensing court to inform him of its objection.

On the other hand, if the applicant was not bound to appear, his failure to do so could not discharge the licensing court from its obligation to inform him of its objection in accordance with s. 12 (2).

Before considering s. 11 of the Ordinance, which is the decisive section, as to whether or not the applicant was bound to appear in person or by advocate before the licensing court, it is important that the provisions of s. 16 of the Ordinance should be borne in mind. Section 16 provides the conditions under which a licensing court may refuse to renew a liquor licence and enacts that a licensing court may refuse to renew an existing licence only when it is satisfied that one or more of six specific circumstances exist. For the purposes of this judgment only two of these circumstances need be referred to, that is to say, those stated in para. (*a*) and para. (*c*) of the section, which are, respectively, where:

> "(*a*) The licensee is not a fit and proper person to hold the licence; or
>
> (*c*) (The licensee) has been convicted of an offence and sentenced to imprisonment, without the option of a fine, in the Colony or elsewhere for a period in excess of six months."

The other paragraphs contained in this section do not apply to this case and, in fact, para. (*c*) does not apply either since the applicant was not sentenced to imprisonment for a period in excess of six months.

With the provisions of s. 16 in mind, we now turn to s. 11 (1) which is as follows:

> "Every person making an application shall, save as otherwise provided, appear in person or by an advocate before the licensing court and shall satisfy the licensing court that there is need for the grant of a licence of the type applied for in the particular locality in respect of which the application is made."

The first part of this section would if it stood alone without the second part, be capable of applying to an application for the renewal of an existing licence as well as to any other application to a licensing court, but the second part of this section is completely inapplicable for the hearing of an application for the renewal of an existing licence.

Further, the only purpose stated in the section for which the applicant is required to appear before the licensing court in person or by advocate, is to satisfy the licensing court that there is need for the grant of a licence in the particular locality. This is an obligation placed by the sub-section on every applicant appearing before the licensing court in accordance with the sub-section–it is applied by the sub-section to every application, within the meaning of the word application, as used in the sub-section, whatever the nature of such application may be. But under s. 16 the licensing court is not entitled to refuse the renewal of an existing licence on the ground that there is no longer a need for the licence in the particular locality. Therefore, it is clear that s. 11 (1) cannot be intended to apply to the case of an applicant for the renewal of an existing licence. This view is not inconsistent with the definition of an "application" contained in s. 3 of the Ordinance as meaning

> "an application for the grant, renewal, transfer or removal of any description other than a temporary liquor licence or a temporary extension liquor licence"

because that definition is expressly enacted subject to the opening words of the section "In this Ordinance except where the context otherwise requires".

The context of s. 11 (1) as we have already shown does otherwise require in that it clearly was not the intention of that sub-section that it should apply to applications for the renewal of an existing licence.

The matter is not at all obvious upon a casual reading of the Ordinance and we can well understand the fact that the licensing court should have placed a wrong construction on s. 11 (1) but the view that we have adopted is the view that was propounded to us by both counsel in the case who found themselves in agreement on the matter. We have examined it with care and we are satisfied that it is correct. It follows that the applicant was not bound to appear in person or by advocate before the licensing court on the hearing of his application for the renewal of his existing licence unless required to do so under s. 11 (2) which was not the case in the present instance and it further follows that the licensing court had no jurisdiction or power to refuse to grant the renewal of the licence on the ground stated in s. 16 (*a*) without first informing the applicant of its objection and giving him an opportunity to answer it as provided in s. 12 (2).

For these reasons we quash the decision and order of the licensing court refusing to grant the application for the renewal of the applicant's licence and order the licensing court to hear and determine the said application according to law and with particular regard to the provisions of s. 12 (2) of the Ordinance. The applicant is entitled to the costs of the application to this court.

Order accordingly.

For the applicant:
J Gledhill
Gledhill & Co, Nairobi

For the respondent:
NJ Howard (Crown Counsel, Kenya)
The Attorney-General, Kenya

Mengo Builders and Contractors Ltd v Kasibante
[1958] 1 EA 591 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	31 October 1958
Case Number:	77/1958
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Jurisdiction – Company – Action in Principal Court of Buganda against limited company – Whether Principal Court has jurisdiction – Interpretation and General Clauses Ordinance (*Cap.* 1), *s.* 3 (1) *and* (8) (*U.*) *– Buganda Courts Ordinance* (*Cap.* 77), *s.* 2 *and s.* 3 (1) (*U.*).

Editor's Summary

The respondent had sued the appellant company in the Principal Court of Buganda concerning the ownership of land. The Buganda Courts Ordinance, s. 3 (1), gives the Principal Court "full jurisdiction, civil and criminal, through-out Buganda over all Africans". At the hearing the appellant company took a preliminary objection that the Principal Court had no jurisdiction over companies. The Principal Court held that it had such jurisdiction by virtue of s. 3 (8) of the Interpretation and General Clauses Ordinance which provides that any company of which all members are Africans within the meaning of that term as defined in that Ordinance is to be deemed to be an African. The appellant appealed against this ruling.

Held –

(i) the definition of "African" in the Interpretation and General Clauses Ordinance does not apply to that term as used in the Buganda Courts Ordinance, because the latter Ordinance has its own definition of that term.

(ii) the Principal Court had no jurisdiction and should dismiss the suit.

Appeal allowed.

Case referred to in judgment:

(1) *K. M. Nakalyakani & Co., Ltd. v. Kulanima M. N. Musoke*, Uganda High Court Civil Appeal No. 34 of 1942 (unreported).

(2) *E. D. N. Kubo v. Buganda Butchers Ltd.*, Uganda High Court Civil Case No. 194 of 1951 (unreported).

Judgment

Sir Audley McKisack CJ: In the Principal Court of Buganda Mr. Kasibante, respondent in the present appeal, brought a suit against a limited company called Mengo Builders and Contractors Ltd., the present appellants, concerning the ownership of land. At the hearing of the suit the company took the preliminary objection that the Principal Court had no jurisdiction over companies. The Principal Court held, however, that it did have such jurisdiction, by virtue of sub-s. (8) of s. 3 of the Interpretation and General Clauses Ordinance (Cap. 1). It is against that ruling that the company has appealed.

The Buganda Courts Ordinance (Cap. 77) gives the Principal Court "full jurisdiction, civil and criminal, throughout Buganda over all Africans" (s. 3(1)). Section 2 of that Ordinance defines the term "African" as follows:

> "African' means any person whose tribe is a tribe of the Protectorate or of the Colony and Protectorate of Kenya, the Trust Territory of Tanganyika, Nyasaland, the Sudan, the Belgian Congo or the Mandated Territory of Ruanda-Urundi, and includes a Swahili."

There is no mention in this Ordinance of jurisdiction in relation to companies or other corporations (save for a reference in s. 6(4) to jurisdiction in respect of proceedings by or against the Crown or the Buganda

Government).

Sub-section (1) of s. 3 of the Interpretation and General Clauses Ordinance, which was enacted in 1951, provides that–

> "In this Ordinance and in every other Ordinance, unless there is something in the subject or context inconsistent with such construction or unless it is therein otherwise expressly provided, each of the terms 'African' and 'native' means any person who is a member of or one of whose parents is or was a member of an indigenous African tribe or community."

The sub-section goes on to exclude from the definition of "African" certain persons whom it is not necessary to particularise for the purpose of this appeal. Sub-section (8) of the same section–and it is upon this that the Principal Court relied in the ruling which is the subject of this appeal–is as follows:

> "Save and except in regard to the provisions of the Income Tax Ordinance, 1940, and any Ordinance amending or replacing the same, any company, association, partnership or body of persons corporate or unincorporate all of whose members are Africans within the meaning of sub-s. (1) of this section shall be deemed to be an African so long as all the members thereof are Africans as aforesaid."

Mr. Pinto appeared for the appellant, and the respondent appeared in person. I had therefore the advantage of hearing legal argument for one side only. Nevertheless, the position is, I think, quite clear. The definition of "African" in the Interpretation and General Clauses Ordinance does not apply to that term as used in the Buganda Courts Ordinance, because the latter Ordinance has its own definition of that term. It will be seen that the definition in the former Ordinance is much wider than the one in the Buganda Courts Ordinance and would include, for example, members of West African or South African tribes or communities, who are not included in the term as defined in the Buganda Courts Ordinance. When the Interpretation and General Clauses Ordinance says that a company of which all the members are Africans within the meaning of that term as defined in that Ordinance is to "be deemed to be an African", it means that the company is to be deemed to be an African as defined in that Ordinance. It does not mean that it is to be deemed an African as differently defined in any other Ordinance. Consequently it cannot mean that the company is to be deemed an African as defined in the Buganda Courts Ordinance. And the Buganda Courts Ordinance gives jurisdiction only over those Africans who are defined in that Ordinance. If the ruling of the Principal Court were correct, it would mean that that court would have jurisdiction over a company all of whose members were West Africans, whereas it has no jurisdiction over an individual West African. Such a result would be quite illogical.

In support of the appeal Mr. Pinto referred me to two cases. The first was *K. M. Nakalyakani & Co. Ltd. v. Kulanima M. N. Musoke* (1), Uganda High Court Civil Appeal No. 34 of 1942 (unreported), in which Manning, J., held that the Principal Court had no jurisdiction over a limited company because the definition of the term "native" (since replaced by the term "African") in the Buganda Courts Ordinance

> "was never meant to include an incorporated company, even if at any given moment all its shareholders happened to be natives".

That decision was, however, given in 1943 when there was in force nothing equivalent to s. 3 of the Interpretation and General Clauses Ordinance now in force. The last-mentioned provision was first introduced in 1945 by the Interpretation (Definition of "Native") Ordinance, 1945, and this is in substantially the same terms as s. 3 of the Interpretation and General Clauses Ordinance.

The other case cited by Mr. Pinto was a decision of Pearson, J., given in 1952; see *E. D. N. Kubo v. Buganda Butchers Ltd*. (2), Uganda High Court Civil Case No. 194 of 1951 (unreported). The question there arose whether the High Court had jurisdiction in a case in which a limited company was a party, or whether, under the provisions of s. 7 of the Buganda Courts Ordinance, the case had to be transferred to the Principal Court on the ground that the latter court had jurisdiction in the matter. Pearson, J., in the course of his ruling said:

> "In fact all the members of this company are, and must by the Articles of Association be, natives within the definition of s. 2, and I hesitate to hold that such natives lose the privilege of suing in their native courts by registering under our Companies Ordinance. On the other hand the company is a distinct legal entity, and I cannot hold that, where a registered company is a party, the court is concerned with the question of the nationality or race of the members. The company is within the jurisdiction of this court (i.e. the High Court of Uganda). This court will proceed to hear."

Although this decision was given after the provisions relating to the interpretation of the word "African" (now to be found in s. 3 of the Interpretation and General Clauses Ordinance) had been in force for some time, no reference is made to it in the decision. Nevertheless, for the reasons I have given, I do not doubt that Pearson, J., would have come to no different conclusion had he thought it necessary to consider those provisions.

The appeal succeeds, and I reverse the ruling of the Principal Court that that court has jurisdiction in the suit in question. It follows that the Principal Court should dismiss the suit for want of jurisdiction.

I have assumed, for the purposes of this appeal, that all members of the Mengo Builders Company Ltd. are Africans, within the definition in the Buganda Courts Ordinance as well as that of the Interpretation and General Clauses Ordinance, since the Principal Court appears to have given its ruling on that basis.

Appeal allowed.

For the appellant:
SA Pinto
SA Pinto, Kampala

The respondent in person.

Nevill and another v Cooper and another
[1958] 1 EA 594 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	24 November 1958
Case Number:	38/1958
Before:	Briggs V-P, Gould JA and Sir Owen Corrie Ag JA
Sourced by:	LawAfrica

Appeal from: H.M. Supreme Court of Kenya–Miles, J

[1] Negligence – Medical practitioner and hospital – Pack left in patient at operation – Life of patient saved by operation – Whether surgeon or hospital negligent.

Editor's Summary

The second respondent underwent a successful abdominal operation at Nairobi in January, 1955. In February, 1956, she was again admitted to hospital. She arrived in a comatose condition, neither her pulse nor her blood pressure could be ascertained, and her heart could just be heard with a stethoscope. After a blood transfusion she underwent a difficult emergency operation by the first appellant, which saved her life. In October, 1956, she was again admitted to the same hospital for observation, when an X-ray revealed an intestinal obstruction. A further operation was then performed by another surgeon, in the course of which an abdominal pack was found in the intestine. Subsequently the respondents sued the first appellant, as the surgeon who had performed the emergency operation earlier in the year, and the second appellants, as the authority controlling the hospital at which that operation was performed. The respondents alleged that the appellants were negligent in failing to count or check the number of packs used during the emergency operation, and that the first appellant had failed to observe that one pack had not been removed. The appellants denied that a pack had been left in the second respondent at the operation performed by the first appellant, and also denied that in the circumstances they were negligent. The trial judge found that negligence had been proved against both appellants and awarded Shs. 1,000/- general damages to the first respondent for loss of consortium, and Shs. 50,000/- general damages to the second respondent, and special damages and costs. On appeal it was submitted for the appellants that neither the surgeon nor the staff of the hospital should have been found negligent, and that the general damages awarded to the second respondent were excessive. It was contended that the pack had been left in the second respondent during the first of the three operations, and that in any event, the condition of the second respondent, when the first appellant operated, was so grave that special haste in its completion was necessary.

Held –

(i) it was more probable that the pack was left in during the operation by the first appellant.

(ii) the finding of the trial judge that there was no causal connection between the difficulties of that operation and the failure to remove the pack, disregarded the essential point that it is not always, if ever, necessary for the surgeon to show how he overlooked the pack; it is enough if he shows that he took all proper precautions and used due care and attention to prevent a pack being overlooked, and since the first appellant had given a proper account of the circumstances and conduct of the operation, which was accepted as true, the mishap was not due to negligence on his part.

(iii) there was evidence of negligence, in miscounting the packs, by one or more of the staff of the hospital, for whose acts and omissions the second appellants were responsible.

(iv) the damages fell to be assessed on the basis of past pain and suffering, with some allowance for future pain or inconvenience, and the assessment of the trial judge was a wholly erroneous estimate, and disproportionate to the general level of damages awarded in such cases.

Appeal of the first appellant allowed. Appeal of the second appellants as to general damages allowed. Judgment and decree of the Supreme Court varied, reducing the general damages from Shs. 50,000/- to Shs. 15,000/-.

Case referred to in judgment:

(1) *Van Wyk v. Lewis*, [1924] A.D. 438.

(2) *Mahon v. Osborne*, [1939] 1 All E.R. 535.

(3) *James v. Dunlop* (1931), British Medical Journal, April 25.

(4) *Southport Corporation v. Esso Petroleum Co. Ltd.*, [1954] 2 All E.R. 561.

(5) *Rushton v. National Coal Board*, [1953] 1 All E.R. 314; [1952] 1 Q.B. 495.

(6) *Urry v. Bierer* (1955), The Times, March 16.

November 24. The following judgments were read:

Judgment

Briggs V-P: This is an appeal from a decree of the Supreme Court of Kenya awarding damages and costs to the respondents.

The first appellant is a surgeon in private practice in Nairobi, and the second appellant is the authority controlling the Nairobi European Hospital. The respondents are husband and wife. On or about February 1, 1956–the exact date is, curiously enough, left uncertain on the evidence–the first appellant operated on the second respondent at the hospital. The respondents alleged that the first appellant and the hospital staff were negligent in the conduct of the operation and sued for damages, the first respondent for loss of consortium, the second for pain and suffering and personal injury, and both for special damages, interest and costs. Both appellants denied negligence. The Supreme Court after a trial lasting eight days awarded to the first respondent Shs. 1,000/- general damages, to the second respondent Shs. 50,000/- general damages, and to both respondents Shs. 5,189/80 special damages and costs as against both appellants. The appellants contend on appeal to us that neither the surgeon nor the hospital staff should have been found negligent, and that the general damages awarded to the second respondent were excessive.

I take the following statement of the facts from the judgment of the learned trial judge:

> "The operation was for a rupture of an ectopic tubal pregnancy.
>
> "The case for the plaintiffs is, that at the operation, an abdominal swab, or pack, was left in the body of the second plaintiff. It is alleged that the first defendant was negligent in failing to count the number of swabs used in the operation and to check that the correct number of swabs was removed, that he failed to instruct the nurse, or nurses, to keep a check on the number of swabs used and/or failed personally to counter-check the number of swabs and failed to observe that one swab remained in the body of the second plaintiff. The

particulars of negligence against the servants of the second defendant allege failure to count the number of swabs used for the operation and failure to detect that one swab had not been removed, in accordance with instructions given by the first defendant, or in accordance with the usual practice.

"The defence, on behalf of both defendants, is first a denial that any pack was left in at the operation performed by Mr. Nevill, and secondly a denial of negligence on the part of any of the defendants."

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"On January 24, 1955 (Mrs. Cooper) was operated on by Mr. P. G. Preston, at the Princess Elizabeth Hospital, Nairobi, for the removal of an obstruction in her fallopian tubes, which were blocked. The blocked parts were removed in that operation and the patent parts of the tubes re-implanted in the uterus. That operation was successful. Mrs. Cooper experienced no ill effect from the operation and her general health was satisfactory.

"On February 1, 1956, the operation with which we are concerned in this case, was performed by Mr. Nevill, the first defendant, at the New European Hospital, for a rupture of an ectopic tubal pregnancy. What took place at this operation will have to be considered in detail hereafter.

"Mrs. Cooper says that about a week after this operation, while she was still in hospital, she had an attack of vomiting. This may, perhaps, just have been the normal aftermath of a serious abdominal operation. On the night of April 23, however, Mrs. Cooper was taken ill at a dinner party. She complained of a pressure on the right side of her back and a feeling of nausea, which continued for some hours, and on the following day she went to see her doctor–Doctor Thompson–to whom she complained-of vomiting and abdominal pain throughout the previous night. This he thought was due to adhesions. She was admitted to the Maia Carberry Nursing Home in May having had a recurrence. According to Dr. Thompson, she was free of symptoms after some two hours, and a clinical examination failed to reveal the cause. After her discharge from the nursing home, she was seen on a number of occasions by Dr. Thompson because she was complaining of occasional abdominal pains, which Dr. Thompson attributed to adhesions. These pains, however, gradually became aggravated and there was frequent vomiting, as a result of which Dr. Thompson admitted her to the New European Hospital for observation, on or about October 28, 1956. An X-ray photograph taken on admission revealed no evidence of an obstruction, but on the following day a further X-ray did show that there was an intestinal obstruction. It was accordingly decided that an operation was necessary and this was performed by Mr. W. C. Barber.

"Mr. Barber states that on opening the abdomen he found an abscess cavity, centrally situated, surrounded by adherent coils of small intestine. There was a localised peritonitis. Mr. Barber tried to determine which portion of the adherent intestine might be causing the obstruction. He first endeavoured to separate one or two adherent loops. On doing this, however, it was found that a leakage of bowel content resulted and since there were many adherent areas, Mr. Barber decided to remove the whole of the affected portion of the bowel. He accordingly cut away about seven feet of intestine. The whole length is some twenty-two feet. Mr. Barber says that he felt something in the piece of bowel he removed. The dissected portion was taken into the sluice in a bowl by Sister Banks, who was the 'dirty nurse' at the operation. Dr. Thompson then took the piece of intestine out of the bowl, placed it on the end of the tap and turned on the tap. There then emerged from the piece of bowel a piece of turkish towelling, measuring some 9? × 7? or 10? × 8?, with hemmed edges. This was immediately recognised by all persons present as an abdominal pack. Mr. Barber thereupon decided to ring up Mr. Nevill on the telephone

> and he informed Mr. Nevill of his discovery. Mr. Barber told Mr. Nevill that if he were asked what was the cause of the trouble he would have to inform Mr. Cooper, and Mr. Nevill very properly agreed that this was the correct procedure."

It was common ground that the abdominal pack must have been left in Mrs. Cooper's body either at the first operation (Mr. Preston's) or at the second (Mr. Nevill's), and the first question for decision was at which operation this occurred. The learned trial judge found on a balance of probabilities that it occurred at the second. This finding was attacked as contrary to the weight of the evidence and on the ground of certain alleged misdirections.

Mr. Salter for the appellants first pointed out that the areas involved in the two operations were similar. One or two packs of the type found had been used on the first operation. He submitted that it was established beyond doubt that all packs used in the European Hospital had a loop of tape some six inches long sewn firmly to one corner of the hem, while at the Princess Elizabeth Hospital the similar packs did not always have such tapes, and were at least offered to surgeons, even if not used, without tapes. This I accept. Mr. Salter submitted that, if the pack found had no tape on it, there was a strong presumption that it came from the first operation. Since there was evidence that it was unlikely that a tape could become detached from the pack in the body, and ocular examination of specimen packs exhibited confirms that the tapes are strongly sewn on, I accept this also. If the pack in question had been produced, had had no tape, and had appeared never to have had a tape, I think it would have been very difficult for the plaintiffs to succeed on this issue; but for reasons which will appear the pack was not produced. Mr. Salter then submitted that on the evidence the learned judge should have found as a fact that there was no tape on the pack. During and after the third operation the pack was seen by Mr. Barber, Dr. Thompson, Sister Molloy, Sister King and Sister Banks. All of them gave evidence. The pack was washed out and spread out, and was handled in such a way that one would have expected every one of them to be able to see whether it had a tape or not. None of them said that it had a tape, but only Sister King said categorically that it had not; and she said so only in cross-examination, having said in chief that she did not think there was a tape on it. Such evidence must be examined closely. The passages are:

> "Mr. Barber, I think, held it up. I can't remember distinctly how he was holding it. I think it was a piece of towelling, it was discoloured. I should say it was roughly the same size as this (exhibit 1). I don't think there was a tape on it. I did not look closely at it. I should think I would have seen a tape had there been one. I was very interested in it. It is very unusual. I can remember somebody saying it did not have a tape but I can't remember who."

and in cross-examination–

> "The remark about there being no tape was made when I saw it in the sluice. At that time I don't remember apart from Mr. Barber who else was there. I don't remember whether it was a male or female who said this. I remember noticing that it did not have a tape. I don't remember when I noticed it. I might have said myself that it had no tape or it may have been someone else but I don't remember. Nobody to my knowledge went to have a more careful look at it as a result of that remark. At that time the pack was opened out. Thinking back I have no doubt at its having a tape or not. It did not have a tape."

I think that on this the learned judge was entitled to find, as in effect he must have done, that Sister King's memory could not be relied upon. Mr. Salter submitted that it was for the plaintiffs to prove that there was a tape on the

pack. The pack itself was thrown away some time after the operation, and Mr. Barber says that this was done with his permission. He might well have failed to appreciate how important it might be; but, looking back now, it is obvious that the absence of a tape, if there was none, would have been significant, and it is possible, though by no means certain, that scientific evidence might have proved that the material of the pack was of a kind used in one hospital and not used in the other. It is therefore most unfortunate that the pack was not forthcoming. Mr. Salter did not suggest that we should draw a presumption on the footing that material evidence had been withheld, but he argued that, in permitting destruction of the pack, Mr. Barber was acting as agent, not of the hospital authorities, but of Mrs. Cooper and that she must bear the consequences of its disappearance, in the sense that a finding of "no tape" should have been made on the oral evidence. I doubt if Mr. Barber, in giving the instructions, acted as Mrs. Cooper's agent, and I think no presumption arises from the loss of the pack. Sister Molloy and Sister Banks both said that, if there had been a tape, they thought they would have noticed it. The learned judge said,

> "In my opinion, it would be unsafe for me to base my decision in this case upon the presence or absence of a tape on the pack which was found on October 29, 1956. The evidence is inconclusive one way or the other."

Mr. Salter submitted that this was passing over the matter too lightly, and that the weight of the evidence was against there being a tape. I think this overlooks one psychological factor which has some weight. The three hospital sisters were all aware of Mrs. Cooper's medical history. They were all aware that in the European Hospital tapes were regularly, and should have been invariably, used. They must have been aware that the matter might be a very serious one for their hospital. If they, or any one of them, had actually observed that this pack had no tape, I should have expected an immediate reaction of "Well, that lets us out" and I should also have expected that the pack would have been preserved with the utmost care, even in face of a doctor's order that it be thrown away. I do not think it can properly be said that the learned judge ought to have found that there was no tape.

There was evidence that after the second operation the unusual precaution was taken of making a second count of swabs after the patient left the theatre, and this evidence was accepted as true. Mr. Salter submitted that the learned judge had not sufficiently considered this in relation to the first issue. I do not think it is established that the point was overlooked, and it is not in my view of much weight. The suggestion is that where two counts are made there is much less likelihood that a mistake will occur than when only the one routine count is made, as on the first operation. But this ignores two considerations, first that an error in the count at the second operation may have occurred when checking in the swabs, rather than when checking out, and secondly, that the unusually large number of packs used at the second operation increased the difficulty of this count and the chance of error. Mr. Preston's was a "cold" operation, and he used only one or two restraining packs and no mopping packs at all.

The other main body of evidence directed to showing that the pack was left in the body at the second operation was a considerable amount of expert evidence that a pack so left in would usually cause symptoms within a few weeks, or at most a few months, after the operation. This weighed substantially with the learned trial judge. Mr. Salter submitted, however, that although this evidence pointed *prima facie* to the second operation there were also in the evidence contra-indications which the learned judge had disregarded. There is noted in the books at least one case where an interval of a year elapsed before symptoms were observed. There was evidence that it is possible for a foreign body to become encysted, or insulated from the general physical processes, and that if this occurs it may remain indefinitely quiescent, so that its presence may never be suspected at all. There was also evidence that a foreign

body so encysted might be disturbed by a subsequent operation, and might thereafter cause symptoms at about the period which would be normal if it had been left in the body at the later operation. In this case the pack was actually inside the small intestine, having apparently penetrated it initially by causing an ulcer. Mr. Salter submitted that all the known facts in this case were consistent with the pack having been left in the body at the first operation, having become encysted, and having been disturbed by the second operation. I think this is perfectly correct. But there is no evidence that encystment of a foreign body such as a pack is of frequent occurrence. It is the exceptional, not the ordinary case.

Mr. Salter's final point on this aspect of the case was that the learned judge had misdirected himself in attaching considerable importance, as I think he undoubtedly did, to the admitted fact that after the third operation Mr. Barber and Dr. Thompson both assumed at once that the pack had been left in at the second operation, not at the first. Mr. Salter submitted that the correct approach to this evidence was that Mr. Barber and Dr. Thompson were both entitled to give their opinions on this point as experts, but that those opinions were no more likely to be correct than the opinions of any other experts. Dr. Thompson is a general practitioner, though no doubt of great experience and ability as such. He had never before seen a case of a pack left in a patient. To that extent, his opinion was perhaps of less value than those of the other experts. It may also be said that both Mr. Barber and Dr. Thompson apparently formed their opinions on the spot and without long or detailed consideration, and this may take something from the weight of those opinions. However that may be, I think Mr. Salter's criticism of the learned judge's approach to this evidence is justified.

But, as regards the other matters raised on this issue, I see no ground for any suggestion that the learned judge either overlooked any of the relevant evidence or misdirected himself as to its effect. He rightly held that the onus lay on the plaintiffs, and that the question must be decided on the balance of probabilities. He found on this basis that the pack was left in Mrs. Cooper's body at the time of the second operation. I think it is open to us to review that finding as res integra and I approach the issue on that basis; but I respectfully agree with the learned trial judge that the weight of the evidence was sufficient to justify a finding for the plaintiffs.

It need hardly be said that both Mr. Preston and Mr. Nevill gave the most positive evidence of their belief that the pack had not been left in the body at the respective operations conducted by them. I find that on this point Mr. Nevill's evidence is shown to have been erroneous; but the learned trial judge did not regard this as throwing the slightest doubt on Mr. Nevill's general veracity, and I agree with him. Except that on the point already mentioned he considered Sister King's evidence to be unreliable, he accepted all the witnesses as witnesses of truth, and in my opinion he was right in doing so. The conviction shared by Mr. Nevill and the witnesses who assisted him, that no mistake had been made in the course of the second operation, explains one aspect of the evidence in this case which is perhaps unusual in swab cases, though a somewhat similar point arose in *Van Wyk v. Lewis* (1), [1924] A.D. 438. In the ordinary swab case there is no disagreement that the swab was left in the body at the one operation to be considered, and the only questions in issue are how and why, and whether with or without negligence. In such a case the closest attention must be given by the defendants and their advisers to the question how the acknowledged mistake arose. In this case that question never attained the same prominence, for the defendants' primary case was that there had been no mistake at all. In that respect they were wrong, and it may

be said at once that no explanation of the presence of the pack was ever expressly put forward by them. The court below was left, and we are left, to consider the possibilities which arise from the circumstances and to draw such inferences from the evidence as seem appropriate.

In the court below there was considerable argument on the law applicable to this case, and in particular on the question whether the doctrine of res ipsa loquitur governed it. I think it is unnecessary for us to consider this question. Before us counsel were in agreement that, since all the evidence on both sides was on record, the questions for decision were simply whether, having regard to their proved acts or omissions and to the circumstances of the operation, (*a*) the surgeon, or (*b*) a member of the hospital staff, or both, had failed in their respective duties to the patient. It should be noted at this point that the assistant surgeon to Mr. Nevill on this operation was a Dr. Wilson, who was at that time employed by Mr. Nevill as an assistant in his practice. Dr. Wilson is a well-qualified and sufficiently experienced surgeon, but naturally not of the same professional attainments as Mr. Nevill. It was at all times common ground that, if Dr. Wilson was negligent in the conduct of the operation, Mr. Nevill was responsible for that negligence on the principle respondeat superior. Accordingly question (*a*) above concerns the acts and omissions of Dr. Wilson as well as those of Mr. Nevill himself. Dr. Wilson was in the United Kingdom at the time of the trial, and did not give evidence.

It may also be convenient to remark at this stage that evidence was given at the trial of the high professional skill of Mr. Nevill as a surgeon. In a sense this may have been unnecessary. His professional qualifications speak for themselves. But Mrs. Kean for the respondents submitted that such evidence was inadmissible, on the authority of Bevan on Negligence (4th Edn.), 1359, where it is stated,

> "Where a specific act of malpractice is charged, evidence that the defendant is of skill in his profession is not admissible. The very nature of the charge involves either that he is of skill generally and did not exercise it, or that he represented himself to have skill which he did not in fact possess; the inquiry is not what he was able to do, but what he actually did. There is a difference where the quality of the act is in dispute. Is the specific thing charged malpractice or not? Then evidence of skill is admissible. If the thing done is admittedly malpractice, then whether the practitioner has the skill which, by hypothesis, he did not use is irrelevant. *Prima facie* to sew up a sponge or an instrument in a patient after an operation is negligence. Very great care and method is to be observed in accounting for all appliances used, and this in proportion to the easiness with which they may escape observation; but even here the fact that some needle or portion of an instrument has been left in a wound is not conclusive, but the conclusion from the fact must be determined by a jury on a view of the whole circumstances."

I think it will appear later that on this authority the evidence was admissible, since the Supreme Court was obliged to consider the quality of some of Mr. Nevill's acts and the validity of some of his decisions; but in any event it was admissible on the first issue, as showing that it was improbable that Mr. Nevill left a swab in the body. In my view nothing turns on this. No one ever questioned Mr. Nevill's general skill in his profession.

As regards the origin and circumstances of the second operation, I quote again from the judgment of the learned trial judge:

> "Mrs. Cooper was brought into hospital somewhere in the neighbourhood of 2.30 p.m. She was first seen by Dr. Lawes who subsequently acted as anæsthetist at 2.40 p.m. She had apparently been removed to hospital as a result of prompt action by Dr. Gillespie and Dr. Spiers. Her

condition on arrival was described by Dr. Lawes as follows: ‘She was comatose, pulseless, no blood pressure, grey-faced, cold and sweating with sighing respirations and the heart could just be heard with a stethoscope. In short, she was dying.’ Dr. Lawes took a sample of blood from a vein in the neck, which was the only one available to a needle, and this was sent to the laboratory for grouping and cross-matching with blood in the blood bank. He states that while blood was being made available, she was given three pints of saline and artificial plasma under pressure in ten minutes. Altogether six and a half pints of blood were given to her between then and 4 p.m. At 3 p.m. he telephoned Mr. Nevill, who arrived shortly after, and at this time she was, to use Dr. Lawes’s words, ‘just becoming an operable risk’. Mr. Nevill describes her condition at that time as ‘not in any sense of the word a reasonable operative risk’. Nevertheless, it was decided that an immediate operation was essential, as being the only hope of stopping the haemorrhage which was killing her. At first it was doubtful whether it would even be safe to move the patient into the theatre, but ultimately it was decided to do so. It was, however, considered unsafe to move her on to the operating table and the operation had to be conducted upon the patient in her bed. The disadvantages of this are obvious. The two main ones are, of course, that first a bed is considerably wider than the operating table, with the result that the surgeon cannot get as near to a patient as is desirable and secondly that he has to operate throughout in a stooping position, with consequent additional fatigue. In normal operations, what is known as a ‘Mayo’ tray containing instruments, is placed over the patient’s legs on the operating table, but this is impracticable if the patient is in bed. This was the first occasion on which Mr. Nevill had ever operated on a patient in bed.”

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“To come to the operation itself. Mr. Nevill states that he made a mid-line incision. There was no bleeding from the body, which is an unusual circumstance and indicates the gravity of the patient’s condition. He found the abdominal cavity full of blood. He placed his left hand deep into the pelvis and felt that the left cornu of the uterus had burst. He seized this, which was the bleeding point, between his finger and thumb and held firm to control any further bleeding. The bleeding was in fact stopped within thirty seconds or so. Blood was then sucked out of the abdominal cavity and placed in specially prepared bottles for the purpose of auto-transfusion. There were four pints removed in this manner. There was still a quantity of blood in the abdomen. This was removed by Mr. Nevill and Dr. Wilson by using mopping packs. Two or three pints were removed in this manner. No clips were attached to these mopping packs. Mr. Nevill is positive that he did not release hold of any mopping pack that he used, because this would not be normal practice. He could not say for certain whether Dr. Wilson did or not, but it would be most unlikely. The sucking and mopping took from five to eight minutes. For the purpose of sewing the ruptured part and in order to keep the field of work clear, Mr. Nevill packed back all the intestines, using two or three packs. These had both tapes and Spencer-Wells forceps. He then sewed up the uterus. The foetus which had caused the trouble was lying free in the pelvic cavity and beside it was the plastic tube which had been used in order to achieve pregnancy. He then checked the pelvic cavity to see that it was free of blood clots, and that there was no other bleeding from the ruptured uterus, which he had stitched. The stage was then reached when he was ready to terminate the operation. Mr. Nevill’s account of his actions at this point is as follows:

> ‘having checked that the pelvic cavity was clear I then removed the packing swabs which I had placed, checking carefully the area involved; removing at the same time considerable quantities of blood which were oozing down from the upper parts of the abdomen. When I was sure that I had done all that I should do in the way of routine checking for packs, I was ready to sew up. While I was checking inside, the theatre staff, under the direction of Sister Banks, was checking up outside, in our routine procedure to ensure against leaving swabs behind. I was assured that the swab count was correct. Sister Banks assured me. You do not sew up until you are informed and until you have completed your own check.’ ”

Later on he says:

> “ ‘My absolute routine is that I personally always remove the packs which I know that I have placed in the abdomen or my assistant has placed. It is my responsibility. I then always check the operation area to make sure that no others or any foreign body could have crept in by mistake.’

Neither Mr. Nevill or Sister Banks could remember in this particular instance, whether she volunteered the information that the count was correct or whether Mr. Neville first asked the question. Both she and Mr. Nevill are positive that the information was given and I have no hesitation in accepting that. In cross-examination Mr. Nevill said that he knew where he had put the two or three packs. They were in an obvious position and he would not have needed any guidance to them. He went on to say:

> ‘In this case I did carry out my routine check. We did the best we could.’

He then explained his routine check in rather more detail.

> ‘I remove the swabs that I know I have placed in position. I look to see, within reasonable limitations, that there are no other swabs visible. I feel with my hand into all reasonable places where a swab might hide itself and when I am absolutely certain that there are no foreign bodies inside the abdomen, I question sister about her swab count, unless it may be that she has already told me her swabs are correct, in which case the question would be superfluous.’

Mr. Nevill also said:

> ‘I never do rely completely on the theatre sister’s count. I rely on my own count in addition.’

He emphasised that he carried out this routine in the present case and that this was not a case which made the routine check impossible.

> “The operation was completely successful, in that it achieved its object which was the saving of Mrs. Cooper’s life. The operation was described by Mr. Barber as ‘extremely difficult and hazardous’, and there is no doubt that it was a brilliant piece of surgery. Mr. Nevill himself described it as an ‘incredibly difficult and delicate operation’, and he said that he had never been faced with conditions such as those in his whole career. Mr. Braimbridge said that he had only known one other case of an operation of this kind being performed on a patient in the condition of Mrs. Cooper. Mr. Nevill readily agreed that the credit was not his alone, but was to be shared by all who had dealt with Mrs. Cooper, both before and after her admission to hospital on the day in question.”

To complete the picture, I think two more passages from Mr. Nevill’s evidence should be quoted.

> "I could not give an assessment about each individual pack which I used for mopping. It would have been far too dangerous to check on that point. All packs at the European Hospital have tapes–we don't have to consider that point. It was inserted to get the blood out of the cavity as quickly as possible. I don't think there was anything to prevent me seeing a pack used for mopping if it had remained there. There was still blood seeping about. I used my hand to go into corners. I could not see within reason. We were moving very swiftly all the time because our patient had been critically ill to start with and all operative manipulations, however gentle, cause an increase in surgical shock, and we knew that the slightest increase in this shock would kill our patient."
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> "The state of the patient before I start to sew up is something which concerns me. Whether Mrs. Cooper was better at the start of the sewing up would be something that concerned me at the time. My note reads 'patient much better at this time'. No mention of 'coming round'. I specifically remember carrying out the steps that I have detailed in this particular operation. You have an incision of about five inches in the lower part of the abdomen. We had packed away the intestines as described upwards. I checked the pelvic cavity very carefully. There one is coming out of the abdomen and checking up as it were 'behind you'. The pelvis is clear. You then remove the restraining packs and as you do that you observe that there is nothing behind in the same area and as you do it the intestines tend to fall downwards. We had by this time removed all the packs that we were aware of but there was a certain amount of blood coming down from the corners and very gently one collects that blood under vision. When we thought all was safe I felt around in that same area, i.e. the area immediately adjacent to the wound in which I had been working and slightly out into either flank. The 'feeling around' would not take more than thirty seconds. 'We' means 'I'."

Against that background, I would set the words of Scott, L.J., in *Mahon v. Osborne* (2), [1939] 1 All E.R. 535 at p. 548, in describing "the well-established legal measure of a professional man's duty". He said,

> "If he professes an art, he must be reasonably skilled in it. There is no doubt that the defendant surgeon was that. He must also be careful, but the standard of care which the law requires is not insurance against accidental slips. It is such a degree of care as a normally skilful member of the profession may reasonably be expected to exercise in the actual circumstances of the case in question. It is not every slip or mistake which imports negligence, and, in applying the duty of care to the case of a surgeon, it is peculiarly necessary to have regard to the different kinds of circumstances that may present themselves for urgent attention. I will mention a few, applicable to a major abdominal operation, (i) the multiform difficulties presented by the particular circumstances of the operation, (ii) the condition of the patient, and the whole set of problems arising out of the risks to which he is being exposed, (iii) the difficulty of the surgeon's choice between risks, (iv) the paramount need of his discretion being unfettered, if he thinks it right, to take one risk to avoid a greater, (v) at the penultimate stage (swab removal), he may, particularly where the patient has been taking the anaesthetic badly, and is suffering from shock, be so anxious on surgical grounds to bring the operation to an end as rapidly as possible that, in the exercise of his discretion, perhaps unconsciously exercised, as soon as he has completed the removal of all swabs of which he is at that moment aware, he asks the sister for the count, and forthwith starts to close the wound."

The facts in *Mahon v. Osborne* (2) were in many ways similar to the facts in this case, and much of the expert evidence was on similar lines. I have paid due heed to the warnings given by Scott and MacKinnon, L.JJ., against treating decisions on fact as if they laid down rules of law; but the evidence in this case makes it clear that each of the five special circumstances to which Scott, L.J. (in *James v. Dunlop* (3) (1931), British Medical Journal, April 25), who first remarked that it is the duty of the surgeon to put in swabs, and it is his duty to take them out. This was repeated in *Mahon v. Osborne* (2) by Mackinnon, L.J., at p. 556, and by Goddard, L.J., as he then was, at p. 559, but it must be remembered in what sense the words were used. Mackinnon, L.J., amplifies the matter by pointing out (p. 554) that in *James v. Dunlop* (3) the plaintiff had led expert evidence that the surgeon's search for swabs had been inadequate in the circumstances, and that the dictum of Scrutton, L.J., laid down no rule of law, but referred only to the facts of the case before him. Mackinnon, L.J., further held that it was a misdirection to treat the dictum as a rule of law in the absence of such expert evidence. Having described the evidence, the difficulties encountered, and the precautions taken, he said, at p. 557,

> ". . . it might well be thought that there was no evidence upon which a reasonable jury could find that the defendant had been negligent."

But that was subject to the further question whether there should have been, and had not been, a search by touch, on which he considered there had been evidence to go to a jury. Goddard, L.J., in his minority judgment said (p. 561),

> "There can be no possible question but that neither swabs nor instruments are ordinarily left in the patient's body, and no one would venture to say it is proper, though in particular circumstances it may be excusable, so to leave them. If, therefore, a swab is left in the patient's body, it seems to me clear that the surgeon is called upon for an explanation. That is, he is called upon to show, not necessarily why he missed it, but that he exercised due care to prevent its being left there."

Both these approaches seem to me entirely consonant, as regards the law, with that of Scott, L.J. Any difficulty or disagreement appears to have arisen only from different views of the facts. I treat the passage cited from Goddard, L.J., as representing the law applicable to this case, and I emphasise the point that it is not always necessary to show why or how the swab was missed. As regards the need for such search as in the circumstances proper, I think it is unnecessary to consider whether common sense has brought into being a new rule of law, or whether, if expert evidence were absent, the court would be entitled to form its own view. Here the attention of the parties was fully applied to the question, the experts gave detailed evidence on it, and I think it will appear that, as regards the first appellant, the really essential question is simply this. On the evidence and in the circumstances was the search for packs made by the first appellant a proper search or not? Obviously Mr. Nevill cannot show satisfactorily how or why the pack was inserted and not removed. If he had any direct knowledge on the point it would have been removed. The question here is whether it was excusable both to be ignorant of its presence and to fail to find and remove it.

I think a good deal may turn in this case on the question whether the pack was a restraining pack or a mopping pack. The learned trial judge dealt with the matter as follows:

> "There is no direct evidence as to whether the pack in question, which was found in the body, was one of the two or three 'restraining' packs,

> or whether it was one of those used for mopping. The total number of packs used in the whole operation was stated to be in the region of twenty. This is a large number, but was necessitated by the very great amount of blood which had to be removed from the abdominal cavity. To my mind the probabilities are that it was one of the restraining packs, because it is not the normal, and in fact would be improper procedure, for a surgeon to release hold of a mopping pack. Mr. Nevill is confident that he did no such thing. In the mopping he was assisted by Dr. Wilson, and although he kept a close observation on Dr. Wilson, left a mopping pack in the body. If he did so, that would undoubtedly be negligence and it is conceded that Mr. Nevill is responsible for negligence, if there was any, on the part of Dr. Wilson. If it was a restraining pack, it must follow that the forceps somehow or other became detached without anybody noticing it."

Speculation is often unprofitable, but I think it is useful in this case to consider some of the ways, whether more or less improbable, in which the mistake may have arisen. There are in this case two matters to be explained, each unusual and exceptional in itself, the surgeon's failure to find the pack, and the nursing sister's wrong count. The odds against each of these occurrences at any operation are long, and the odds against both occurring at the same operation through unrelated causes must be mathematically so great that one is tempted to seek an explanation on the basis of a single cause producing both results. If such an explanation can be found, the hypothesis would appear to be inherently more probable than any based on unrelated causes. The learned judge's view of the probabilities seems to me on this basis to be open to criticism. Only two or three restraining packs were used, that is, the small number normal in any ordinary abdominal case, and they were used with forceps attached. It must be assumed, on the learned judge's hypothesis, (*a*) that a forceps fell off unnoticed, (*b*) that Mr. Nevill miscounted the two or three restraining packs, which it was second nature to him to memorize, which he said were all in clear view and (*c*) that the miscount by the sister was due to some other unrelated cause. On the other hand about twenty mopping packs were used, some of them perhaps more than once, in an abdomen full of blood. No Spencer-Wells clips were used on the mopping packs, and this was proved to be good surgical practice, although some surgeons use them for some operations. The surgeon did not keep a mental count of the mopping packs, and it was proved that it was not his duty to do so. The mopping was done at the highest possible speed, for it was essential to clear the operational area and sew up the ruptured uterus as soon as possible. The learned judge states that it would have been improper procedure for Mr. Nevill or Dr. Wilson to release his hold on a mopping pack. Mr. Ormerod's and Mr. Braimbridge's evidence shows that this may not have been a rule of universal application; but that may for the moment be disregarded. The learned judge concludes that, if a mopping pack was left in the body, Mr. Nevill, either personally or vicariously through Dr. Wilson, must have been negligent by releasing his hold on it. I think this was an incorrect assumption on which the whole case against the first appellant may turn, but before explaining my reasons for this I find it necessary to diverge to another subject.

The system in force at the European Hospital for checking and counting packs was described by the learned judge in these terms:

> "The packs are made in the work-room at the hospital and tapes sewn on there. Soiled packs are washed in the hospital premises. After washing, boiling and drying, they are put into a special drawer to await the sister, or whoever is going to check them into the store cupboard. This is done by one of the theatre staff. Before being put into the cupboard, packs are

tested to make sure that they each have a tape and that this is securely sewn on. The packs are then rolled into bundles of three and placed in a storage cupboard. At a later stage they are taken out of the cupboard and put into drums for the purpose of sterilisation. At this stage they are again checked to make sure that there is a tape on each of them and that they are in bundles of three. Before an operation the sister who is laying out the trolley takes what is known as a laparotomy bundle out of the drum with forceps and lays it on a trolley. The bundle consists of four dressing towels for towelling up the patient and a large abdominal sheet which goes on after the towels, two bundles each of twelve gauze swabs, one roll of three packs and one roll of wool for dressing. The sister who is taking the case, first of all breaks one bundle of twelve swabs and checks to see if the number is correct, separating each one. She places six on the top of the trolley. If it is anticipated that packs are going to be used, the bundle of three is taken from the bottom of the trolley (the trolley consists of two shelves) and placed on the top. The pack is then unrolled and the packs are checked one by one. If it is known at this stage that more than one bundle of packs is likely to be used, extra bundles are taken out of another drum, labelled ‘abdominal packs’. When the trolley is being laid, they would be put at the side of the laparotomy bundle, but when the sister who is taking the case is scrubbed up she puts the extra packs on the bottom of the trolley and only leaves on the top those actually in use. If the three packs in use are exhausted, another bundle is taken from the bottom of the trolley and checked in the same way. At no stage in the operation is more than one bundle of three packs on the top of the trolley. If a pack is going to be used for ‘restraining purposes’, the Spencer-Wells clip may be attached, either by the surgeon or the theatre sister in charge. When the surgeon has finished using a ‘restraining pack’ he hands it back to the sister who takes off the forceps and either puts the pack into the bowl of hot saline solution which is by her or discards it. If she discards it, she puts it into what is known as a ‘run-around bowl’ on the floor. When the surgeon has finished with a mopping pack, he may discard it by putting it into another ‘run-around bowl’ by his feet. The sister may then either put it into the saline bowl, or discard it. When packs are discarded they are picked up by the ‘dirty nurse’ with forceps as they are discarded and placed on a mackintosh sheet on the floor, where the sister in charge can keep an eye on them. The packs are invariably laid out in threes, side by side. When there are three packs on the sheet, the ‘dirty nurse’ reports ‘I have three packs sister’ and the sister looks over and checks. When the packs have been checked, the ‘dirty nurse’ puts them together in threes on the mackintosh. If more than three are used the ‘dirty nurse’ counts them in threes, leaving the three in the bundle. The second bundle goes at the side of the first and so on. At the end of the operation the sister in charge looks over to the mackintosh and asks the ‘dirty nurse’ how many swabs she has. On receiving the number, the sister checks herself and checks with the clean swabs on her trolley, to make sure that the total amounts to twelve. Similarly in the case of the packs, the ‘dirty nurse’ tells her how many completed bundles of three she has and gives the number of any odd ones over. This is then checked by the sister with those on the trolley. Prior to sewing up the wound, the surgeon either asks the sister in charge whether the swabs, including of course, the packs, are correct, or it may be that the sister herself volunteers the information. He does not sew up until he has received an assurance that the count is correct. None of the experienced surgeons who gave evidence in this case had any fault to find with this system and I see no reason to dissent from this view. It is not in fact the case for the plaintiffs that the system was an improper one. All

> such systems, however, are in the last resort dependent on the human element and as such liable to human fallibility."

I respectfully agree, and in this case the count of packs was wrong. No small gauze swabs were used, and nothing turns on them. In considering how the count came to be wrong, a number of points must be borne in mind, (i) the packs and swabs removed and those still held unused at the end of the operation were counted twice–an exceptional precaution–and were twice found to agree with the sister's count of packs and swabs made available for the operation; (ii) the second count was made at leisure after the patient had been removed from the theatre, and after a warning by Sister Banks to the "dirty nurse" to be careful; (iii) only a single count was made by Sister Banks of the "incoming" packs; (iv) that count was in part made in the pressure of the operation in progress; (v) it was made piecemeal, since not enough packs were on the trolley at the beginning of the operation and more bundles were brought in and counted from time to time; (On these points see the evidence of Sister Banks) (vi) these packs were made of turkish towelling, were used and laundered repeatedly, and presumably would grow thin with long use. From this I think it may be said that it is more likely that the incoming count was wrong than the outgoing, and that the only probable source of error disclosed on the evidence is that one of the bundles contained not three, but four, packs. The nursing staff witnesses were cross-examined as to this possibility. They were only able to say that they had not known such a thing to happen, but if it did it would be a very serious matter. It would, of course, reflect on those who prepared the packs and put them in the sterilising drum, as well as on the theatre sister, if she failed to discover the mistake. It appears to me that two old and thin packs, with the tape of one between them, might easily feel and look like one fairly new and thick one, and might be miscounted in haste. This possibility was considered in *Mahon v. Osborne* (2) (pp. 547, 556 and 565), but there were there special reasons, not applicable to this case, for rejecting it, in particular the way the pack was folded when found. I think the learned judges may have been impressed, as I am, by the point of a single possible cause leading to both errors. If the sister counting in the packs could be misled into thinking two packs were one, it seems not improbable that she might hand those two together to the surgeon (or his assistant) and that he might be similarly misled. If the surgeon had removed the two packs separately there would later have been a surplus pack on counting out, which might have caused much embarrassment to the nursing staff. But that did not occur.

I return to the question whether a mopping pack or a restraining pack was left in the body. The incision was about five inches long. During the initial removal of blood from the abdomen Mr. Nevill's left hand was occupying part of the incision and holding the ruptured portion of the uterus. Pumping out and later mopping had to be done through the remainder. It would seem probable that mopping packs would be pushed in and pulled out again when soaked with blood and would not be in clear view all the time, except, perhaps, as to the part held. If two packs were handed together to Mr. Nevill or Dr. Wilson, and if a corner of one as well as its tape was folded inwards, and if the surgeon's grip was only on the corner of one, it would seem possible that the other might detach itself unseen as it became wet in the body and might never be seen again. The amount of blood in the abdomen was a quite unusual circumstance. If what I have outlined in fact occurred, the lost pack, once out of sight, may have been remote from the immediate area of the operation. The process of packing back the organs to expose the uterus for sewing, the natural movement of the intestines, and the seepage of blood from the upper part of the body, which could not be controlled by tilting because the patient was on a bed, may all have served to render it invisible and beyond

the range of the tactile search which Mr. Nevill made. I appreciate that much of this is speculation; but on the evidence I think it could have occurred and, if the inherent improbability of the coincidence of independent causes is borne in mind, I think it is a more probable, or less improbable, hypothesis than that put forward by the learned judge, or any other I can think of. The learned judge did not consider this possibility at all. If he had, he might not have found, as he did that, if this was a mopping pack, negligence by one of the surgeons was established beyond doubt. I give my own opinion at once that, if the two mistakes arose in the way I have indicated, it is doubtful whether Sister Banks personally was guilty of negligence, and the surgeon who received and lost the pack, whichever of them it was, was definitely not guilty of negligence in losing control of it. I defer consideration of the search.

In dealing with the final stages of the operation the learned judge said,

> "It is, of course, not an uncommon occurrence in abdominal operations that the movement of the intestines is so great that this may cause the pack to be displaced, but Mr. Nevill says that the movement in this case was comparatively slight and was not more than an inch or so. Furthermore, he was particularly insistent that he remembered where he had put the packs and that they were in an obvious position. It is not suggested that the final stages of the operation had to be accelerated in this case because the patient was showing signs of collapse. On the contrary, the evidence indicates that towards the end of the operation, which lasted about half an hour, the condition of the patient had very slightly improved, no doubt owing to the stopping of the bleeding and the transfusion. There was, therefore, no need for special haste at this stage apart from the general overriding necessity for speed in an operation of this kind. It cannot be said either that Mr. Nevill did not have the assistance of an ample staff. It seems to me that all the conditions which might reasonably excuse a surgeon overlooking a pack were excluded by Mr. Nevill in his evidence. Making all allowances for the very great difficulties of this particular operation, and I have endeavoured not to minimise them, I cannot see that there was any causal connection between these difficulties and Mr. Nevill's failure to remove the packs. He said over and over again in his evidence that he carried out his normal routine. In my opinion, the evidence points to the fact that Mr. Nevill did not make such a search as was reasonable and necessary in the circumstances, and that he failed to carry out his routine practice in this case with his usual care. He had only two or three packs to remember, they had not moved appreciably free from the position in which they were originally placed, and they were after all, not inconspicuous objects. It seems to me that Mr. Nevill is in fact convicted of negligence out of his own mouth."

With respect, I think this passage indicates a misunderstanding of the true effect of the evidence. The first two sentences refer, of course, to the circumstances relative to the restraining packs, and in that sense are correct. As to the need for speed in terminating the operation, I think the learned judge has failed to appreciate several material points. He speaks of the "general overriding necessity for speed in an operation of this kind", but suggests that the patient was so far recovered that a search for packs could have been made at some length and more or less at leisure. The evidence is entirely to the contrary. The plaintiffs' expert, Mr. Barber, said,

> "I keep the mental count in my mind and I expect to find the same number when I remove them at the end of the operation. I think if one knows in a big operation that one has used a number of packs I do subconsciously feel round the area in which I have been working but I can't say that this is a conscious search. I do this because I might be afraid

> I might leave one behind. This feeling takes a second or two. I do not make a general search of the whole abdomen for packs. It might take half a minute to do that. Packs always move in the course of an operation further from the original manipulations and partly as the result of movements of the intestine brought about by the patient's breathing. This happens in every case. The count carried out by the sister is fallible. This is well known to surgeons. A Spencer-Wells has disappeared inside the abdominal cavity too. I think that every surgeon knows that there have been cases on record of an instrument being left in the abdominal cavity. I can't recall a clip being detached from the tape."
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> "I don't think that if the surgeon and staff followed the system I have described they could do any more."

But the most important evidence was, I think, that of Mr. Ormerod, whose status as an independent expert is beyond argument. I must quote him at some length. He said,

> "I have had a description of the operation by Mr. Nevill given to me. I am familiar with Mrs. Cooper's condition at the time. I don't think it exists except as an emergency operation. As a surgeon I would describe it as an operation of extreme difficulty. I would say it is one of the most difficult emergencies of surgery. The patient is quite often in a moribund condition and literally loses a very high fraction of her total blood volume."
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> "The nursing staff if they carried out their part of the routine check of the swabs and reported to the surgeon that the check was correct and the surgeon had made a rapid examination of the site in which he had been working and in which he knew he had deliberately placed a swab, I would say that under those conditions the surgeon could not be held responsible for any degree of carelessness."

I note the word "rapid". Again,

> "This operation is one which requires a high degree of combination of dexterity and speed. With a moribund patient the life of the patient depends on those qualities in the surgeon. If the patient was 'much better' before the abdomen was closed, I would say that that indicated that the surgeon had in fact achieved the object he set out to achieve. He had succeeded in stopping the source of bleeding but that would not give the surgeon any right to take any liberties which might extend the time of the operation because such appearances of improvement are often only temporary appearances, i.e. having known the condition of the patient a few minutes before the improvement, no surgeon of experience would trade on that improvement. Definitely he would not be justified in slowing the operation up. Speed is of paramount importance. I think in the hands of an inexperienced and slow surgeon such a patient might die on the table."
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> "He would make an inspection by eye and he would feel with one hand the area in which he had been working. Under ordinary cold conditions it would be possible to make a search which would be thorough. I would say that it would take the best part of a minute if the area of operation is easily visible. In emergency conditions there would be a very considerable difference. I would expect an ordinary careful surgeon in those particular conditions and under the conditions of this operation where the abdomen has recently been full of blood and doubtless is still obscured by blood

clots which have a habit of reappearing right up to the last minute, I would expect him to feel in the position where he thought or remembered he had put a pack. I would then expect him to turn to the sister in charge and ask her if she was satisfied. I think he would always ask. if she volunteered the information that would render the question unnecessary. I would then expect him to close the abdomen as rapidly as possible. I think Mr. Nevill went as far as he possibly could."

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"I think you have to take into account the whole context. You are working under conditions of stress. You are very much in the position of a captain at sea in a storm. Your routine tends to be a bit displaced. I did not say it would not be negligence on the part of the surgeon if a swab were overlooked in the body of Mrs. Cooper. I said it might not. It is possible that in attempting to get a clear view of the area he would pack a swab down and forget where he put it under those conditions of stress. He might even fail to remember that he had put it there. That would be a packing swab. I think he would only be excused under conditions of extreme stress in failing to remember that he had in fact put it there. I can conceive another set of circumstances. I can imagine that a swab might be placed in a certain position and during the manipulations which are necessary in this particular operation that swab could be displaced and it could become surrounded by coils of the gut. That would be any form of swab or pack. While he is mopping a mop would not and should not leave the surgeon's hand. I can conceive that suddenly he might decide to use it in another form, for packing. In a woman who is so dangerously ill it would be very meddlesome surgery to rummage among those coils because that would be attended by further shock. There is nothing else."

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"You cannot conceive the difficulties in an operation of this kind in which the surgeon has one objective and to insist on the routine 'cold' checks being carried out and to insist that no accident shall take place under those conditions is a tremendous lot to ask. If a pack was left in the circumstances described by Mr. Nevill it was an accident."

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"Having an assistant surgeon might in some respects lower the time factor of such an operation. It might enable the surgeon to proceed more quickly although the responsibility for carrying out all procedures is still the responsibility of the surgeon doing the operation; with the aid of a good assistant he might be able to go a little bit faster. It would never be a question of his going a little bit 'easier'. His responsibility remains the same. When I refer to a swab being 'displaced' it would be I think one placed as a pack. The time of doing a check will depend on the efficient way the swabs have been laid out on the floor. I think the check might be more difficult in an emergency particularly of this nature than in a cold operation. I think there is more chance of accidental error on the part of the theatre sister rather than the surgeon or a combination of both. Under the conditions of this operation the atmosphere for the theatre sister and her difficulties are parallel with the surgeon's difficulties. She is in a harassed position. She is very often harassed by the surgeon himself. There would be a temptation for the surgeon to perform his check more quickly for the sake of the patient in an emergency. Under these circumstances if a surgeon has a mental note of the number and is assured by the theatre sister that the count is correct, I would say he is not required to

> do more than that. His mind would be at rest. I would say in this particular instance it compared very favourably with the ordinary practice of a careful surgeon. If in addition he makes a visual check and does something with his hand he has done all he could do. I do not think a reasonably careful surgeon could have done anything else. In the difficult circumstances he achieved considerable success."

Dr. Braimbridge's and Mr. Nevill's evidence is to the same effect. I think the learned judge has failed entirely to appreciate that the patient was in a condition of collapse, not merely towards the end, but during the whole of the operation. So far from a sudden need arising to get her to bed quickly, she had never been well enough to be moved from her bed. The improvement in her condition was simply this, that she was no longer actually dying, but might possibly survive. The need for "special haste" was present throughout and never diminished.

As regards the extent of Mr. Nevill's search for packs, his own evidence has already been quoted, and was accepted as true. The essential points, as I see them are four. First, he made both a visual and a tactile search. Secondly, it would have been bad surgical practice, and probably fatal to the patient, to carry out a general search of the abdominal cavity. Thirdly, he made and relied on his own mental count of restraining packs, and he was under no duty to memorise the mopping packs. Fourthly, he relied on the sister's count, and the sister in question was one of whose efficiency he had good reason to be confident. See *Mahon v. Osborne* (2) at p. 553. The learned judge's references to "normal routine" ignore that normal routine is something which must depend on the circumstances of the individual operation. What might be normal in one case might be dangerous and wrong in another. I think also that the learned judge has assumed wrongly that a "normal routine search" must in this case inevitably have resulted in the discovery of all restraining packs at least. I am not satisfied on the expert evidence that that is correct. In any event, it overlooks the point that a mopping pack might have been lost without negligence, and might not have been recovered by the most extensive search which could properly be made.

I think the last sentence of the passage quoted shows that the learned judge, though he set out correctly the law applicable to the case, did not in the event apply that law to the evidence. The "conditions which might reasonably excuse a surgeon overlooking a pack" were not excluded, but were shown by the expert evidence to be present and numerous. To say that there was "no causal connection" between the difficulties of the operation and the failure to remove the pack is, I think, to disregard the essential point that it is not always, if ever, necessary for the surgeon to show how he came to overlook the pack: it is enough if he shows that he took all proper precautions, and used due care and attention to prevent a pack being overlooked. In that sense, and having regard to the expert and factual evidence, I am clearly of opinion that, so far from being convicted out of his own mouth, Mr. Nevill gave a proper account of the circumstances and conduct of the operation, which was accepted as true, and which showed that the mishap was not due to negligence on his part.

The learned judge cites a passage from the judgment of Scrutton, L.J., in *James v. Dunlop* (3) and says that the observations there made "are all particularly relevant to the present case". This may be partly true, but it ignores the special circumstances which arose in the present case and did not arise in that one. The Court of Appeal in *James v. Dunlop* (3) was concerned only with the question whether a jury's verdict was supportable. Even so, the almost contemptuous dismissal of the theory of a "perambulating swab" seems strange in view of the expert evidence in every swab case which I have read.

The learned judge summarises his findings on the issue of negligence in the surgeons in these words,

> "To sum up, if the pack was a mopping pack it was negligence on the part of the person who used it, whether it was Mr. Nevill or Dr. Wilson, to lose control of it and leave it in the body. If it was a restraining pack, having regard to the small number used and their obvious position, the absence of movement and the lack of any particular need for haste at the conclusion of the operation immediately prior to sewing up, it was negligence on the part of Mr. Nevill, not to remove it, the responsibility being, as he admits, upon him to do so, and there being no justification for departure from the normal routine. In my view the whole circumstances of this operation are more consistent with negligence on the part of Mr. Nevill than the absence of it."

I would summarise my own views by saying that, if this was a mopping pack, its loss may have occurred without negligence and is not proved to have been due to negligence. If it was a restraining pack, it may still in the special circumstances of this operation have been lost without raising any strong inference of negligence, and the evidence shows that Mr. Nevill used due care and attention to avoid the mistake which occurred, and in particular that his search was as extensive as was proper in the circumstances. It is somewhat ironic to consider that Mrs. Cooper was not a patient of Mr. Nevill before the emergency arose, that if he had declined to operate, or delayed doing so in the hope that conditions might become easier, she would probably have died, and that if she had died before, during or shortly after the operation no word of criticism of his conduct would ever have been uttered. I would allow the appeal by the first appellant, set aside the judgment and decree as against him, and order that the respondents do pay his costs in both courts. I would certify for costs of two counsel, one of them being Queen's Counsel, in the Supreme Court, and for costs of two counsel in this court. Any costs paid by him under the decree set aside should be refunded.

I turn now to the case of the second appellants. For the reasons given, I respectfully agree with the learned judge's finding that the count of the sister in charge, or of the "dirty nurse", or of both, was wrong, and that this is a circumstance which calls for explanation on the part of the second appellants. It is, I think, possible that Sister Banks was not personally negligent, if an extra pack was included in one bundle and not observed. The "dirty nurse" was certainly not negligent, if that occurred. But if it did, the second appellants are in no better position, for both the person who made up the bundle and the person who checked it into the sterilising drum were under a duty to see that an extra pack was not so included in a bundle, and there were no circumstances of stress affecting them which might have excused error. For the negligence of both those persons the second appellants would be liable.

If, however, the theatre sister or the "dirty nurse" was alone responsible for the error, it is necessary to consider whether the error could in the circumstances be excused. This was, of course, an emergency operation in the technical sense, but such operations are of daily occurrence in a hospital, and theatre routine is designed to deal with them as calmly and as efficiently as with a "cold" operation. There was an ample and fully-trained staff. The particular problems which face a surgeon in an exceptionally difficult and critical operation like this do not necessarily in any way disturb the ordinary routine of the theatre staff. It is true that Mr. Ormerod says that in an operation such as this the sister may be "harassed", the count is more difficult, and error may be excused. But Sister Banks did not suggest that she was in any way unable to carry out her usual routine, except as regards the inconvenience of not having the Mayo tray over the bed and differences in wrapping up the patient. She had to work fast, but there is nothing unusual in this. All the

evidence is that during the operation she was working calmly and apparently efficiently. The count is a purely mechanical matter. It calls for no special skill or judgment, and where a large number of packs is used it must always be done with exceptional care to ensure accuracy. I am far from saying that a miscount could never occur without negligence. It might be explainable in all sorts of special ways. But no such explanation at all is put forward here or, so far as I can see, can be suggested on the evidence. I respectfully agree with the conclusion of the learned trial judge that the miscount can only be attributed to negligence on the part of one or more of the staff for whose acts and omissions the second appellants are responsible in law. They have not, in my opinion, satisfied the test applied by Singleton, L.J., in *Southport Corporation v. Esso Petroleum Co., Ltd*. (4), [1954] 2 All E.R. 561, at p. 569, where he said,

> "If the defendants have produced a reasonable explanation, equally consistent with negligence or no negligence, the burden of proving that the defendants were negligent and that their negligence caused the damage rests upon the plaintiff."

On the further point whether the negligence caused the damage in this case, there was evidence that, if the sister's count had been right and she had said that one pack was missing, a further search would have been made by Mr. Nevill and continued until the missing pack was found. It is true that in that case the patient might have died, but in spite of this I think the miscount was in law a cause of the damage.

The next question is that of the general damages awarded to Mrs. Cooper. The amount, as I have stated, was Shs. 50,000/-. The learned trial judge dealt with the matter thus:

> "So far as the second plaintiff is concerned, as a result of the leaving in of this pack she has undoubtedly gone through considerable pain and suffering. I have already mentioned the abdominal pains and vomiting which led up to her admission to the Maia Carberry Nursing Home. After her discharge the pains and vomiting became recurrent and the period up to her admission to hospital in October, 1956, was described by her as 'a nightmare'. She mentions one occasion after her admission to hospital and before the operation, when the pain became so intense that she got out of bed, put on her coat and shoes and decided to run out and throw herself under a car. She was, in fact, stopped by a nurse in time. Apart from the physical suffering, there is always in the case of abdominal pains, a considerable psychological effect, particularly when the cause of the pain has not been diagnosed. Mrs. Cooper says that after a time she came to suspect that she had a cancer. After the operation, when in hospital, she underwent a good deal of physical discomfort from a machine which was used for the purpose of draining the wound. She also suffered from a fistula. This closed itself before she left hospital but she had a discharging sinus from where the drainage tube had been left in. This eventually cleared up.
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> "The effects of the removal of seven feet of intestine, approximately one-third of the whole, are not easy to assess. Mr. Barber expressed the view that she has probably still got sufficient for normal digestive purposes, but that the amount lost is about the borderline and that the loss of any further portion might have some effect on her digestive ability. He said that a patient might manage with half the normal length of small intestine, with little or no digestive disturbance, but that there would be the probability of more frequent bowel action than normally. Mrs. Cooper said that she still experienced periodical abdominal pains and this has

> been confirmed by Dr. Thompson. He says that an X-ray of the stomach and intestines after the operation was satisfactory and that these pains are probably due to adhesions and that they might continue for the rest of her life.
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> "There was some discussion during the course of the case as to whether Mrs. Cooper's child-bearing capacity had been affected as the result of the leaving in of this pack. Dr. Thompson said that it would be impossible to determine whether Mrs. Cooper could now have a child without an examination under anaesthetic and he is of the opinion, having regard to all the operations which she had undergone, that this would be inadvisable. He added, however, that he would have advised her not to attempt to have a child, even before this last operation. I think, therefore, that any question of Mrs. Cooper's prospects as a mother must be left out of account in assessing the damages."

It may thus be said that the only proved permanent injury which can be said to have resulted from the second or third operation, or from both of them, is occasional pains caused by adhesions, and there is no reason to think that these are severe. It was not suggested before us that Mrs. Cooper's inability safely to bear a child was in any way attributable to the matters in issue in this suit. As regards the removal of seven feet of the smaller intestine, there was some slight difference of expert opinion. Mr. Barber thought she could compensate satisfactorily with the remaining two-thirds, but that if she had to have any more removed she might have digestive trouble. Dr. Thompson said she had recovered from the third operation, but had some residual symptoms of occasional loose stools and abdominal pains. The latter probably result from adhesions and the former do not appear to be of any gravity. Mr. Braimbridge was clearly of opinion that the loss of seven feet of intestine was quite immaterial to health. Mrs. Kean argued that Mrs. Cooper had been obliged to alter her diet and her way of life. The learned judge does not appear to have been impressed by this, since he does not mention it. I am not impressed either. I think that any potential consequences of the possible removal of more of the intestine are an altogether too remote head of damage, and I regard the actual consequences to future health of the removal of seven feet as comparatively trivial. The damages fell to be assessed, as I see the matter, on the basis of past pain and suffering, with some allowance for future pain from adhesions and for inconvenience from loose stools.

On this basis, I find myself obliged to regard the assessment of the learned trial judge as a "wholly erroneous estimate", and one so disproportionate to the general level of damages awarded in such cases that it ought to be reduced. See *Rushton v. National Coal Board* (5), [1952] 1 Q.B. 495. While admittedly no arithmetical calculation is possible, I think that for the pain and suffering and the minor permanent consequences involved a sum of Shs. 15,000/- would be sufficient compensation. I would only add that the case of *Urry v. Bierer* (6) (1955), The Times, March 16, where £3,000 general damages were given, stands on a wholly different footing from this. In that case a third operation had yet to be undergone, and the inability to have a child, though psychological in origin, was a direct result of the operation in question.

I would allow the appeal of the second appellants so far only as it relates to the general damages awarded to Mrs. Cooper. I would vary the judgment and decree of the Supreme Court by reducing those damages from Shs. 50,000/- to Shs. 15,000/-.

The question of cost is somewhat complicated owing to the different positions of the two plaintiff/respondents and the two defendants/appellants. In the Supreme Court the plaintiffs must be deemed, in the absence of any agreement made prior to the commencement of the action, to be liable each for one-half

of the amount of their own advocate's costs. Their party and party costs have apparently been taxed at Shs. 10,817/- as against both the defendants, who were separately represented. Those costs must be retaxed, first, in order to excise any amounts separately charged in respect of matters relating only to the first defendant, e.g. letters to and attendances on his advocates, and secondly, in order to allow the taxing-officer to review the exercise of his discretion as to any discretionary or variable items, e.g. the instructions fee, having regard to the much reduced sum recovered. Those costs will be paid by the second appellants. For purposes of set-off they will be payable as to one-half to each of the plaintiffs. In this court the first respondent has been successful as against the second appellants. Accordingly the respondents' costs must be taxed, as if they had both succeeded, and the second appellants must pay to the first respondent one-half of the amount so taxed. On the other hand the second appellants have succeeded as against the second respondent and she must pay their costs of the appeal. In their case I would not certify for costs of two counsel. If costs of leading counsel in this court were shared between the appellants they must be apportioned. As regards the second respondent the amounts due for costs in the two courts may be set off against one another and against the damages payable to the second respondent, i.e. the sum of Shs. 15,000/- plus half the amount of the special damages. I would order accordingly.

Gould JA: I am in full agreement with the reasoning and conclusions expressed in the judgment of the learned Vice-President and consider that there is nothing I can usefully add.

Sir Owen Corrie Ag JA: I also agree.

Appeal of the first appellant allowed. Appeal of the second appellant as to general damages allowed. Judgment and decree of the Supreme Court varied, reducing the general damages from Shs. 50,000/- *to Shs.* 15,000/-.

For the first appellant:
CW Salter QC and *AE Hunter*
Daly & Figgis, Nairobi

For the second appellant:
CW Salter QC and *RDC Wilcock*
Archer & Wilcock, Nairobi

For the respondents:
Mrs L Kean
Sirley & Kean, Nairobi

The Collector v Abdulla Pirmohamed and others
[1958] 1 EA 616 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	1 November 1958
Case Number:	48/1958

Before:	Briggs V-P, Gould JA and Pelly Murphy J
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Appeal from:	H.M. Supreme Court of Kenya–Mayers, J

[1] Compulsory purchase – Compensation – Assessment – Small plots of land some distance from made-up road – Whether distance and size of plots are material factors in assessing value of land – Indian Land Acquisition Act, 1894, *s.* 18.

Editor's Summary

The respondents, who were the owners of three plots at Mombasa compulsorily acquired by the East African Railway and Harbours Administration as part of a scheme for an industrial area, appealed to the Supreme Court against an award of compensation made to them by the collector, acting under the Indian Land Acquisition Act, 1894. The three plots were contiguous, long and narrow, but varied in area from 1.4 acres to .76 of an acre. They were all some distance from any made-up road. At the hearing of the appeal the collector gave evidence that in valuing the plots he had allowed for the prospect of industrial development, but in valuing the whole area involved, he had divided the land into four zones, each of which he assessed at a different value per acre. The evidence of three other witnesses called as experts on land values, was that small plots had always a higher value per acre than large ones. The trial judge accepted this evidence, held that the distance of the plots from a road was a trivial inconvenience, and accordingly increased the collector's award. On appeal by the collector it was contended that the trial judge had erred in finding that the distance of the plots from a main road did not materially affect their value.

Held – the distance of the plots from a main road was a material factor in assessing their value; in accepting the evidence that small plots have a higher value per acre than large ones, the trial judge had acted in accordance with the weight of the evidence, and in that respect there was no reason to interfere with his decision.

Appeal allowed. Assessments of the collector restored, with minor variations.

No cases referred to in judgment

November 1. The following judgments were read by direction of the court:

Judgment

Gould JA: In this appeal the appellant is the collector, an official acting under the provisions of the Land Acquisition Act, 1894, an Indian Act in force in Kenya, the first three respondents are the owners of plots 135 and 136 of section VI of Mombasa Mainland North and the fourth respondent is the owner of a seven-eighths share in plot 133 of the same sub-division. These three plots were compulsorily acquired by the East African Railways and Harbours Administration for the purpose of an industrial area. The respondents objected to the amount of compensation awarded to them by the collector and their objections were referred to the Supreme Court of Kenya under s. 18 of the Land Acquisition Act, 1894; an order for the consolidation of the objections in respect of the three plots was made and they were

heard together. The learned judge in the court below after hearing a great deal of evidence, set aside the awards of the collector and substituted awards materially increased in amount, from which substituted awards the collector now appeals.

The grounds of appeal as set out in the memorandum are as follows:

"1. The learned trial judge erred in each case in increasing the collector's award.

2. The learned trial judge's decision to increase the collector's awards was against the weight of evidence.

3. The learned trial judge erred in holding (in effect) that distance from a main motor road not (sic) materially affect the market value of the plots to be valued.

4. The learned trial judge failed to take into account the fact that the plots to be valued had no proper roads or made-up roads of access to the nearest main motor road, and that the absence of such roads of access in conjunction with distance from the nearest main motor road materially affected the market value of the said plots."

As argument was developed upon these grounds it became apparent that there were two main points of difference between the approach of the collector and that adopted by the learned judge of the court below to the question of valuation. There was no dispute that the three plots were themselves similar in topography, and were similar in nature to all of the relevant surrounding area except for variations in size. Plot 133 is the largest of the three, being 1.4 acres in area, plot 135 is .97 and plot 136.76 of an acre. The three are contiguous and are rather long and narrow in shape, backing at one end on to a disused railway line. They are at some distance from Magongo Road, which is the nearest properly formed road, though there are rough roads or tracks in the area, sufficient for personal access in the present state of the land, but manifestly inadequate for the purpose of industrial development. Possible development of this kind was the basis of the collector's approach to his problem, and it is admittedly a far more favourable approach so far as the owners are concerned than would have been valuation upon the basis of present use, i.e. the growing of a comparatively small number of fruit trees. The collector having regard to the nature of the land and the state of its development adopted a zoning system for the area as a basis of valuation and this provides the first point of difference between his approach and that of the learned judge.

The collector divided the area to the south of the railway into four zones, the first of which immediately fronted Magongo Road and was of a depth therefrom of 100´. This was in his view the most valuable and he assessed it at £900 per acre. Zone 2 comprised the next strip to a depth of 250´ and was valued at £800 per acre; zone 3, the next 500´ in depth, at £725 per acre and zone 4, extending in depth to the railway, and within which the three plots in question are situated, at £650 per acre. North of the railway was a further zone which was valued at a still lower figure.

The collector gave evidence and supported this system upon the main ground that increased distance from the main road involved increasing difficulty of access. He also considered that there was greater advertising value attaching to main road frontage. Of the three witnesses called as experts in valuation of land, Mr. R. A. Hawkins said that in a particular valuation in which he had been concerned in the area he took into consideration frontage on a main road and Mr. Mbarak Warshow agreed that if a plot were on the main road it would be more valuable and that the more difficult it was to get to the main road from the plot, the less its value; Mr. Gulamali Datoo, while opposing the zoning system for a number of reasons which do not appear to me to be particularly convincing, agreed that distance from a main road is an important factor.

The learned judge in the court below said in his judgment–

"No doubt shop premises situate at a distance of two minutes from a

> main road would be vastly less valuable than similar premises having road frontage, but it would seem to me that quite other considerations apply in relation to warehouses and factories and I do not think that the trivial inconvenience and expense entailed by a journey to factory A or warehouse A taking only two minutes longer than a journey to factory B or warehouse B is likely to have any appreciable effect upon the respective values of the plots upon which these factories or warehouses stand. From this it would seem to me that subject to what is said hereafter, the only elements at all likely to enhance the value of these plots over that fetched by plot 128 in 1955, assuming that the latter figure represents the market value of lands in this area at that time are any general increases in values between the time of the transaction in respect of plot 128 and this acquisition, and any enhancement in price consequent upon these plots being smaller than plot 128 in area."

Later he said–

> "That plot" (i.e. No. 128) "is somewhat nearer to the main road than the plots the subject of these proceedings but on inspection of the plan which was tendered in evidence, it appears quite clear that it is not more and is probably substantially less than one-quarter of a mile nearer to that road–a distance which for the reasons already advanced cannot in my view appreciably affect the comparative values of these plots."

With respect to the learned judge, who took great pains in formulating a very detailed judgment, I think that the grounds upon which he arrived at the opinion expressed in the above passage were erroneous. It is true that the inconvenience and expense of having to travel some hundreds of feet further to reach a particular plot is inconsiderable. That, however, is not the point. The collector's main ground in support of his submission, expressed briefly as "increased difficulty of access with increasing distance from the main road", really postulates that development for industrial purposes involves good and permanent roading and the provision of other services such as water, lighting and possibly sewerage and drainage. Roading in particular is notoriously an expensive matter, and obviously the cost, which would fall upon the owner, would be increased proportionately, with increasing distance from the main road. This is in my opinion a very material matter. Even if the argument were advanced that a particular plot owner might await development of other plots in the vicinity in the expectation of his own access becoming less expensive, the uncertainty of such a course and the necessity of waiting while the plot and the money invested in it lay idle and unproductive would be an equally depressing factor upon any valuation. It being conceded that the nature of all the land is generally similar and having regard to the potential use for which the land was valued, I consider that for the reason given above the collector was justified in the system he adopted. His second reason, that concerning more advantageous position for the purpose of advertisement, I regard as being of little materiality, except perhaps as regards zone 1, but the principle that, other things being equal, distance from an existing main road is a substantial factor, appears to be logically sound, and received at least some support from the evidence of the expert witnesses in the passages above mentioned. I consider therefore that so far as this aspect of the matter is concerned the collector's method of approach was justified and his assessments (except to the extent that they may be varied for other reasons) should be restored.

The second matter in which the learned judge differed from the collector was that relating to the comparative areas of the plots. The collector's view was that variation in size of plots of undeveloped land in the area had no bearing on their value per acre in the case of plots of less than five acres. Mr. Hawkins,

Mr. Warshow and Mr. Datoo, however, were all firmly of a contrary opinion. They considered that smaller plots had always a higher value per acre than large ones. Very little emerges from the evidence to show the reasoning behind this factor of valuation, and the learned judge accepted the opinions of the three valuers other than the collector, that even in areas such as the one in question, difference in size was a material factor in determining relative value per acre. In so doing he acted upon the evidence of the majority of the witnesses and I see no reason to interfere with his decision.

There appears to be inconsistency in making allowance for such factors within the general limits of a zoning system dependent upon comparative distance from a main road. In some sub-divisions topography and shape might also have to be considered but the former is inapplicable here and the court has not been asked to consider the latter. It remains, however, to consider the quantum of the allowance to be made.

The collector's assessment appropriate to zone 4 was £650 per acre. The learned judge in the court below increased this figure in the case of plot 133 to £725 per acre and of plots 135 and 136 to £735 per acre. The following passage form his judgment is relevant:

> "Furthermore I incline to the view held by both Mr. Hawkins and Mr. Datoo and Mr. Warshow that even in areas such as this the difference in the size of plots is a material factor in determining their relative values per acre. Plot 128 is considerably bigger than any of the plots with which we are now concerned. On balance therefore I cannot but feel that despite the manifest fairness with which the collector approached this matter, he has somewhat under-estimated the value of these plots, and when due regard is had to all relevant sales, the true market value of these plots at the date of acquisition was substantially the same as that assigned by him as the value of plot 128, that is to say £725 per acre.
>
> "This is, however, subject to the qualification that I think that in relation to plots 135 and 136 the rate per acre should be slightly greater by reason of their being smaller plots. While it is extremely difficult to assess the amount which ought to be added to the basic rate of £725 per acre on this account, as I have little doubt that this factor is less important in a semi-rural area than in an urban area, I assess it as £10 per acre."

As indicated above, it is my opinion that the basic rate fixed by the collector should be restored, but that the learned judge's view that allowance should be made for size should also be maintained. The passage from his judgment above quoted is not entirely clear upon this last-mentioned aspect of the matter. As between plot 133 (1.4 acres) and plots 135 and 136 (.97 and .76 acres respectively) he made a differentiation of £10 per acre. But in relating his basic valuation of £725 per acre to that of plot 128, which is a zone 3 plot of 4.15 acres, he did not specify how much of the increase of £75 per acre he attributed to relative size and how much to other factors.

There is no evidence upon the record which would serve as a guide to the proper measure of an allowance of this nature and the learned judge had recourse to an arbitrary assessment. No doubt had the collector been disposed to make such an allowance he would have based it upon some scale which took into consideration the maximum, minimum and average areas of the plots concerned. There is no guide of this sort before the court and in the circumstances counsel for both parties agreed that, should it decide that such an allowance was proper, the court should similarly be asked to impose an arbitrary assessment rather than send the matter back for further evidence. It is manifest that in doing so the court would not be laying down any guide for future cases in which the matter may be covered by evidence.

Upon this basis I consider that the differentiation adopted by the learned judge as between plots 135 and 136 on the one hand, and plot 133 on the other, that is £10 per acre, should be maintained. As between plot 133 and plot 128, where there is a much greater disparity in area there should be an additional differentiation but one diminished in ratio. I would allow a further £20 per acre. In the result the valuation per acre of plot 133 would be £650+£20=£670, and of plots 135 and 136, £650+£20+£10=£680 in each case. There is of course a statutory addition of 15 per cent.

The only other variation made by the learned judge in the collector's valuation related to the buildings on plot 133, the amount of which was negligible and which we have not been asked to disturb. As applied to the particular plots therefore, the valuations which appear to me to be appropriate are as follows:

(*a*)	In respect of the seven-eights share in plot 133 (1.4 acres at £670)–Land	£820	15	0
	Statutory addition of 15 per cent.	123	2	0
	Buildings	498	0	0
	Statutory addition of 15 per cent.	74	14	0
		£1,516	11	0
(*b*)	In respect of plot 135 (.97 acres at £680)–Land	£659	12	0
	Statutory addition of 15 per cent.	98	19	0
		£758	11	0
(*c*)	In respect of plot 136 (.76 acres at £680)–Land	£516	16	0
	Statutory addition of 15 per cent.	77	10	0
		£594	6	0

I would allow the appeal to the extent indicated above and consider that the appellant should have as against the respondents the costs of the appeal, but that as the respondents have retained portion of the increase awarded in the court below, the order as to the costs in that court made by the learned judge should not be disturbed.

Briggs V-P: I agree with the judgment of the learned justice of appeal. An order will be made in the terms proposed by him.

Pelly Murphy J: I concur.

Appeal allowed. Assessments of the collector restored, with minor variations.

For the appellant:
J Gledhill
Gledhill & Oulton, Nairobi

For the respondents:
IT Inamdar and *ST Inamdar*
Inamdar & Inamdar, Mombasa

Queensland Insurance Co Ltd v Omar Abdulla Baabad

[1958] 1 EA 621 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	31 October 1958
Case Number:	74/1958
Before:	Briggs V-P, Gould JA and Pelly Murphy J
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Mayers, J

[1] Arbitration – Award – Remission – Application to remit award before notice of filing given to parties – Whether application competent – Arbitration Ordinance, s. 9 (2) (*K.*) *– Rules of the Supreme Court* (*Proceedings in Arbitration*), *r.* 7 (*K.*).

Editor's Summary

An award was filed by arbitrators, who failed to give notice thereof to the parties, pursuant to s. 9 (2) of the Arbitration Ordinance. The appellants applied to the Supreme Court for an order that the award be remitted to the arbitrators for reconsideration of certain matters. This application was dismissed, on the ground that under r. 7 of the Rules of the Supreme Court (Proceedings in Arbitration), there was no right to object to an award until notice had been given by the arbitrators to the parties that the award had been filed.

Held – the limitation of time laid down in r. 7 is designed to ensure that the party objecting to an award cannot delay lodgment of his objections indefinitely after the award has been filed, but was not intended to preclude lodgment of objections before time begins to run.

Dictum of Lord Esher, M.R., in *Re North, Ex parte Hasluck*, [1895] 2 Q.B. 264 at p. 269, adopted.

Appeal allowed. Application remitted for hearing by Supreme Court.

Case referred to:

(1) *Re North, Ex parte Hasluck*, [1895] 2 Q.B. 264.

October 31. The following judgment was read by direction of the court:

Judgment

Pelly Murphy J: This was an appeal from an order of the Supreme Court refusing an application by the present appellants that an award made by arbitrators on June 2, 1957, be remitted to them for reconsideration of certain matters. We allowed the appeal and we now give our reasons for doing so.

The award was filed by the arbitrators on August 20, 1957, but they did not give notice to the parties of the filing as is required by s. 9 (2) of the Arbitration Ordinance. Rule 7 of the Rules of Court (Proceedings in Arbitration) is as follows:

> "7. Any party objecting to an award filed under s. 9 (2) of the Ordinance may, within eight weeks after notice of the filing thereof shall have been served upon the party so objecting, apply that the award may be remitted or set aside as the case may be, and lodge his objections thereto, together with necessary copies and fees for serving the same upon the other parties interested.

> "The parties on whom such objections are served may within fourteen days of the date of service thereof lodge cross objections which shall be served on the original objector."

The learned judge being of opinion that, where an act is required to be done within a period which is expressed to be after the happening of a particular event, the period within which the act is required to be done cannot be regarded as commencing until the happening of that event, held that there was no right to object to the award which had been filed until notice had been given by the arbitrators that it had been filed. He accordingly dismissed the application.

The limitation of time laid down in the rule is obviously designed to ensure that a party objecting to an award cannot be allowed to delay the lodgment of his objections indefinitely after the award has been filed and he is notified to that effect. As was said by Lord Esher, M.R., in *Re North, Ex parte Hasluck* (1), [1895] 2 Q.B. 264 at p. 269,

> "The rational method of computation (of time) is to have regard in each case to the purpose for which the computation is made."

Applying this principle we do not think that the limitation of time during which objections may be lodged imposed by r. 7 in any way precludes lodgment of objections before the commencement of the period allowed.

It is, we think, beyond argument that an application to remit an award could not be made until the award had been filed. But to hold that such an application cannot be entertained merely because notice of that filing has not been given is, in our opinion, too narrow a view.

The appeal was therefore allowed with costs and the order of the Supreme Court set aside. The application is remitted for hearing by the Supreme Court, all points remaining open except the question of time now decided on this appeal. Costs in the Supreme Court up to date to be in the discretion of the judge hearing the application.

Appeal allowed. Application remitted for hearing by Supreme Court.

For the appellants:
HV Anderson
Atkinson, Cleasby & Co, Mombasa

For the respondent:
SF Hassan
O'Brien Kelly & Hassan, Mombasa

Sheikha Binti Ali Bin Khamis and another v Halima Binti Said Bin Nasib and others

[1958] 1 EA 623 (CAM)

Division: Court of Appeal at Mombasa

Date of judgment: 22 October 1958

Case Number:	69/1958
Before:	Briggs V-P, Gould JA and Pelly Murphy J
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Mayers, J

[1] Mohamedan law – Wakf – Life interests created by wakf deed offending rule against perpetuities – Whether wakf saved by Wakf Commissioners Ordinance, 1951, *s.* 4 (1) (*a*) (*K.*) *– Indian Wakf Validating Act,* 1913.

Editor's Summary

Two of the respondents in this appeal sued in the Supreme Court for a declaration that certain wakfs of land in Mombasa were void ab initio and made both the appellants and the Wakf Commissioners defendants in the suit, but neither the latter nor a fourth defendant took any part in the proceedings. The trial judge held that the successive life interests created by the wakf deed in favour of various individuals living and unborn offended against the rule of perpetuities, and were not saved by the provisions of s. 4 (1) (*a*) of the Wakf Commissioners Ordinance, 1951, since they were not trusts merely "for the maintenance and support" of those individuals, but were absolute gifts to them of the income of the fund from time to time, and accordingly he gave judgment for the two respondents. On appeal the Wakf Commissioners and the fourth defendant were, with the plaintiffs, made respondents, and at the hearing it was conceded, on behalf of the appellants, that if the trial judge was right in his finding that the wakf deed offended against the rule of perpetuities, his decision, as a whole, must stand. Arguments were accordingly heard on this point only. It was the appellants' contention that whilst a wakf, to come within the provisions of s. 4 (1) (*a*) of the Wakf Commissioners Ordinance, must have as its purpose "to maintain and support" the individual beneficiaries, those words need not be used, and the purpose might appear by implication, and where income is given simpliciter to persons within the scope of s. 4 (1) (*a*), it was, or should be deemed to be given for their maintenance and support, and the trust should, therefore, be valid. This submission was based on the proposition that in Mohamedan law, the maintenance and support of issue and relatives is recognised as a charitable purpose; that the words should be interpreted broadly, that the purpose and effect of the Mussalman Wakf Validating Act, 1913, of India, on which the Wakf Commissioners Ordinance was modelled, were to re-introduce the rules of pure Mohamedan law relating to wakfs, and that in consequence the words "maintenance and support" appearing in the Act and in the Ordinance should be construed as they are understood in Mohamedan law. For the first and second respondents it was contended that the historical basis of the appellants' case was unsound, that the Wakf Commissioners Ordinance should be given its natural meaning and that the view that the Ordinance re-enacted the pure Mohamedan law was wrong.

Held –

(i) it is useless to contend that the Wakf Commissioners Ordinance re-enacted in Kenya the pure Mohamedan law, and equally useless to invoke that law as an aid to construction of the Ordinance (*Amina binti Abdulla v. Sheha binti Salim* (1954), 21 E.A.C.A. 12 followed).

(ii) the life interests given by the wakf deed were not within the permitted purpose of "maintenance and support" of the wakif's family and the wakf was not validated by s. 4 of the Ordinance; the

wakf deed was void as in breach of the rule against perpetuities.

Appeal dismissed.

Case referred to in judgment:

(1) *Faqir Mohamed v. Abda Khatoon* (1952), A.I.R. All. 127.

(2) *Mohamed Sabir Ali v. Takir Ali* (1957), A.I.R. All. 100.

(3) *Abdul Karim Adenwalla v. Rahimabai* (1946), A.I.R. Bom. 342.

(4) *Balla Mal v. Ata Ullah Khan* (1927), 54 I.A. 372.

(5) *Syed Ahmad v. Julaiha Bivi* (1947), A.I.R. Mad. 176.

(6) *Muhammad Hamid v. Mian Mahmud* (1922), 50 I.A. 92.

(7) *Abdul Razak v. Ali Baksh* (1945), 27 Lah. 544.

(8) *Said bin Muhammad v. Wakf Commissioners* (1946), 13 E.A.C.A. 32.

(9) *Suleman bin Ahmad v. Salem* (1910), 1 Z.L.R. 328.

(10) *Tatu bin Said v. Wakf Commissioners* (1929), 4 Z.L.R. 7.

(11) *Hamira Bibi v. Zubaida Bibi* (1916), 43 I.A. 294.

(12) *The Sussex Peerage Case* (1844), 11 Cl. & Fin. 85; 8 E.R. 1034.

(13) *Austin v. Boyce* (1876), 4 Ch. D. 233.

(14) *Talibu bin Mwijaka v. Exors. of Siwa Haji* (1903), 2 E.A.L.R. 33.

(15) *Bikani Mia v. Shuk Lal Polldar* (1893), 20 Cal. 116.

(16) *Abdul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry* (1894), 22 I.A. 76.

(17) *Irfan Ali v. Official Receiver, Agra* (1930), 52 All. 748.

(18) *Ramanandi Kuer v. Kalawati Kuer* (1928), A.I.R. P.C. 2; 55 I.A. 18.

(19) *Amina binti Abdulla v. Sheha binti Salim* (1954), 21 E.A.C.A. 12.

(20) *Re Coleman* (1889), 60 L.T. 127.

(21) *Re Neil* (1890), 62 L.T. 649.

Judgment

October 22. The following judgment was read by direction of the court: This was an appeal from a judgment and decree of the Supreme Court of Kenya declaring certain wakfs of land in Mombasa to have been void ab initio and granting consequential relief. The facts are set out in detail in the judgment appealed from, and it is not necessary to repeat them. Many issues were raised in the suit, but the learned trial judge based his decision on one point only, that the successive life-interests created by the wakf deed in favour of various individuals living and unborn offended against the perpetuities rule, and were not saved by the provisions of s. 4 (1) (*a*) of the Wakf Commissioners Ordinance (No. 30 of 1951), since they were not trusts merely for the “maintenance and support” of those individuals, but were absolute

gifts to them of the income of the fund from time to time. It was conceded by the appellants that, if the learned judge was right on this point, his decision as a whole must stand. Accordingly we heard argument first on this point and, being of opinion that it was rightly decided, found it unnecessary to consider any of the other issues raised on the appeal. There was a cross-appeal, to which reference will be made later.

It was submitted for the appellant that, although a wakf, in order to come within the provisions of s. 4 (1) (*a*), must have as its purpose the "maintenance and support" of individual beneficiaries, those words need not be used, and the purpose might appear by implication. This may be conceded; but in the present case the gifts are in form absolute gifts of income, with no indication in the wording of the deed as to the object of the gifts or as to any restriction on disposal of the income. The appellant's counsel conceded that, if it was apparent from the wording that the money was intended to be applied to

purposes not within the true meaning of "maintenance and support", for example, to gambling, an intended wakf might be bad; but he argued that, where income was given simpliciter to persons within the scope of s. 4 (1) (*a*), it was, or should be deemed to be, given for their "maintenance and support", and the trusts should therefore be valid.

He based himself first on arguments of principle, submitting that in Mohamedan law the maintenance and support of one's issue and relatives is recognised as a charitable purpose, that the words should be interpreted broadly, that the purpose and effect of the Mussalman Wakf Validating Act, 1913, of India, on which the Kenya Ordinance was modelled, were to reintroduce the rules of pure Mohamedan law relating to wakfs, and that in consequence the words "maintenance and support" appearing in the Act and in the Ordinance should be construed in the sense in which they are understood in Mohamedan law, which is that an absolute gift of income is to be treated as a gift for maintenance and support unless a contrary intention is expressed.

Counsel supported his arguments by two judgments of the High Court of *Allahabad*, that of Malik, C.J., in *Faqir Mohamed v. Abda Khatoon* (1) (1952), A.I.R. All. 127, and that of Agarwalla, J., in *Mohamed Sabir Ali v. Takir Ali* (2) (1957), A.I.R. All. 100. Without going into detail, it may be said that these judgments fully support counsel's arguments. On the other hand in each case the decision turned upon another point, so that the judgments on this point, though fully considered, are obiter. And in *Faqir Mohamed's* case (1) the other member of the court, Desai, J., gave judgment on this point in the opposite sense, preferring to follow the decision of Chagla, J., in *Abdul Karim Adenwalla v. Rahimabai* (3) (1946), A.I.R. Bom. 342, to which further reference will be made.

A further argument for the appellant was based on the definitions of "wakf" and "wakf Ahli" in s. 2 of the Ordinance. A "wakf Ahli" is defined as follows:

> " 'Wakf Ahli' means a wakf made for the benefit of an individual or family or for the performance of rites or ceremonies recognised by Muslim law as being for the benefit of the soul of an individual (including the dedicator) or of the soul of the members of a family."

The argument was that the purpose of the Ordinance was to validate such wakfs generally. We thought, however, that the whole tenor of s. 4 was against this view. If the intention had been to validate every wakf Ahli, it would have been easy to say so in so many words.

It was also submitted, on the authority of *Balla Mal v. Ata Ullah Khan* (4) (1927), 54 I.A. 372, that a wakf deed should be liberally construed, but the principle laid down by the Privy Council in that case was only that it should not be construed with undue strictness against individual beneficiaries or the ultimate charitable object.

Counsel for the appellant also referred to the following cases, in addition to others mentioned elsewhere in the judgment:

Syed Ahmad v. Julaiha Bivi (5) (1947), A.I.R. Mad. 176;

Muhammad Hamid v. Mian Mahmud (6) (1922), 50 I.A. 104;

Abdul Razak v. Ali Baksh (7) (1945), 26 Lah. 544;

Said bin Muhammad v. Wakf Commissioners (8) (1946), 13 E.A.C.A. 32;

Suleman bin Ahmad v. Salem (9) (1910), 1 Z.L.R. 328;

Tatu bin Said v. Wakf Commissioners (10) (1929), 4 Z.L.R. 7;

Hamira Bibi v. Zubaida Bibi (11) (1916), 43 I.A. 294;

The Sussex Peerage Case (12) (1844), 11 Cl. & Fin. 85;

Austin v. Boyce (13) (1876), 4 Ch. D. 233;

Talibu binti Mwijika v. Exors. of Siwa Haji (14) (1903), 2 E.A.L.R. 33;

and to numerous text-books.

We think it unnecessary to deal with these, and would only comment that we do not think they assist him.

Mr. Inamdar for the first and second respondents, the successful plaintiffs in the court below, attacked first the appellants' arguments on the historical basis, and then their submission that the object of the Act and of the Ordinance was to restore fully the Mohamedan law regarding wakfs. Referring to the famous dissenting judgment of Ameer Ali, J., in *Bikani Mia v. Shuk Lal Polldar* (15) (1893), 20 Cal. 116, he relied on *Abdul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry* (16) (1894), 22 I.A. 76, where the Privy Council corrected the views theretofore generally held in India, and he contended that, even on the historical view, the interest of a private person in a wakf should be confined to "eating out of the wakf as one of the poor", while the general charitable intention must be paramount. On this footing the words "maintenance and support" read in their natural sense provided the correct test and for that reason were adopted in the Act of 1913. He further contended that the Muslim texts relied on by Malik, C.J., and Agarwalla, J., in giving an unusually wide meaning to the words "maintenance and support" were of late date and questionable authority. He made it clear, however, that this part of his argument was merely subsidiary, since it was, in his submission, quite improper to attempt to construe the provisions of a statute by reference to the previous state of the law on the same subject. He cited *Irfan Ali v. Official Receiver, Agra* (17) (1930), 52 All. 748, where the court said, in reference to the Indian Act, at p. 752:

> "The learned judges, who heard the appeal in the first instance, have extensively quoted from text-books and decisions of various courts including the decisions of their lordships of the Privy Council to show whether the mere use of the word 'waqf' necessarily implied a gift to the poor, ultimately. The inquiry of the two learned judges has resulted in different and contrary results. It appears to us that the legislature having passed an Act, relating to the subject, it would not be fruitful of any good to start a research into the previous state of the law as it existed before the legislature added one more Act to the book."

and also *Mt. Ramanandi Kuer v. Mt. Kalawati Kuer* (18) (1928), A.I.R. P.C. 2; 55 I.A. 18, where the Privy Council's opinion contains the words,

> "It has often been pointed out by this board that where there is a positive enactment of the Indian Legislature the proper course is to examine the language of that statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law–or of the English law upon which it may be founded."

Mr. Inamdar emphasised the futility of adopting the method of construction contended for in this case by referring to *Amina binti Abdulla v. Sheha binti Salim* (19) (1954), 21 E.A.C.A. 12, where Sir Newnham Worley, then Vice-President of this court, said:

> "Prior to the enactment of Ordinance No. 30 of 1951 the Wakf we are now considering would quite plainly have fallen within the prohibition of the rule laid down by this court in *Fatuma binti Salim Bakhshuwen v. Mohamed bin Salim Bakhshuwen* (1949) 16 E.A.C.A. 11, and confirmed by the Judicial Committee, [1952] A.C. 1. It is not in dispute that this decision ran counter to the generally accepted view among Mohammedans as to the validity of such trusts or wakfs, and that the 1951 Ordinance was specially enacted to get over this decision and bring the law back into closer harmony with general Mohammedan jurisprudence. But there is no ground for saying that the legislature intended to, or did, restore the pure Mohammedan law of Arabia in its full force, and it is true to say

> that except so far as the decision in *Bukshuwen's* case is expressly repealed by the 1951 Ordinance, it is still good law."

and again at p. 15:

> "When to these considerations is added the provision in sub-s. (2) of s. 4 that no Wakf is to be invalid merely because the charitable gift over in the property dedicated is not to take effect until after the extinction of the 'family, children, descendants or kindred of the maker', it is to my mind sufficiently clear that the legislature intended to overrule the decision in the *Bakhshuwen* case only to the extent of validating Wakfs for the family and descendants of the maker himself; in other words, that they were prepared, in deference to Mohammedan sentiment, to set aside the rule against perpetuities to that extent, but not to the extent of validating Wakfs for the benefit of the descendants of strangers in perpetuity."

In face of this authority it is useless to contend that the Kenya Ordinance re-enacted the pure Mohamedan law in Kenya, and equally useless to invoke that law as an aid to construction of the Ordinance.

Mr. Inamdar submitted that the words of the Ordinance should be given their natural meaning, and that an absolute gift of income was not necessarily, or even probably, confined within the permitted purpose of maintaining and supporting the donee. He referred to *Re Coleman* (20) (1889), 60 L.T. 127, and *Re Neil* (21) (1890), 62 L.T. 649, and to the necessity for the interposition of a trustee where the gift is for maintenance and support. He also stressed that such a gift was protected from execution proceedings and that the benefit of it was not assignable. We prefer not to rely on any of these last arguments, and we do not think they are needed in support of the general proposition that an absolute gift of income is something wider than, and different in kind from, a gift for maintenance and support.

Finally Mr. Inamdar relied on the judgment of Chagla, J., in *Abdul Karim Adenwalla v. Rahimabai* (3), quoted at some length in the judgment appealed from. We agree with the learned trial judge that this decision is directly in point, is correct in principle, and should be followed in this country.

For these reasons and for the further reasons given on this point by the learned trial judge, we were of opinion that the life-interests given by the wakf deed were not within the permitted purpose of maintenance and support of the wakif's family, that the wakf was consequently not validated by the provisions of s. 4 of the Ordinance and that it was rightly held void as being in breach of the rule against perpetuities. This disposed of the whole appeal, and of all points raised on the cross-appeal, save one as to costs of the proceedings in the Supreme Court, and this point Mr. Inamdar elected not to pursue. We accordingly dismissed both appeal and cross-appeal.

We should add that the third respondent took no part in the proceedings in either court, and that in this court the fourth respondent, represented by Mr. Mahmud, took no active part in the proceedings and submitted to any order which the court might make. In the circumstances, we ordered the appellants to pay the costs of the first and second respondents of the appeal, and also the costs of the fourth respondent of the appeal, but with a direction that in his case the fee for instructions should not exceed Shs. 500/-. We made no order as to the costs of the third respondent in this court, and no order as to costs of the cross-appeal.

Appeal dismissed.

For the appellants:
RK Mitra and *DS Obhrai*
RK Mitra, Mombasa

For the first and second respondents, and cross-appellants:
TJ Inamdar QC and *NM Brahmbhatt*
Inamdar & Inamdar, Mombasa

The third respondent did not appear and was not represented.

For the third respondent:
Wakf Commissioners for the Colony and Protectorate of Kenya

For the fourth respondent:
Mahmud, Albuquerque & Sharma, Mombasa
AZ Mahmud

Edwardes and another v Denning
[1958] 1 EA 628 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	22 November 1958
Case Number:	42/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Forbes JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Pelly Murphy, J

[1] Evidence – Agreement for sale of Crown land – Whether admissible in evidence if unregistered – Crown Lands Ordinance (*Cap.* 155), *s.* 88 (1) *and* (3), *s.* 126, *s.* 127, *s.* 129, *s.* 137 (1) *and s.* 138 (K.) – *Indian Transfer of Property Act*, 1882, *s.* 54, *s.* 55 (6) *and s.* 111 – *Indian Registration Act*, 1908, *s.* 17 (1) *and* (2) *and s.* 49.

Editor's Summary

The appellants had sued the respondent for specific performance of an agreement for the sale of land, alternatively for rectification of the agreement and specific performance thereof as rectified, or alternatively for damages for falsely representing the extent of the frontage and area of the land, and other relief. The appellants alleged that they had agreed to purchase for £10,000 certain land forming a portion of the respondent's farm, with a frontage to Lake Naivasha and the riparian land appurtenant thereto, all of which the respondent, as vendor, was to have surveyed. A survey was made, which the appellants alleged was not in accordance with the agreement, in that *inter alia* the area of the non-riparian land and the frontage to the lake were less then agreement provided for. By the time this survey had been completed, the appellants had taken possession of the land, had constructed a house and other buildings thereon, and had paid £9,000 of the agreed price. The respondent's defence was that *inter*

alia he had complied with the agreement. Later the respondent took a preliminary point, which was upheld by the Supreme Court by which the claims for rectification, damages and an injunction were dismissed, leaving the claims for specific performance and other relief to be decided. At the subsequent hearing of these claims, the first appellant sought to produce the agreement as evidence, whereupon counsel for the respondent objected on the grounds that the agreement by s. 55 (6) (*b*) of the Indian Transfer of Property Act, 1882, created a charge for the amount of the purchase price paid, and that as an instrument which required registration under s. 126 of the Crown Lands Ordinance, it had not been registered, and under s. 127, could not be admitted in evidence. The trial judge held that he was precluded from receiving the agreement in evidence and dismissed the action with costs. On appeal it was argued that s. 127 (2) of the Crown Lands Ordinance applies only to evidence relative to a charge where an interest is created in land, and not the evidence of rights in personam arising out of a contract, that decisions founded on statute law applicable to India did not govern the case, since the relevant provisions of the Indian law differ from the Crown Lands Ordinance, and in any event, since the agreement did not have the Governor's consent endorsed upon it, it was void in so far as it purported to effect a charge over land in the Highlands. For the respondent it was objected *inter alia* that the points taken for the appellants had not been raised in the Supreme Court and could not be taken on appeal.

Held –

(i) since the agreement was not endorsed with the Governor's consent and was an instrument which "purported to effect a charge", within the meaning of s. 88 (3) of the Crown Lands Ordinance, it was, to that extent, void and did not create a charge; therefore the agreement was excluded by s. 129 (*e*) from the operation of s. 127 of the Ordinance, if that applied.

(ii) although the Indian Crown Grants Act, 1895, enacted that the Indian Transfer of Property Act, 1882, should not apply to Crown grants as between Crown and subject, there is nothing to negative its application to dealings relative to land held upon Crown grants between subject and subject; accordingly s. 55 (6) (*b*) would be applied in the present case.

(iii) s. 127 of the Crown Lands Ordinance does not disqualify an unregistered instrument per se in so far as it is to be received as evidence of any transaction affecting immovable property, but it does disqualify evidence as to the sale, lease, or other transfer or the mortgage or charge or registered land unless effected by an instrument in writing which has been registered; an instrument may effect a transaction which is required to be registered by s. 126, but may, nevertheless, not itself be excluded from evidence by s. 127, though not registered.

(iv) the agreement in this case was not tendered as evidence of a charge, no charge was sought to be proved, and the existence or otherwise of a charge was irrelevant to any issue in the suit.

(v) the agreement was not excluded by s. 127 (2) from being received in evidence in this suit.

Appeal allowed. Order that the decree dismissing the suit be set aside, and that the suit do proceed.

Case referred to in judgment:

(1) *Dayal Singh v. Inder Singh* (1926), 53 I.A. 214.

(2) *Ebrahimji Gulamhussein Anjarwalla and Others v. Sheikh Fazal Elahi*, Kenya Supreme Court Civil Case No. 99 of 1948 (unreported).

(3) *The Commissioner of Lands v. Sheikh Mohamed Bashir*, [1958] E.A. 45 (C.A.).

(4) *Connecticut Fire Insurance Co. v. Kavanagh*, [1892] A.C. 473.

November 22. The following judgments were read:

Judgment

Sir Kenneth O’Connor P: This is an appeal from a ruling of a judge of the Supreme Court of Kenya dated March 14, 1958, and a decree dated May 26, 1958.

The matter arises in this way:

The appellants who were plaintiffs in the Supreme Court filed, on May 1, 1957, a plaint in which they pleaded that by an agreement in writing dated April 17, 1954 (which I will call “the agreement”), the respondent (the defendant in the Supreme Court) agreed to sell to the appellants for Shs. 200,000/- a portion of the respondent’s farm at Naivasha being an area of 180 acres more or less and having a frontage of 645 yards or thereabouts to Lake Naivasha, with the riparian land appurtenant thereto estimated to comprise an area of 67 1/2 acres or thereabouts. The land described as “riparian land” is land lying between that portion of the respondent’s farm which was the subject of the agreement and the line of the water’s edge, which line varies according to the rise and fall of Lake Naivasha. The appellant pleaded that it was a term of the agreement that the respondent should cause the land to be surveyed and a deed plan to be issued in respect of it by the Survey Department of the Colony. In or about November, 1955, the respondent caused a survey to be made, but, according to the appellants, this survey was not in

accordance with the agreement, in that *inter alia* the area of the non-riparian land was 147 1/2 acres only, and the frontage was less than the frontage mentioned in the agreement. In para. 13 of the plaint, it was pleaded that, in pursuance of the agreement, the appellants paid Shs. 180,000/- to the respondent on account

of the purchase price. This was paid on February 1, 1955, and the appellants entered into possession of the land and the adjoining riparian land before it had been surveyed and constructed a house and buildings thereon. The appellants pleaded further that, since the survey, the respondent had claimed 32 1/2 acres, which the appellants said was theirs, and corresponding riparian land, and had trespassed on their (the appellants') land. The appellants claimed specific performance of the agreement and prayed that the respondent be ordered to cause a survey to be made of land having a frontage of 645 yards to Lake Naivasha and an area of 180 acres more or less, to cause a deed plan of the land to be issued and to cause the boundaries of the riparian land to be surveyed and demarcated in accordance with the frontage and area aforesaid; and, further, to execute a proper conveyance of the land to the appellants accordingly. Alternatively, the appellants claimed rectification of the agreement and specific performance of it as rectified, or damages for falsely representing the extent of frontage and area of the land, which damages they calculated as the difference between the value of the land as represented and the value of the land as surveyed, and damages for trespass and special damage for cutting crops. The appellants also claimed an injunction to restrain the respondent from entering on their land and cutting crops or timber and removing the same.

In his defence, the respondent admitted the making of the agreement and that by it he had agreed to sell to the appellants, for Shs. 200,000/-, a portion of his farm, of the area and dimensions mentioned above. He said that he had caused a survey to be made of that part of his land described in clause 1 of the agreement and that the survey had disclosed that the area of the piece of land so described was 147 acres only and not 180 acres more or less as stated in the agreement. Otherwise he denied the correctness of the allegations contained in the plaint and maintained that the land surveyed was the land described in clause 1 of the agreement. He raised certain other matters not material to this appeal and said that the appellants were not entitled to an order for specific performance of the agreement or to the other relief claimed. He counterclaimed for an order for rectification of the agreement to make it conform with the real understanding between himself and the first appellant or alternatively that he be allowed to perform his part of the agreement by transferring 180 acres of his non-riparian land to the appellants.

In their reply and defence to the counterclaim the appellants raised points not material to the present appeal.

We have been informed by counsel that by a ruling delivered on or about January 10, 1958 (of which there is no copy in the record, but which I will refer to as "the ruling of January 10") the court dismissed, on a preliminary point, the claims for rectification of the agreement, damages and an injunction, without having made any order as to the costs of the claims dismissed, leaving to be decided the claims for specific performance and for further and other relief and costs.

The hearing of what remained of the suit was commenced on March 12, 1958, when the first appellant gave evidence to the effect that he had entered into a written agreement (i.e. the agreement) at the end of 1954 to purchase a portion of the respondent's farm at Naivasha. He tendered the agreement. Mr. Khanna, for the defendant, thereupon objected to the agreement being put in evidence, on the ground that it was an instrument which required registration under s. 126 of the Crown Lands Ordinance (Cap. 155) and had not been registered. Mr. Khanna submitted that, by the operation of s. 55 (6) (*b*) of the Indian Transfer of Property Act, 1882, the agreement created a charge for the amount of the earnest money and purchase money (Shs. 180,000/-) paid under it. He submitted that the agreement, being a registrable instrument

and not registered, could not, under s. 127 of the Crown Lands Ordinance, be admitted in evidence.

The learned judge accepted the arguments of Mr. Khanna, and following the decision of the Privy Council in *Dayal Singh v. Inder Singh* (1) (1926), 53 I.A. 214, which he considered governed the present case; and the decision of De Lestang, J., in *Ebrahimji Gulamhussein Anjarwalla and Others v. Sheikh Fazal Elahi* (2), Kenya Supreme Court Civil Case No. 99 of 1948 (unreported), held that he was precluded from receiving the agreement in evidence. Accordingly, by a decree dated March 14, 1958, he dismissed the plaintiffs' claims and ordered that the plaintiffs pay to the defendant the taxed costs of the suit down to and including that decree. We have been informed that the costs have been taxed and paid. Against the whole of the decree of March 14, 1958, the appellants appeal, by leave, to this court.

The agreement which, as already mentioned, is dated April 17, 1954, was made between the respondent (therein called the vendor) of the one part and the appellants (therein called the purchasers) of the other part. After reciting that the vendor was registered as the owner as lessee from the Crown, for all the unexpired residue of a term of ninety-nine years from May 1, 1906, of land therein described and that the vendor had agreed with the purchasers for the sale to them of a portion of that land at the price of Shs. 200,000/-, it was agreed between the parties that the vendor should sell and the purchasers should purchase the land described in the agreement having a frontage of 645 yards to Lake Naivasha or thereabouts and containing an area of 180 acres more or less together with the riparian land appurtenant thereto estimated to contain 67½ acres or thereabouts, as more particularly delineated and described on the sketch plan annexed to the agreement, together with improvements, but subject to the apportioned rent payable to the Crown and to the performance and observance of the covenants in the head lease. By clause 2 of the agreement it was stipulated that the purchase price of Shs. 200,000/- should be paid, as to Shs. 8,000/- on the signing of the agreement, the receipt of which the vendor acknowledged, as to Shs. 172,000/- on or before April 30, 1954, and the balance on delivery by the vendor to the purchasers of a proper legal assignment. It was admitted on the pleadings that Shs. 180,000/-, that is the first two instalments, had been paid. The agreement permitted the purchasers to take possession of the premises from the date of payment of the second instalment of the purchase price, and possession was taken accordingly. Clause 4 of the agreement reads:

> "4. The purchase and sale hereby effected is expressly made subject to the consent thereto of the Land Control Board and the Governor of the said Colony. In the event of such consents being refused then this agreement shall become null and void and any payment made by the purchasers shall thereupon be refunded to them but without interest."

By clause 7 of the agreement it was provided that upon payment of the second instalment of the purchase price (when the purchasers would be entitled to take possession) the vendor should become the tenant of the said piece of land from the purchasers at a monthly rent and that such tenancy should continue for a minimum period of six months and be thereafter terminable by three months' notice in writing. It is difficult to see how the vendor could become a tenant holding from the purchasers until the purchasers had become owners of the land, which would not occur until an assignment was executed. Under s. 54 of the Indian Transfer of Property Act the purchasers would not become equitable owners of the land or obtain any interest in it merely by reason of the execution of the agreement, and a mere licence to occupy the land such as was conferred by clause 3 would not entitle them to grant a tenancy. I do not think, therefore, that clause 7 of the agreement created an interest in the land.

Clauses 8 and 9 of the agreement read as follows:

"8. The vendor shall with all convenient speed cause the said premises to be surveyed and deed plans issued by the Survey Department of the said Colony.

"9. Within twenty-eight days of the delivery of the relevant deed plan to the purchasers' advocates the purchasers shall make payment of the balance of the purchase price in full to the vendor and the vendor with all other necessary parties (if any) shall thereupon execute and deliver to the purchasers a legal assignment of the said premises hereby agreed to be sold."

The other clauses of the agreement are not relevant to this appeal.

It will be noted that:

(*a*) The agreement is an agreement for sale of a leasehold interest in land situate in the Highlands of Kenya and held under a Crown lease and registered under the Crown Lands Ordinance (Cap. 155 of the Laws of Kenya). It does not, in terms, purport to transfer or charge the land or to create, declare or assign any right, title or interest to or in the land, though it confers a licence to the purchasers to take possession. It creates a right to obtain another document, that is to say a valid assignment to the purchasers of the leasehold interest of the vendor. Whether a charge for the instalments of the purchase money paid is created by operation of law, i.e. by operation of s. 55 (6) (*b*) of the Indian Transfer of Property Act, is a question which will be discussed hereafter.

(*b*) Notwithstanding the words of clause 4 "the purchase and sale hereby effected", the agreement does not effect a sale as defined by s. 54 of the Indian Transfer of Property Act, 1882. It is an agreement for sale merely.

(*c*) The purchase and sale are expressly made subject to the consents thereto of the Land Control Board and the Governor: if such consents are refused, the agreement is to become null and void and any payment thereunder is to be refunded. We were informed from the bar that the consent of the Governor had been obtained since the agreement was signed but not prior to its execution. The consent of the Governor was not endorsed on the original agreement which had been tendered in the court below and which was on the court file. We have no information whether the written consent of the Land Control Board was obtained pursuant to s. 7 (1) of the Land Control Ordinance (Cap. 150) or whether or not that board tendered advice to the Governor under s. 8 (1) (*a*) of that Ordinance.

(*d*) The agreement has annexed to it a sketch plan only, by reference to which the property was more particularly described. This plan is not signed by the Director of Surveys and, accordingly, the document is precluded from being accepted for registration by s. 137 (1) of the Crown Lands Ordinance. As a matter of practice, the director would always refuse to sign a sketch plan of this type.

The relevant provisions of the Crown Lands Ordinance are:

"88 (1). No person shall, except with the written consent of the Governor, sell, lease, sub-lease, assign, mortgage or otherwise by any means whatsoever, whether of the like kind to the foregoing or not, alienate, encumber, charge or part with the possession of any land which is situate in the Highlands, or any right, title or interest whether vested or contingent, in or over any such land to any other person, nor, except with the written consent of the Governor, shall any person acquire any right, title or interest in any such land for or on behalf of any person or any company registered under the Companies Ordinance; nor shall any person enter into any agreement for any of the transactions referred to in this sub-section without the written consent of the Governor:

"Provided that nothing in this sub-section contained shall affect–

(*a*) any such transactions made by or in favour of the Crown;

(*b*) any gift of land by way of testamentary disposition.

"(2) Applications for the consent of the Governor under the provisions of sub-s. (1) of this section shall be made in the manner prescribed.

"(3) Any instrument, in so far as it purports to effect any of the transactions referred to in sub-s. (1) of this section shall be void unless the terms and conditions of such transactions have received the consent of the Governor which shall be endorsed on the instrument:

"Provided that where the Governor refuses his consent and any money has been paid by either party in respect of any such transaction, such money shall be recoverable as a civil debt from the party to whom it has been paid."

Section 126 reads as follows:

"126. All transactions entered into, affecting or conferring or purporting to confer, declare, limit or extinguish any right, title, or interest, whether vested or contingent to, in or over, land registered under this Part (other than a letting for one year only or for any term not exceeding one year) and all mutations of title by succession or otherwise shall be registered under this Part."

Section 127 of the Crown Lands Ordinance, so far as material, provides:

"127. No evidence shall be receivable in any civil court:

"(1) of the sale, lease or other transfer inter vivos of land registered under this Part, unless such sale, lease or other transfer is effected by an instrument in writing and such instrument has been registered under this Part.

"(2) of a lien, mortgage or charge (otherwise than such as may arise or be created in favour of the Crown or the Government under or by virtue of any Ordinance or other enactment) of or upon such land unless the mortgage or charge is created by an instrument in writing, and the instrument has been registered under this Part."

There follows a proviso dealing with equitable mortgages by deposit of title deeds.

Section 129, so far as material, provides:

"Nothing in the last two preceding sections shall apply to–

"(*e*) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in land registered under this Part, but merely creating a right to obtain another document, which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or . . ."

Section 137 (1) reads:

"A document other than a judgment, decree or order of a court, to which there is attached a map or plan which is not signed by the Director of Surveys, shall not be accepted for registration."

Section 138 requires, *inter alia*, that every document produced for registration shall contain an accurate and clear description of the property affected thereby; and s. 139 provides that documents which do not state the particulars required by s. 138 shall not be admitted to registration except with the sanction of the principal registrar.

As already stated, the objection by learned counsel for the defence to the admission of the agreement in evidence was based on s. 55 (6) (*b*) of the Indian Transfer of Property Act, 1882. That Act was applied to Kenya by art. 11 (*b*) of the East Africa Order in Council, 1897. In *The Commissioner of Lands v. Sheikh Mohamed Bashir* (3), [1958] E.A. 45 (C.A.), one of the questions raised was whether the provisions of s. 111 of the Indian Transfer of Property Act relating to forfeiture of a lease applied to a grant of Crown land in Kenya. It was held that they did not. In the course of my judgment in that case I said that the Indian Crown Grants Act, 1895, had declared that the Transfer of Property Act, 1882, should not apply or be deemed ever to have applied to Crown lands in British India and that, for that reason, the Transfer of Property Act would not, in 1897 (when the Act was applied to Kenya), have applied to Crown land in Kenya. This was inaccurately stated. The Indian Crown Grants Act, 1895, enacted that the Indian Transfer of Property Act, 1882, should not apply or be deemed ever to have applied to Crown *grants*, as regards the construction and effect of such grants. Similarly, the Indian Transfer of Property Act would not apply to, or affect the construction of Crown *grants* in Kenya as between Crown and subject (which was the matter before the court in *Bashir's* case (3)); but, so far as I am aware, there is nothing to negative the application of the Indian Transfer of Property Act, 1882, to dealings between subject and subject relating to lands held upon Crown grants or leases, which is the matter raised in the present case. I will, therefore, proceed on the footing that s. 55 (6) (*b*) of the Indian Transfer of Property Act, 1882, applies in the present case.

Section 55 of the Indian Transfer of Property Act provides, among other things, that, in the absence of a contract to the contrary, the buyer and seller of immovable property, respectively, are subject to the liabilities, and have the rights mentioned in the rules which follow. Paragraph (*b*) of r. 6, which follows, says *inter alia* that the buyer is entitled, unless he has improperly declined to accept delivery of the property to a charge on the property as against the seller . . . for the amount of any purchase money properly paid by the buyer in anticipation of the delivery and interest on such amount and, when he properly declines to accept delivery, also for the earnest (if any).

The argument against the admission of the agreement in evidence was that by virtue of s. 55 (6) (*b*) it created a charge over the property for the part of the purchase money paid under it, i.e. it created or conferred an interest in land: therefore it required to be registered under s. 126 of the Crown Lands Ordinance: and, under s. 127 (2), as it had not been registered, no evidence of it was receivable: it would not be excluded from the operation of s. 127 by s. 129 (*e*), because it was itself a document creating an interest in land.

The learned judge dealt with the matter as follows:

> "It is common ground that the land in question forms part of a larger parcel of land registered under Part XII of the Crown Lands Ordinance. In my judgment the provisions of that Ordinance relating to the registration of transactions in land govern, and exclusively govern, the registration of the document with which we are here concerned. The agreement has not been registered under that Ordinance.
>
> "It is not disputed that in fact part of the purchase money was paid in pursuance of clause 2 of the agreement. That being so, it is in my judgment clear that, by virtue of the provisions of s. 55 (6) (*b*) of the Indian Transfer of Property Act, 1882, the purchaser thereupon became entitled to a charge on the property, and the agreement, in addition to being an agreement for sale, evidences the creation of that charge.
>
> "Section 127 (2) of the Crown Lands Ordinance provides that no evidence shall be receivable in any civil court of a charge upon land

> registered thereunder unless the instrument creating the charge has been registered."

The learned judge considered that the decision in *Dayal Singh v. Inder Singh* (1) (1926), 53 I.A. 214 (P.C.), completely governed this case and he held that he was precluded from receiving the agreement in evidence.

In *Dayal Singh's* case (1) an agreement for sale of immovable property acknowledged the receipt of part of the purchase price paid by the buyer as earnest money. The seller having refused to complete, the buyer sued for specific performance. So far as can be ascertained from the report, he did not claim damages or any other relief. The agreement was not registered. It was held that under s. 55 (6) (*b*) of the Transfer of Property Act, 1882, the buyer was entitled to a charge on the property in respect of the earnest money, and that, consequently, the agreement created an interest in the property: with the result that the agreement was required to be registered by s. 17 (1) (*b*) of the Indian Registration Act, 1908, and was not exempt by s. 17 (2) (v) thereof. Therefore the suit could not be maintained.

The Indian Acts considered by their lordships in *Dayal Singh's* case (1) are not all obtainable here; but the main statutory provisions which their lordships were there considering were s. 55 (6) (*b*) of the Indian Transfer of Property Act (the gist of which is set out above), and s. 17 (1) (*b*) and (2) (v) and s. 49 of the Indian Registration Act, 1908. Section 17 (1) (*b*) made compulsorily registrable

> "non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards to or in immoveable property."

Section 17 (2) (v) is identical in all material respects with s. 129 (*e*) of the Crown Lands Ordinance set out above. Section 49 of the Indian Registration Act enacts *inter alia* that no document required by s. 17 of the Registration Act to be registered shall affect any immoveable property comprised therein or . . . be received as evidence of any transaction affecting such property . . . unless it has been registered.

It will be noticed that there are significant differences between the wording of the statutory provisions considered in *Dayal Singh's* case (1) and the wording of s. 126 and s. 127 of the Crown Lands Ordinance. In the first place, s. 17 of the Indian Registration Act refers to "documents" and "instruments" and s. 49 of the Indian Registration Act makes "documents" required by s. 17 to be registered not receivable as evidence of any transaction affecting immoveable property unless registered. This disqualifies the instrument per se, in so far as it is to be received as evidence of any transaction affecting immoveable property. On the other hand, s. 127 of the Kenya Crown Lands Ordinance says

> "No evidence shall be receivable in any civil court . . . of a sale, lease . . . charge, etc."

What is rejected by s. 127 is not the unregistered instrument per se in so far as it is to be received as evidence of any transaction affecting immoveable property, but evidence of certain specified transactions, and of those only, such, for instance as a sale, lease, mortgage or charge. An instrument may effect a transaction which is required to be registered by s. 126; but might, nevertheless, not itself be excluded from evidence by s. 127, though not registered. Section 126 and s. 127 are not co-terminus, as are s. 17 and s. 49 of the Indian Registration Act, 1908, considered in *Dayal Singh's* case (1). In the second place, the Indian provisions disqualify instruments which purport

or operate to create, etc., an interest in land. Not only, therefore, are instruments not receivable in evidence which purport to create interests, but expressly also those which create an interest in land by operation of law, e.g. those which confer on a purchaser a charge for purchase money under s. 55 of the Indian Transfer of Property Act. Under the Indian provisions, therefore, such an instrument as the agreement in this case would not be receivable as evidence of any transaction affecting immoveable property comprised therein. But, under s. 127 of the Crown Lands Ordinance, what is rejected is evidence of the sale, lease or other transfer and of a lien, mortgage, charge, etc., of registered land, unless it is effected or created by an instrument in writing and the instrument has been registered under Part XII.

The effect of the decision in *Dayal Singh's* case (1) seems to have been unacceptable in India, because in the following year an amendment was made to the Indian Registration Act, 1908, by adding to s. 17 an "Explanation" in the following terms:

> "A document purporting or operating to effect a contract for the sale of immoveable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money."

No such amendment was made in Kenya. Sale agreements providing for payment of a deposit on execution are common here, and may be required to be registered and registrable if they fall within s. 126 and comply with s. 137 and s. 138. But whether they are receivable in evidence or not depends on s. 127.

Notwithstanding any consideration of inconvenience we are bound to follow *Dayal Singh's* case (1) in so far as it was decided upon an Indian Act identical in wording or in pari materia with the provisions of the Crown Lands Ordinance; but the effect of the differences in the legislation in the two countries must be considered. As has been pointed out above, what is rejected in Kenya is evidence of specified transactions–of the sale, lease, transfer or charge, etc., of registered land. The agreement in this case was not tendered as evidence of a charge. No charge was sought to be proved, and the existence or otherwise of a charge was irrelevant to any issue in the suit. I am of opinion that the agreement was not excluded by s. 127 (2) from being received as evidence in this suit. It has not been argued that the agreement is evidence of a "sale" under s. 127 (1) and I do not think that it is. The words "or other transfer" in that sub-section make it plain that "sale" in this context is a completed sale, a transfer of ownership (cf. s. 54 of the Indian Transfer of Property Act, 1882) and not an executory agreement to sell.

It follows that, if I am right that the agreement was not within s. 127 and was not precluded by that section from being received in evidence for the purposes of the present suit, it is unnecessary to consider the effect of s. 129 (*e*) upon which sub-section the decision of the Privy Council in *Dayal Singh's* case (1), having been given upon a virtually identical provision of an Indian Act, is binding upon this court.

This is sufficient to dispose of the appeal; but there was a further ground raised by the appellant with which I had better deal, in case I am wrong in holding that the agreement was not caught by s. 127. This contention was expressed as follows in ground 5 of the memorandum of appeal:

> "5. In the further alternative the learned judge failed to appreciate that as the respondent (vendor) had failed to comply with the provisions of s. 88 of the Crown Lands Ordinance, the agreement for sale in so far as it purports to effect a charge is void and does not therefore require to be registered."

Mr. Wollen's argument may be summarised as follows: The land was situate in the Highlands. The reason of the learned judge for excluding the agreement from evidence was that, by virtue of s. 55 of the Indian Transfer of Property Act, the agreement effected a charge over the land: it was, therefore, excluded from s. 129 (*e*) and caught by s. 127. But, under sub-s. (3) of s. 88 read with sub-s. (1), an instrument which has not the Governor's consent endorsed upon it is void in so far as it purports to effect a charge over land in the Highlands. The original agreement, which had been tendered in the court below and was on the court file for reference, did not have any consent by the Governor endorsed upon it. It could not, therefore, have validly effected a charge. Accordingly, notwithstanding *Dayal Singh's* case (1), s. 129 (*e*) would apply to the agreement which would, by that sub-section, be excluded from s. 127 and be exempted from the necessity for registration.

Mr. Khanna argued that this point was not taken in the court below and could not be taken now, as it depended on evidence: the Governor's consent might have been endorsed on the counterpart of the agreement. He drew attention to the words in s. 88 (1)

> "nor shall any person enter into any agreement for any of the transactions referred to in this sub-section without the written consent of the Governor"

and argued that the consent must be obtained before the agreement was entered into: this had not been done and the agreement was, therefore, void and the suit should be dismissed: if, by giving evidence of the agreement, one automatically gave evidence of a charge, the agreement could not be received.

As regards Mr. Khanna's first argument: In *Connecticut Fire Insurance Co. v. Kavanagh* (4), [1892] A.C. 473, Lord Watson said at p. 480:

> "When a question of law is raised for the first time in a court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below. But their lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts if fully investigated would have supported the new plea."

I am satisfied by the fact that the original agreement bears no endorsement of the Governor's consent, that no such endorsement has, in fact, been made on it. If an endorsement had been made on the counterpart and not on the original (which would be a very unusual procedure) I feel sure that that endorsement would have been copied upon the copy of the agreement reproduced in the record, since it would clearly be relevant under ground 5 of the memorandum of appeal. I am satisfied that it is established beyond doubt that the agreement does not bear an endorsement of the Governor's consent. Accordingly, I think, since a substantial point of law is involved, that we ought to entertain the question raised in ground 5, notwithstanding that it was not taken below.

Mr. Khanna, in his second contention, relied on the words in sub-s. (1) of s. 88, which prohibit the entry into agreements for any of the transactions referred to in the sub-section. I think that that argument is answered by the form of the agreement. The sale of the land was expressly made subject to the consent of the Governor. That was not an agreement to sell land without the consent of the Governor, which is what is prohibited by sub-s. (1). I see no reason for holding that the consent of the Governor to an agreement in that form must be obtained before the agreement is entered into or that such

an agreement is made void by s. 88. I think that sub-s. (3) and the proviso thereto indicate that the consent of the Governor may be given after an agreement is entered into.

Mr. Khanna's last-mentioned argument has already been dealt with. I have already indicated my opinion that the agreement was not evidence of a charge, it was not tendered as such, and any evidence of a charge would have been irrelevant to any issue arising on the pleadings in this case. I have drawn attention to the differences between s. 127 and the statutory provisions considered in *Dayal Singh's* case (1).

I think Mr. Wollen's argument on the effect of s. 88 is sound, if the agreement is an "instrument which purports to effect" a charge within the meaning of sub-s. (3). It does not in terms "purport" to effect a charge. I have said that, in my opinion, the agreement is not "evidence" of a charge within s. 127 which deals with the reception of evidence in courts, unlike s. 88 which avoids the instrument in so far as it offends. But the agreement does purport to acknowledge the receipt of earnest money which, by the operation of s. 55 (6) (*b*) of the Indian Transfer of Property Act, effects a charge. To that extent it "purports to effect" a charge. The mischief aimed at by s. 88 is the effecting, without the consent of the Governor, of the transactions referred to, and, clearly, charges arising by operation of law on the execution of a particular instrument would be within the mischief of the section no less than charges created by express words of charge. For instance, I think that a memorandum of equitable mortgage or charge created by deposit of title deeds would be an "instrument" within sub-s. (3) of s. 88, notwithstanding that it merely recorded the deposit of the deeds as security for a loan and did not contain express words purporting to charge the property. It may be that the expression "purports to effect" in the context of sub-s. (3) of s. 88 is used for the reason that, under the sub-section, the instrument cannot be said to "effect" the transaction, because its effect is avoided unless the terms and conditions of the transaction have received the Governor's consent. If such consent has not been received, the instrument does not "effect" the transaction; but could be said to "purport to effect" it.

I have also entertained some doubts as to whether an instrument which does not have endorsed upon it the written consent of the Governor, is void if, in fact, that consent has been obtained. I am inclined to think, however, that the words "which shall be endorsed on the instrument" are mandatory, and that the endorsement, and that only, is the evidence which the Ordinance requires of the fact that the consent has been obtained.

My conclusion on ground 5 is, therefore, that the agreement is an instrument which "purports to effect" a charge within the meaning of s. 88 (3). It is accordingly void, under that sub-section, to that extent, by reason of the fact that the Governor's consent to its terms and conditions is not endorsed upon it and such endorsement would (apart from s. 65 of the Indian Evidence Act, which is not shown to be applicable) be the only receivable evidence of such consent. It follows that the agreement does not create a charge: it, therefore, falls within s. 129 (*e*) and is thereby excluded from the operation of s. 127 (assuming that s. 127 would otherwise apply to it). This is not inconsistent with the decision in *Dayal Singh's* case (1) as to the correct interpretation of s. 129 (*e*). It is a matter of construing the effect on s. 129 (*e*) of a statutory provision relating to land in the Highlands of Kenya, which does not exist in the Indian legislation considered by their lordships in *Dayal Singh's* case (1).

I had better also mention briefly ground 4 of the memorandum of appeal and Mr. Wollen's arguments based on s. 137, s. 138 and s. 139 of the Crown Lands Ordinance.

Mr. Wollen contended that s. 127 of the Ordinance could not apply to exclude a document from

evidence on the ground that it was not registered,

if it was not, in fact, registrable because the plan attached to it was a sketch plan only and was not signed by the Director of Surveys as required by s. 137 (1). He also contended that the agreement was not registrable by reason of s. 138 and s. 139 in that it did not contain an accurate and clear description of the property affected thereby, its boundaries, extent and situation. He said that surveyors' plans, which alone the Director of Surveys would sign, took months to obtain: and, moreover, that it was impossible for the parties to comply with s. 138 because a decision on what property was affected by the agreement and a clear description of it was precisely what the parties had not got and sought to obtain in the suit.

Mr. Khanna argued that s. 137, s. 138 and s. 139 were merely machinery sections and that the fact that the parties to the agreement might be unable to comply with the provisions of those sections did not avoid the obligations to register the document under s. 127.

If the agreement were registrable under s. 127, I should be inclined to agree with Mr. Khanna; but I have held that it is not so registrable.

I would allow the appeal and set aside the ruling of the learned judge rejecting the agreement as inadmissible in evidence. In consequence the decree must be set aside and the suit must proceed.

We have heard argument on the question of costs. Mr. Khanna has argued as regards the costs of the appeal, that the appellants have succeeded only on a point of law not taken in the court below and should, therefore, be deprived of their costs, and no order as to costs should be made.

This is not correct. The appellants have succeeded on their main point that the learned judge was wrong in holding that he was bound by *Dayal Singh's* case (1) because of the difference between the provisions of the Kenya Ordinance and the Indian Acts considered in *Dayal Singh's* case (1), and that the agreement was not within s. 127 of the Crown Lands Ordinance and was admissible in evidence. This point was taken in the court below and I have already said in this judgment that, in my view, that was sufficient to dispose of the appeal. It is true that the appellants also succeeded on their argument based on s. 88 which was not raised below; but that is additional and is no reason for depriving them of their costs of the appeal. I think that the appellants should have their costs of the appeal.

As to the costs in the Supreme Court, Mr. Khanna argues:

(*a*) that, although the memorandum of appeal purports to appeal against the whole of the decree of March 14, there are no grounds of appeal relating to the claims previously decided by the ruling of January 10, or relating to anything but the claim for specific performance;

(*b*) that the ruling of January 10 is not appealed against and is not before us and that costs of the claims thereby decided must follow the event and that we should not set aside the order re costs contained in the decree of March 14, but should only vary it by directing a deduction from the costs of the suit of the costs attributable to claim No. 1.

I would agree if the Supreme Court had dealt in the ruling of January 10 with the costs of the claims then disposed of. But it did not deal with the costs of those claims until it had been held (erroneously I think) that the defendant succeeded also on claim 1 by reason of his preliminary objection. The only order as to costs is that in the decree of March 14 and the whole of that is appealed against. I do not think that we should fetter the discretion of the judge who will hear the suit as to the costs of the whole of it or attempt to make an apportionment on papers not before us. No doubt the judge will bear in mind, when dealing with the costs of the suit, that the defendant succeeded on the claims dismissed by the ruling of January 10. The costs of the suit

already paid should, in my opinion, be repaid and those costs should be costs in the cause.

Briggs V-P: I have read the judgment of the learned president and am in full agreement with his reasoning and conclusions as regards the essential differences between the Indian Registration Act and the Crown Lands Ordinance. I agree that those differences make the decision of the Privy Council in *Dayal Singh v. Inder Singh* (1) (1926), 53 I.A. 214, inapplicable to the present case. The only doubt which I feel as regards this part of the judgment is that, although s. 127 does not, I think, preclude the reception of the agreement in evidence in support of a claim for specific performance, the agreement, in so far as it operates to create a charge, is apparently within the wording of s. 126, which provides that

> "All transactions entered into, affecting or conferring or purporting to confer . . . limit or extinguish any right, title, or interest . . . to, in or over land . . . shall be registered".

In consequence of the provisions of s. 55 (6) (*b*) it might be argued that this agreement did affect the title of the vendor by creating a statutory charge against it, and did confer a corresponding interest on the purchaser. I think there are two possible answers to this argument, first, that assuming it to be correct, s. 126 alone is brutum fulmen and does not affect substantive rights. The sanctions for enforcing registration are provided by s. 127, and are not such as to affect this agreement. The second answer is that, in interpreting the words "transactions entered into" in s. 126, one may be guided both by the general scheme of the Ordinance and by the express words of s. 88 (1), which distinguishes between "transactions" and "agreements for transactions", and clearly restricts the meaning of "transactions" so as to exclude an executory agreement to effect a "transaction". I think it is permissible to say that "transaction" in s. 126 has a similarly limited meaning. It is perhaps a slight support to this argument that s. 129 (*e*) does not use the word "transaction".

As regards ground 5 of the memorandum of appeal, I again agree with the learned president. It is clear from the wording of s. 88 (3) that an instrument may be avoided in part and remain valid in part. It is avoided to the extent that, were it not for the provisions of the sub-section, it would effect one of the "transactions" (in the special sense) governed by the first part of s. 88 (1). In so far as it would not have that effect, it remains in full force. This agreement is, I think, typical of such severable instruments. The statutory charge is avoided, but otherwise the agreement stands. It is then a document precisely within the terms of s. 129 (*e*), and is exempted from registration.

I confess to a feeling of some relief at being able to reach this conclusion. Registration of these agreements is normally impossible, because no proper plan exists at the time when they are made. If the decision of the Supreme Court were to stand, either legislation would be necessary, or conveyances would be obliged to insert, in every agreement for sale of land which acknowledged a part-payment, a provision negativing the operation of s. 55 (6) (*b*). This would be a grave trap for the unwary, and it must be remembered that agreements of this kind are often prepared by laymen.

I agree with the order proposed by the learned president.

Forbes JA: I agree.

Appeal allowed. Order that the decree dismissing the suit be set aside, and that the suit do proceed.

For the appellants:
SR Wollen
Ennion & Macdougall, Nairobi

For the respondent:
DN Khanna
DN & RN Khanna, Nairobi

Choitram v Hiranand Ghanshamdas Dadlani
[1958] 1 EA 641 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	27 October 1958
Case Number:	61/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Farrell, J

[1] Burden of proof – Action for account – Defence that vouchers destroyed by plaintiffs' agent – Change of onus during proceedings – What plaintiff and defendant must each prove.

Editor's Summary

The appellants had employed the respondent as manager of their shop at Eldoret from 1952 until the shop was closed in 1956. The appellants conceded that the respondent had accounted to the appellants for all sales and expenditure to April 30, 1955, and handed over to the appellants the relevant vouchers to December 31, 1954, but alleged that he had neither accounted nor handed over vouchers from those dates onwards. At the time the branch was closed in 1956, the respondent was ill and the appellants sent W., their branch manager at Kisumu, to Eldoret to close the business. His evidence was that the respondent said he was too ill to complete the books and asked that the books be left for completion by him. W. also said he threw away at the time certain useless papers, after showing them to the respondent. The respondent's evidence was that he was ill in bed when W. came, all the papers were in the shop, and he did not know what happened to them, but that he complained to the appellants by telephone about the papers which W. was destroying and was told to let W. do as he liked. The trial judge did not accept that the respondent had complained, or that he had agreed to the destruction of the papers, but he treated the loss of the vouchers as an answer to the claim for an account and held that the onus of proving the existence of the vouchers was upon the appellants. On appeal against dismissal of the action

Held –

(i) the mere inability to produce vouchers by a party liable to account does not relieve him of responsibility, but if the removal or destruction of vouchers by the other party makes compliance impossible, then the party claiming an account could not expect to obtain an order.

(ii) the burden of proving that the respondent was liable to account lay on the appellants, and they had discharged that burden; the onus then rested on the respondent to show, if he could, that he was

released from his liability by certain actions of the appellants.

(iii) it was, therefore, essential for the trial judge to decide whether the documents had been removed, suppressed or destroyed by W.; as this issue rested almost entirely on credibility, the appellate court's proper course was to order a new trial on that issue.

Appeal allowed. Order for a new trial limited to the issue whether the cash sales vouchers had been removed or destroyed by W.

Case referred to:

(1) *Columbian Government v. Rothschild* (1826), 1 Sim. 94; 57 E.R. 514.

October 27. The following judgments were read:

Judgment

Gould JA: This is an appeal against the dismissal of an action in the Supreme Court of Kenya in which the appellants claimed as against the respondent the following relief:

> "(*a*) An order that–
>
> (i) the defendant do give to the plaintiffs a full and true account of such daily sales and expenditure and an account of the moneys received by the defendant for the plaintiffs from the 1st day of May, 1955, to 31st day of March, 1956, of the plaintiffs' shop at Eldoret;
>
> (ii) the defendant do render to the plaintiffs all the said relevant vouchers of daily sales and expenditure from the 1st day of January, 1955, to the 31st day of March, 1956;
>
> (*b*) Costs of this suit;
>
> (*c*) Such other relief as may be just."

The basis of the claim was that the appellants, a firm of merchants, had employed the respondent and placed him in charge of their shop at Eldoret from June 17, 1952, until March 31, 1956, when the shop was closed. Apparently at the trial of the action there was a good deal of controversy as to whether the respondent should properly be described as manager of the branch, but as the learned trial judge rightly held, the question of nomenclature was immaterial, as he was substantially in control; before this court his counsel conceded that he was in a position in which he was liable to account to the appellants, but contended that by reason of facts which will be discussed he should either be regarded as having done so or as being relieved of his obligation to do so.

It is conceded in the plaint that the respondent rendered a true and full account of all daily sales and expenditure up to April 30, 1955, and rendered to the appellants the vouchers relevant thereto up to December 31, 1954; the default claimed is from and after those dates respectively.

Before coming to the evidence I would refer briefly to a point argued by counsel relating to the form of the action. The plaint is indeed unusual in that while it contains a claim for an account there is subjoined no claim for an order for payment of any sum found due by the defendant upon the taking of the account. No point appears to have been taken on this in argument in the court below but the learned judge, though he based his decision upon other grounds, expressed himself as being doubtful whether he could in any event have ordered the respondent to account in the absence of an allegation in the pleadings that he owed any money to the appellants and a prayer for its recovery. Counsel for the appellants contended that had the learned judge in fact so held he would have been wrong in law. The only authority he quoted was the case of *The Columbian Government v. Rothschild* (1), decided as long ago as 1826 and reported in 57 E.R. 514. All that can be drawn from that case is that it had apparently been the earlier practice that a bill for an account was required to contain an offer on the part of the plaintiff to pay the balance if found against him, but that at the date of the case in question such an undertaking was no longer considered necessary. This does not take the matter very far–presumably where a plaintiff is asking for an order for payment of any balance found in his favour such an undertaking on his part is now implied. Counsel for the appellants submitted that even without the prayer for payment the court was in a position to do justice between the parties and referred to the practice of the court in matters of accounts and to the payer for further relief.

Counsel for the respondent contended that without the prayer for payment the action was not a true action for accounts but something akin to an action

for a mandamus. He referred to the preliminary note at p. 25, Vol. 1 of Atkin's Encyclopædia of Court Forms and Precedents in Civil Proceedings as to the nature of the action, but had no direct authority indicating that the omission of such claim was fatal. I see no reason to hold that it was. If a plaintiff is entitled at law or in equity to an account from a defendant he has a right which he is entitled to enforce through the courts and in the present action we are not concerned at this stage with any difficulty the appellants might have to meet should they, if successful in their claim for an account, later desire to ask for an order for payment.

The claim for an account is limited to

> "a full and true account of such daily sales and expenditure and an account of the moneys received by the defendant"

and presumably was not in wider terms because the evidence showed, that while the respondent from time to time paid moneys into the firm's bank account he was not entitled to draw cheques upon it. He was in charge of sales, ordered goods at his discretion, and paid daily expenses, no doubt from the cash takings. It is clear from the outset that cash sales dockets or vouchers would be basic and necessary documents in any accounting on the lines claimed.

Great importance attaches to what took place at the time of the closing of the branch at the end of March, 1956. This was effected by Wadhumal Mulchand Kirparan who was at the time the manager of the appellants' Kisumu branch and who was sent to Eldoret for the purpose. His evidence was that he was in Eldoret in March-April and actually closed the shop on March 31, 1956. He would normally, he said, have removed all the books, but the respondent told him they were not ready as he was ill and could not prepare them. The only books he took were the customers' "outstanding" ledger and customers' invoice book–no cash vouchers. The respondent said he would prepare the books and take them to Nairobi. In cross-examination the witness admitted that the respondent was ill but said that he came to the shop though he did no work. (It appears from the evidence of one Bhanji Premji, a witness called by the respondent, that the house of the latter was at the back of the shop.) The witness also said in cross-examination that he threw away certain useless papers after showing them to the respondent. These papers were burnt, but they did not include any cash vouchers.

Upon this matter the respondent said in evidence that he was confined to bed when Wadhumal came. All his papers were lying on the table in the shop and he did not know what happened to them. As a result of what his wife (who was not called as a witness) told him he asked Wadhumal why he had torn the papers and received the reply–"I am the manager. I can do what I like". He complained to his employer upon the telephone but was told–"Let him do what he likes". The learned judge did not accept either that he had complained or that he had been consulted and agreed to the destruction of the documents.

The respondent attributed his falling behind in the accounts to illness of which there is some mention in letters from him dated June 28, 1955, September 1, 1955, and November 16, 1955. No mention was made in letters of his hand having been dislocated as he claimed in evidence.

The relevant events subsequent to the closing of the shop are summarised in the judgment of the learned trial judge as follows:

> "On April 13, 1956, the plaintiffs sent a registered letter to the defendant asking him to bring all books of account, together with all relevant correspondence and records to Nairobi as soon as possible: and this was followed up by a strong reminder on May 2, 1956. In a reply dated May 19, 1956, the defendant

acknowledges receipt of the registered letter but

> refers to his poor state of health, and goes on 'I am sure by next week I shall be able to send you the books for which please have every assurance from me'. Again in a letter of June 19, 1956, he says 'On the 13th or 14th I shall come to your side with all the books'. Nothing is said in those letters about the books no longer being in his possession and the plaintiffs say that this is evidence that at that time the defendant still had them in his possession. It is to be noted, however, that there is no indication in the letter what books are referred to and that the reference is to books and not to documents. The defendant came to Nairobi in July-August, 1957, bringing with him the daily cash reports for April, 1955, and certain other papers which are material then spent some twenty days sorting at the head office of the plaintiff firm during which he did some work upon the accounts and it is alleged that at this time the defendant led the plaintiff to believe that he would be able to complete the accounts in a matter of a week or two. However, the defendant ceased to attend at the office without having produced anything material and on September 13, 1957, the plaintiffs' advocates wrote a final letter of demand warning the defendant that unless he produced full and proper accounts within a specified time, proceedings would be taken against him. No reply was received to this letter, and the plaintiffs point out that at no time prior to the delivery of the defence was any statement made by the defendant denying the possession of the relevant documents."

The following passage is also relevant:

> "The defendant admits that on May 19, 1956, he wrote saying 'I am sure by next week I shall be able to send you the books' but explains this by saying that at that date he was still sick and had not checked what papers he had and what had been taken away by Wadhumal; he was referring to the books which he had with him and later brought to Nairobi. His explanation of his failure to reply to the solicitor's letter of September 13, 1957, is merely that he could not afford an advocate."

The respondent also said that he was unable to write up the books in Nairobi because certain of the papers were missing.

The approach of the learned trial judge to the problem presented by this evidence does not appear from his judgment to have been entirely correct. The following passage contains his final conclusion in which he apparently treats the claim for accounts in para. (*a*) (i) of the claim as two separate claims:

> "As it has not been established that the defendant has the relevant voucher in his possession, the third claim fails and as in the absence of the vouchers it appears to be impossible for the defendant to give a true account of the matters referred to in the first two claims, it follows that I must apply the maxim 'Lex non cogit ad impossibilia' and dismiss the first two claims also."

There are two matters arising out of this passage. The first is that the learned judge treats the absence of the relevant vouchers from the respondent's possession from whatever cause as a defence to the claim for an account. This is not necessarily so, for the mere inability of a party liable to account to produce relevant vouchers does not relieve him of responsibility–it would be strange if it were so. On the other hand if he is prevented from completing and presenting accounts by the absence of vouchers, and that absence has been occasioned by the wilful removal and suppression or the destruction thereof by the other party or his agent, then that party could not be heard to ask for an order, compliance with which he had by his own act rendered impossible. This much was not disputed by counsel for the appellants.

The second matter is that of the onus of proof. The passage, read alone, indicates that the learned judge considered that the onus of proving that the respondent was in possession of the vouchers was upon the appellants. That such was his view is also clear from an earlier passage of the judgment:

> "The evidence of the defendant as to the events that occurred at the time of Wadhumal's visit, while I am unable to accept it in its entirety, nevertheless leaves a doubt in my mind as to whether the defendant did retain the vouchers or whether they were accidentally or otherwise lost or destroyed during the closing down of the shop: and I find no convincing evidence to show that the defendant had them in his possession at any later date. That being so, the plaintiffs have failed to discharge the onus which in my view lies upon them if they are to succeed in this claim."

Upon the broad aspect of the case this was an incorrect approach. It lay upon the appellants to prove that the respondent was a party liable, by reason of their contractual relationship, to account. This burden they discharged, as the learned judge found, and before this court there was no dispute about the matter. The onus then shifted to the respondent to show, if he could, that he was released from his liability by reason of certain actions of the appellants' agent. This general burden lay upon the respondent and the short issue before the learned judge was whether on the balance of probability the respondent had shown that he was prevented from accounting by the acts of the appellants or their agent. I have referred to the "general burden" as of course the onus of proof in the sense of the burden of adducing evidence may change during a trial. As it is put in Phipson on Evidence (9th Edn.) at p. 34, it

> "may shift constantly, according as one scale of evidence or the other preponderates".

Also–

> ". . . it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgment if no further evidence were adduced".

Whether in the opinion of the learned judge there had been any change of this nature was a matter for him, but he did not so express himself and the general onus lay as I have stated above.

As I indicated earlier the cash sales vouchers would be essential documents in any accounting of the business of a shop. If these were removed by Wadhumal they have obviously been suppressed. If so, and also if Wadhumal destroyed them deliberately or accidentally the respondent would be relieved. This was a matter which it was essential for the learned trial judge to decide as fact, on the probabilities and with a proper direction to himself on the matter of the onus of proof. He has not done so and as the question rests almost entirely upon credibility, this court is not in a position to supply the deficiency. It would seem therefore that the only proper course is to order a new trial of the particular issue, which, on the evidence, can be kept within narrow limits.

I consider that the appeal should be allowed with costs and the judgment and decree in the court below be set aside; that there should be a direction for a new trial of the action before the same or another learned judge limited to the issue

> "whether at or about the time of the closing of the appellants' shop in Eldoret, Wadhumal Mulchand Kirparan removed or destroyed or caused to be removed or destroyed the cash sales vouchers";

that judgment in the action should be given in favour of the party successful on the issue; and that costs of the first and subsequent hearings should be in

the discretion of the learned judge who conducts the new trial. It would of course be open to the parties if they so desired to agree to rely upon the evidence already given.

It should be added that at the hearing of the appeal counsel for the appellants did not press for any order in relation to para. (*a*) (ii) of the claim; if an account is finally ordered this is a matter which could be postponed to await its outcome.

Sir Kenneth O'Connor P: I agree.

Briggs V-P: I agree.

Appeal allowed. Order for a new trial limited to the issue whether the cash sales vouchers had been removed or destroyed by W.

For the appellants:
B O'Donovan and *JK Winayak*
Johar & Winayak, Nairobi

For the respondent:
JM Nazareth QC and *OP Nagpal*
OP Nagpal, Nairobi

Rajani v R
[1958] 1 EA 646 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	6 October 1958
Case Number:	241/1958
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Criminal law – Obtaining credit by fraud – Goods ordered on credit – No intention to pay for goods – Whether credit obtained by fraud – Penal Code, s. 292 (1) (*U.*).

Editor's Summary

The appellant who resided in Mwanza ordered some bicycle parts from a company at Kampala by a letter headed "Kalyanji Jiwan Co.", and the signature to the letter read "Bhagwanji, Kalyanji Jiwan Co.". Before the goods were despatched the appellant agreed to pay the company by two promissory notes payable after sixty and ninety days respectively. The goods were despatched to the appellant with the two promissory notes for his signature, which he did not return. The appellant later gave another set of

promissory notes to the company which were dishonoured. There was evidence that a person named Kalyanji Jiwan was trading in Mwanza under his own name and dealt in cycle parts. The appellant was charged and convicted of obtaining credit by fraud contrary to s. 292 (1) of the Penal Code. In his judgment the magistrate found that at the time of ordering the goods the appellant had no intention of subsequently paying for them. On appeal it was argued *inter alia* that mere intention not to pay does not amount to obtaining credit by fraud.

Held – when the appellant accepted the credit terms offered by the Kampala company for the goods he had ordered, having no intention of paying for them and concealing that intention, he had obtained credit by fraud.

Appeal dismissed. Sentence reduced.

Case referred to in judgment:

(1) *R. v. Jones*, [1898] 1 Q.B. 119.

(2) *R. v. Thompson*, 5 Cr. App. R. 9.

Judgment

Sir Audley McKisack CJ: The appellant was convicted of obtaining credit by fraud, contra s. 292 (1) of the Penal Code, and was sentenced to two years' imprisonment.

The learned trial magistrate found that the appellant had ordered some bicycle parts from a company called The Kampala Cycle Trading Co., Ltd. (to which I shall refer as the Kampala company), that he obtained credit in respect of this transaction, and that the credit was obtained by fraud in that he never had any intention of paying for the goods. In February, 1957, the appellant, who lived at Mwanza, caused a letter (exhibit A) to be sent to the company aforementioned in which the heading and address of the letter were as follows:

"Kalyanji Jiwan Co.,

Box 662,

Mwanza."

The signature to the letter was:

"Bhagwanji,

Kalyanji Jiwan Co."

These were written in the Gujerati language, but there is no dispute as to the accuracy of the translation. The contents of the letter (also in Gujerati) read as follows:

> "We have received your price list and noted the prices. We shall place orders if before placing orders terms can be settled with you.
>
> "First of all you should inquire from any trader in Mwanza what the firm of Kalyanji Jiwan is like. Only if you get a good report can we proceed further. We want about five to seven thousand worth of bicycle spares on a sixty days promissory note. Alternatively, we may send you an order of Shs. 10,000/- of which you should supply us goods worth Shs. 5,000/- against cash and for the balance of Shs. 5,000/- we would give two promissory notes at sixty and ninety days.
>
> "Please let us know if you agree, and we shall then send you an order. We do not want bicycles. Bicycles can be sold during season but not now. At present there is market for spare parts. Amongst the bicycle dealers of Mwanza, Karmali Juma, Jayanti Cycle Mart, Handa Stores and Cosmopolitan Stores know us. You may obtain references from any trader in Mwanza whom you know; we shall do business if you get a good report.
>
> "Please reply."

According to a statement (exhibit F) made to the police by the appellant he had, at some unspecified date before sending this letter, registered the name "Kalyanji Jiwan and Company" with the Registrar-General, Dar-es-Salaam. There was evidence that an individual named Kalyanji Jiwan was trading in Mwanza under his own name and dealt in cycle parts. The manager of the Kampala company (P. 3) testified that he knew of this person and that "he had quite a good reputation". The appellant's name has, of course, no resemblance to that of Kalyanji Jiwan. The manager of the Kampala company made inquiries about Kalyanji Jiwan from one trader in Mwanza by telephone, and thereafter wrote (exhibit B) as follows:

> "Messrs. Kalyanji Jiwan
>
> P.O. Box 662,

MWANZA.

We are in receipt of your letter dated 22.2.57. Thank you.

You will be placing an order to the value of Shs. Ten Thousand; thanks for that.

Shall we keep the terms of payment as immediate or on sixty and

> ninety days' promissory notes. And arrange new terms then for future (dealings). So sent whatever you have by return post. Please note that our prices as on the special price list are valid up to the 10th of March only. Thereafter the usual prices will be charged. That is all for the present.
>
> Sgd. UMAKANT
>
> K.C.T. CO. LTD."

(The original of the above was written in Gujerati and this translation is not disputed.)

An order in the name of "Kalyanji Jiwan Co." (exhibit C) was then sent ordering cycle parts, and asking for a sixty and a ninety days' promissory note of equal amounts to be sent in respect of the purchase price. The goods were despatched accordingly, and the promissory notes, with an invoice dated March 6, 1957, were sent by post to the address given in exhibit A. The goods were received by the appellant. He did not, however, return the signed promissory notes–or, at any rate, none was received by the Kampala company–and, after receiving certain information from another trader in Mwanza the manager of the Kampala company went to Mwanza in April and there located the appellant and taxed him with ordering the goods under a false name. The appellant's reply to this was that the manager should go and inquire of the Registrar of Companies, and that he (the appellant) was in fact the proprietor of the firm. He said he had already resold the bicycle parts (which was true–he had sold them all a few days after receiving them). When asked about the promissory notes he said he had already signed and posted them. But when the manager said they had not been received, the appellant signed a new set. The notes were dishonoured, and the Kampala company has never received any payment for the cycle parts. These and other material facts are to be found in the following passage in the judgment in which the learned magistrate gives the reasons for his conclusion that, when the appellant obtained credit for these goods, he never had any intention of paying for them:

> "The promissory notes have not been honoured and not 1/- of this large debt has ever been paid or even offered: nor has the accused at any time sought to excuse or explain his failure to pay. I regard this as of considerable significance. Equally significant is the fact that he re-sold this valuable consignment within a few days of receiving it at a price virtually the same as what it was costing him. In the absence of any explanation it is a reasonable presumption that he was paying off past debts and not just meeting some present "cash" transaction. He owns no shop or go-down and apparently conducts his business, such as it may be, from his house. When visited in April by Mr. Haribhai he had already been paid 2,500/- in cash and received cheques to the value of 4,000/-, two of which he had endorsed over to other persons and the third he had paid into his own account. And yet he told Mr. Haribhai that he would pay the Kampala Cycle Trading Co. Ltd. when he himself was paid. The fourth cheque, for 2,500/- was not due to be met until May. It may have already been endorsed over to M.S. Shah or it may have been still in the accused's possession. Whichever way one looks at it he was lying to Mr. Haribhai not only in respect of this cheque but in respect of the other cheques and the cash received by him. On the evidence before me, and I am not concerned with the name under which he obtained them, I can come to no other conclusion than that the accused at the time he obtained these goods had no intention of subsequently paying for them. In this he acted fraudulently."

It will be seen that the magistrate, in coming to this conclusion, appears to have excluded from his mind the use of the name "Kalyanji Jiwan Co.", under

which the goods were ordered and obtained. I think, however, that the magistrate ought to have taken this part of the transaction, and in particular the misleading letter, exhibit A, into account when considering the question of fraudulent intent. It certainly appears to me that those were circumstances indicative of such an intent. The magistrate may, however, have felt he was restricted by his decision on two other counts on which the appellant had been acquitted. The first of those was one of obtaining the cycle parts by false pretences, the false pretence being that he was associated in business with Kalyanji Jiwan, was acting on his behalf and was authorised to pledge his credit. The other count was that of obtaining the goods by a fraudulent trick, the trick being that of sending a letter in the name of Kalyanji Jiwan & Co. The magistrate may well have been right in finding that those two charges had not been sufficiently established, but this should not have debarred him from taking into account the letter in question (exhibit A) which, to my mind, was a factor which could properly be regarded as indicating a fraudulent intent, that is to say, the intention to obtain on credit goods for which he had no intention of paying.

I am satisfied that the magistrate's conclusion on the facts was right. Reliance was placed by Mr. Wilkinson on the offer in the letter of February 22, 1957 (exhibit A), to make part payment in cash, and on the fact that the Kampala company did not ask for cash but said they would accept promissory notes. But this "offer" was made before any goods were ordered and did not in any way bind the person making it. It may well have been, as Crown counsel termed it, mere "bait".

It has been further argued that the mere intention not to pay does not amount to obtaining credit by fraud. That proposition, however, does not appear consistent with the authorities. While I agree with Mr. Wilkinson that the instant case is distinguishable from *R. v. Jones* (1), [1898] 1 Q.B. 119 (in which the prisoner ordered a meal in a restaurant having no money to pay for it), there still remains the concise but unambiguous statement in *R. v. Thompson* (2), 5 Cr. App. R. 9, that:

> "The cases establish this–that if a man never had any intention to pay, that is fraud other than false pretences."

This means, of course, an intention which is not revealed when the credit is obtained. Such conduct is clearly dishonest. When the appellant accepted the credit terms offered by the Kampala company for the goods when he ordered them, having no intention of paying for them and, of course, concealing that intention since credit would not otherwise have been given, the appellant's conduct, to my mind, did amount to obtaining credit by fraud. That is the crux of the matter, and the appeal against conviction must therefore be dismissed.

As regards sentence, the term of two years' imprisonment is the maximum prescribed for this offence. The appellant is a first offender. I do not think this was a case for the maximum penalty. I reduce the sentence to one year's imprisonment.

Appeal dismissed. Sentence reduced.

For the appellant:
PJ Wilkinson
PJ Wilkinson, Kampala

For the respondent:
AM McMullin (Crown Counsel, Uganda)
The Attorney-General, Uganda

Teck Huat & Co Ltd v Merali Dewji & Sons (Kenya) Ltd
[1958] 1 EA 650 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	27 October 1958
Case Number:	14/1958
Before:	Briggs V-P, Gould JA and Pelly Murphy J
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Mayers, J

[1] Arbitration – Award – Remission – Error of law on face of award – Remission to arbitrator for reconsideration – Further award filed containing same error – Whether court should remit again and consider affidavit referred to in award – Civil Procedure (*Revised*) *Rules,* 1948, *O. XLV, r.* 14 (*K.*).

Editor's Summary

In 1953 the appellants sued the respondents for damages in respect of two consignments of coffee beans sold to the appellants by the respondents. The appellants alleged that the contract called for Bukoba Native f.a.q. coffee beans, and the beans delivered were inferior to this description. In November, 1954, all matters in dispute were referred to an arbitrator, who duly filed his award, in which he said he could not determinate the quality of the coffee. The appellants then applied to have it remitted to the arbitrator on the ground that there were errors in law on the face of it. This application was supported by an affidavit, to which was exhibited another affidavit referred to in the award. By consent an order for remission was made, directing the arbitrator to make a specific finding as to the quality of the coffee. When a further award was filed, the appellants made a similar application, on the ground that the further award contained the same manifest errors in law as in the original award. This application was dismissed. On appeal, counsel for the respondents objected for the first time to the affidavit mentioned in the award being admitted, although counsel for both parties had referred to it on the original application for remission.

Held –

(i) since the Supreme Court had acted and by consent made an order upon the basis that the exhibited affidavit could be looked at, it was too late to take the objection on appeal.

(ii) in any event, since the Court of Appeal was called upon to exercise a discretion, and was, therefore, entitled to consider the whole of the circumstances, it was proper to look at the exhibited affidavit for that purpose. *Kiril Mischeff Ltd. v. Constant Smith & Co.*, [1950] 2 K.B. 616; [1950] 1 All E.R. 890, approved.

(iii) there were errors of law apparent on the face of the award, which, by reason of the arbitrator's failure to comply with the requirements of the consent order, persisted in the further award.

Appeal allowed. Order that the matter be reconsidered by the arbitrator in the light of the criticisms of the award and further award contained in the appellate judgment, with a view to making a finding on the evidence whether the standard of the coffee beans was Bukoba Native Robusta f.a.q.

Case referred to in judgment:

(1) *Absalom Ltd. v. Great Western* (*London*) *Garden Village Society Ltd.*, [1933] A.C. 592; [1933] All E.R. Rep. 616.

(2) *Kiril Mischeff Ltd. v. Constant Smith & Co*., [1950] 2 K.B. 616; [1950] 1 All E.R. 890.

(3) *Champsey Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co., Ltd*., [1923] A.C. 480.

(4) *Hodgkinson v. Fernie* (1857), 3 C.B. (N.S.) 189.

October 27. The following judgments were read by direction of the court:

Judgment

Gould JA: This is an appeal from an order of a judge of the Supreme Court of Kenya dated November 21, 1957, dismissing an application that a further award made by an arbitrator appointed under the provisions of O. XLV of the Civil Procedure (Revised) Rules, 1948, be remitted to him for reconsideration. The history of the matter, so far as it is relevant, may be shortly stated. In the year 1953 the appellant company commenced an action against the respondent company for damages in respect of two consignments of coffee beans, totalling 40 tons, which had been sold by the latter to the former and delivered at Singapore. The contract, according to the pleadings, called for Bukoba Native f.a.q. coffee beans and it was alleged by the appellant company that the beans delivered were inferior to the requirements of that description.

On November 17, 1954, all matters in dispute between the parties were referred by consent to the arbitration of Mr. J. A. R. Jenkinson but it was not until March 13, 1957, that an award was filed. It is in the following terms:

"ARBITRATOR'S AWARD.

"1. There is no evidence that the plaintiff took adequate steps to ensure that the defendant was advised in time to enable him to have a representative available when the sampling of the coffees was carried out.

"2. According to the affidavit of Mr. Macdougal proper and careful samplings of the coffees were carried out after the goods were removed from the port area. Furthermore, this sampling was not carried out at the time of removal but only on the following day. This, in my opinion, is most irregular, and is sufficient reason on its own for dismissing the claim.

"3. The coffees were sold on description, as Bukoba Native Robusta f.a.q. coffees. Such coffees are sold by the producers in East Africa on the same description, in accordance with a Government grading schedule which stipulates that the coffees should not contain more than ten per cent. defectives, i.e. damaged, broken, discoloured beans. There is no evidence that at the time of delivery these coffees did in fact contain more than the permitted ten per cent. defectives, and the qualities have only been described as either 'A', 'B' or 'C'.

"4. The samples produced cannot be considered suitable for two reasons: (*a*) they are too old to be of any value to accurately determine the quality; (*b*) they were not taken in the correct manner. See para. 2 above.

"5. In the light of the foregoing I find that the plaintiff's case is insufficiently substantiated and I find in favour of the defendant.

(Signed) J. A. R. Jenkinson,

Sole Arbitrator.

March 12, 1957."

It will be observed that the word "Robusta", which does not appear in the description of the coffee in the pleadings, is used in the award. Nothing, however, turns on this as the further award hereinafter mentioned includes a finding that the coffee was of "Robusta" type.

The appellant company applied to the court to have the award remitted to the arbitrator for consideration on the ground that there were errors in law apparent upon the face of it. and on April 12,

1957, an order was made by consent as follows:

"ORDER BY CONSENT.

"Award to be remitted to arbitrator with a direction that he arrive at a specific finding whether or not there is a preponderance of probability that the samples examined by Mr. Macdougal are of the standard known as Bukoba Robusta f.a.q. Amended award to be filed on or before April 12, 1957.

"Costs of application to be costs in cause."

It is to be observed that this order by its wording implies that the onus of proof is on the respondent which is not the case; it is upon the appellant who accepted the coffee and relies upon a breach of warranty. On April 29, 1957, the arbitrator sent to the court an amended award in the following terms:

"ARBITRATOR'S AWARD.

"1. There is no evidence that the plaintiff took adequate steps to ensure that the defendant was advised in time to enable him to have a representative available when the sampling of the coffees was carried out.

"2. According to the affidavit of Mr. Macdougal, proper sampling of the coffees were carried out after the goods were removed from the port area. Furthermore this sampling was not carried out at the time of the removal of the coffees, but only on the following day. This, in my opinion, is most irregular, and is sufficient reason on its own for dismissing the claim.

"3. The coffees were sold on description, as Bukoba Native Robusta f.a.q. Such coffees are sold by the producers in East Africa on the same description and in accordance with a Government grading schedule which stipulates that the coffees should not contain more than ten per cent. defectives, i.e. damaged, broken, and discoloured beans. There is no evidence that at the time of delivery these coffees did in fact contain more than the permitted ten per cent. defectives, and the qualities have only been mentioned as either 'A', 'B' or 'C'.

"4. The samples produced cannot be considered suitable for two reasons: (*a*) they are too old to accurately determine the quality; (*b*) they were not drawn in the correct manner. (See para. 2.)

"5. From the samples examined it is not possible to be specific as to the quality being Bukoba Native Robusta f.a.q. for reason already given in the previous paragraphs. It is, however, possible to state that the coffees are of 'Robusta' type.

"6. In the light of the foregoing I find that the plaintiff's case is insufficiently substantiated, and I find with costs in favour of the defendant.

(Sgd.) J. A. R. Jenkinson,

Sole Arbitrator."

This award was forwarded under cover of the following letter, at which, inasmuch as it to some extent augments one aspect of the award which it accompanied, the court is entitled to look:

"P.O. Box 3092,

Ralli House,

Prince Charles Street,

Mombasa, Kenya.

April 29, 1957.

The Ag. Deputy Registrar,

H.M. Supreme Court of Kenya,

Mombasa.

Dear Sir,

re Supreme Court Civil Case No. 169 of 1953–

Teck Huat & Co. Ltd. *v.* Merali Dewji & Sons (Kenya) Ltd.

I have for acknowledgment receipt of your letter dated 20th instant and I return herewith an amended copy of my award for filing. Please acknowledge receipt.

I hope the additional opinion given meets your requirements. I regret I cannot give a specific opinion as to whether or not the coffees, samples of which were submitted, are of the then current Bukoba Robusta f.a.q. quality. The samples are too old to give any indication one way or the other.

Yours faithfully,

(Sgd.) J. A. R. Jenkinson.

c.c. Atkinson, Cleasby & Co.

Satchu & Satchu."

The appellant company, being dissatisfied with the award as amended applied to have it remitted once more to the arbitrator and it is from the dismissal of this application that the present appeal is brought.

There is no doubt that in para. 1 and para. 2 of the award (repeated in the further award) there are, in the language of r. 14 (*c*) of O. XLV of the Civil Procedure (Revised) Rules, 1948, objections to the legality of the award, apparent on the face of it. In so far as para. I purports to be a reason for a finding against the appellant company it is defective, and the allegation in para. 2 that the fact that sampling took place outside the port area, and the day following removal, was sufficient reason for dismissing the claim is manifestly an error in law. As the learned judge in the court below indicated, it might have been open to the arbitrator to consider these matters in relation to the weight to be attached to the affidavit by Mr. Macdougal, but they have not been put forward on this basis and are otherwise irrelevant.

If the affidavit of Mr. Macdougal referred to in para. 2 of the award may be looked at as incorporated therein by reference, a further objection becomes manifest. Whether the affidavit ought properly to be regarded as so incorporated, is a matter upon which I entertain grave doubt. The court was referred to the case of *Absalom Limited v. Great Western* (*London*) *Garden Village Society, Ltd*. (1), [1933] A.C. 592, in which it was held that clauses in a contract referred to in an award were deemed to be incorporated therein. In *Kiril Mischeff Ltd. v. Constant Smith & Co*. (2), [1950] 2 K.B. 616, the whole contract under which reference had been made was looked at without objection. We were referred also to *Champsey Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co. Ltd*. (3), [1923] A.C. 480, approving at p. 486 a passage from *Hodgkinson v. Fernie* (4) (1857), 3 C.B. (N.S.) 189, in which reference is made to a question of law which

> "necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award".

None of these authorities go so far as to say that because a portion of the contents of an affidavit is mentioned in the award the whole of the contents may be looked at, and, as indicated above, I should regard it as a matter of considerable doubt.

I do not, however, need to express any concluded opinion upon this matter as I take the view that for

two reasons it is proper in the particular circumstances

to have regard to the contents of the affidavit in question. The first arises from the course of conduct of the case by the parties or their representatives. Objection has been taken to the admissibility of the affidavit for the first time before this court. When application was made to have the original award remitted the affidavit in support exhibited a copy of the affidavit of Mr. Macdougal. When counsel appeared on the application not only was no objection made to this exhibit but both counsel referred directly or indirectly to the evidence of Mr. Macdougal. The result was that the court, in whose discretion the making of the order lay, made by consent of the parties, an order based at least in part upon knowledge of the contents of Mr. Macdougal's affidavit. Similarly, in the proceedings in the court below from the determination of which this appeal has been brought, no point was taken that the affidavit in question should not be regarded as incorporated. As the matter appears to me, therefore, the court has already acted and by consent of the parties made an order upon the basis that the affidavit could be looked at, and it is too late now for the respondent company to argue the contrary.

In the second place it would appear proper for this court to have regard to the affidavit for another purpose. As has been indicated there are objections apparent on the face of the award without the necessity of looking at incorporated documents. The court is therefore called upon to exercise a discretion as to what steps (if any) it is appropriate to take and for that purpose is entitled to consider the whole of the circumstances of the case. In *Kiril Mischeff Ltd. v. Constant Smith & Co*. (2) it was put thus at p. 622:

> "Although I have held that I am not entitled to look at the affidavit or correspondence to supplement the award, I think that I can and should do so in order to determine how to exercise my discretion and in what way it should be exercised. In *Odlum v. City of Vancouver* Lord Dunedin, giving the opinion of the Privy Council, said: 'There remains the question of whether it' [the award] 'should be set aside or remitted for reconsideration. This seems to their lordships a question for discretion for the judges in the whole circumstances of the case, and unless that discretion has been obviously misused they do not feel inclined to interfere with it.' "

It is not necessary to set out the whole of the affidavit in question. It gives details of the deponent's qualifications and of the inspection and sampling of the coffee when it arrived at Singapore. Paragraphs 11 to 17 are as follows:

> "11. At 0800 hours of 17th June, 1952, I attended at the Singapore Harbour Board godown No. 40 where the total of 40 tons of coffee packed into 680 bags as aforesaid was available for inspection: samples were drawn from various bags selected at random, these samples being taken as representative of the balance. In my opinion these samples were as follows:
>
> "The qualities differed considerably, none, in my opinion coming up to 'Bukoba Native f.a.q.'.
>
> "12. The Singapore Harbour authorities do not allow detailed sampling in the Harbour Board area and the consignee was advised to take delivery in order that samples could be drawn when delivery was complete: the bags except the 18 bags referred to below were removed from the harbour area on the 18th June, 1952.
>
> "13. Bags containing similar qualities were stacked together: these stacks are referred to as A, B and C stacks according to the difference in quality: these differences in quality were ascertained by comparison with coffee up to the required standards.
>
> "14. Eighteen bags remained in the Harbour Board godown for ships survey and the quality of the contents of these bags was noted.

> "15. At 0930 hours on 19th June, 1952, I attended at 9 Hamilton Road and examined two stacks of coffee representing respectively 104 out of the said 680 bags and respectively 57 out of the said 680 bags making a total of 161 bags: samples were drawn from 11 bags and 6 bags respectively: selected at random as representative of the balance: these samples were put back and split into three portions sealed with the seal of Langdon & Every with a device 'L. & E.'.
>
> "16. The said stack containing 104 bags was deemed quality A and the second stack comprising 57 bags was deemed quality C.
>
> "17. I attended at 41 Robertson Quay at 1015 hours on the 19th June, 1952, and there saw respectively 154 bags of the said 680 bags, 142 bags of the said 680 bags and 205 bags of the said 680 bags. The said 154 bags were of quality A, the said 142 bags were of quality B and the said 205 bags were of quality C. Again samples were drawn respectively from 16, 14 and 21 bags and treated as mentioned before with respect to the consignments stacked at 9 Hamilton Street."

In the light of this evidence it would appear that the last sentence in para. 3 of the further award is a misdirection of himself by the arbitrator unless he had evidence or reason to believe that the rule concerning the permitted ten per cent. defectives was unknown to Mr. Macdougal and that the coffee used for comparison purposes mentioned in para. 13 of Mr. Macdougal's affidavit was for some reason not to be relied upon. The same sentence in para. 3 of the award also implies that if the coffee did not in fact contain more than ten per cent. defectives it was therefore not below f.a.q. This appears to be a non sequitur for it is surely possible for inferiority in quality to arise from other causes and conditions than the presence of damaged, broken or discoloured beans. The evaluation of the weight to be attached to this affidavit is entirely a matter for the arbitrator; if he had reason to find it insufficient evidence to establish on the balance of probabilities that the beans were below the specified quality it was quite open to him to do so, but to say that there was no evidence at all that such was the case (for that is what para. 3 is obviously intended to mean) is a mistake in law.

It is apparent that the arbitrator did not comply with the requirements of the consent order made on the 27th March, 1957. That directed a finding on the probabilities and implied recourse to all the evidence, though it referred specifically to the samples examined by Mr. Macdougal. It may be that the arbitrator did not understand fully what was required, for he appears to have based his amendments upon examination of samples in his own possession and upon nothing else. Furthermore, it is likely that he had no knowledge of the basis upon which the order remitting the award was made as this was done by consent and no written reasons were therefore given; he was consequently without the benefit of guidance as to the correct view of what he expressed in para. 1, para 2 and para 3 of the award. This is apparent for in para. 5 of the further award he refers again to the "reason already given in the previous paragraphs".

The learned judge in the court below took the view that the finding of the arbitrator that there was no evidence that defective beans exceeded ten per cent. was sufficient to warrant his decision that the appellant company had not established its case. In my view the finding of the arbitrator to this effect was an error in law, and furthermore, as appears from the letter accompanying the further award, it was arrived at by examination of part of the evidence only. For this reason, although the matter was one for the judicial discretion of the learned judge it appears clear that he erred in coming to the conclusion expressed in his judgment.

It remains now to determine what order should, in the circumstances, be made in the exercise of the discretion vested in this court. By the further award the arbitrator indicated that the samples examined by him were inconclusive; in his own words "The samples are too old to give any indication one way or the other". The samples were not, however, the only evidence before the arbitrator–there was at least the affidavit of Mr. Macdougal and there may of course be other evidence of which this court is not aware. Having taken the view of the value of the samples expressed above it was the duty of the arbitrator to arrive at a conclusion upon the remaining evidence whether as a matter of probability the appellant company had discharged the onus of showing that the coffee was below the required quality. In the circumstances it appears to be most in accordance with convenience and to provide the best possibility of ending this prolonged litigation if the matter be remitted once again to the arbitrator for reconsideration in the light of the criticism of the award and further award expressed above.

The order which I would consider proper is that this appeal be allowed with costs here and in the court below and that the further award be remitted to the arbitrator with the following direction:

> "That having regard to the views expressed in this judgment on the errors in law contained in the award and further award, and notwithstanding his expressed view of the lack of evidential value of the samples, he reconsider the matter in the light of the remainder of the evidence before him and arrive at a finding whether or not upon that evidence there is a preponderance of probability that the coffee in question was not of the standard known as Bukoba Native Robusta f.a.q.; and that he make such consequential findings as to costs and (if the question arises) damages, as he may think fit."

Briggs V-P: I have had the advantage of reading the judgment of the learned justice of appeal. I agree with it and cannot usefully add anything. An order will be made in the terms proposed.

Pelly Murphy J: I concur.

Appeal allowed.

For the appellants:
RP Cleasby
Atkinson, Cleasby & Co, Mombasa

For the respondents:
JEL Bryson and *CK Kanji*
Satchu & Satchu, Mombasa

Finaughty trading as Hi-Way Service and Engineering v Prinsloo
[1958] 1 EA 657 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	6 November 1958
Case Number:	58/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Gould JA

Sourced by: LawAfrica

Appeal from: H.M. Supreme Court of Kenya–Goudie, Ag. J

[1] Practice – Trial – Advocate representing plaintiff present without his client – Whether plaintiff "appears" if his advocate appears – Civil Procedure (*Revised*) *Rules,* 1948, *O. IX, r.* 11, *r.* 17 *and r.* 19 (*K.*).

Editor's Summary

The appellant sued the respondent, claiming Shs. 3,599/40 as the price of materials provided, goods sold and delivered and work and labour done. The respondent admitted part of the claim amounting to Shs. 1,459/72 and counterclaimed for Shs. 4,812/25 for expenses incurred in having work done by the appellant, which the respondent said was defective, put right. When the suit came on for hearing the appellant's advocate applied for an adjournment, stating that the appellant had become bankrupt, that the Official Receiver had instructed him to continue with the case, but that the appellant was away and could not attend until the following day. The judge refused an adjournment, and taking the view that the appellant had not appeared, entered judgment for the appellant for the amount admitted, dismissed the remainder of the appellant's claim by virtue of the provisions of O. IX, r. 19, and ruled that the counter-claim should proceed *ex parte* under the provisions of O. IX, r. 17. The appellant's advocate thereupon withdrew. The court heard evidence on the counterclaim and gave judgment thereon for the respondent. On appeal by leave.

Held – the appellant had appeared by his advocate and neither r. 17 nor r. 19 of O. IX applied, and the judge was in error in making the order.

Appeal allowed. Case remitted to the Supreme Court for hearing.

Case referred to in judgment:

(1) *Robinson v. Chadwick* (1878), 7 Ch. D. 878.

(2) *Din Mohamed v. Lalji Visram & Co.* (1937), 4 E.A.C.A. 1.

Judgment

Sir Kenneth O'Connor P: read the following judgment of the court: This was an appeal, with leave, from an order of the Supreme Court of Kenya purporting to have been made under O. IX, r. 19 of the Civil Procedure (Revised) Rules, 1948, dismissing the appellant's claim, except as to the portion (Shs. 1459/72) thereof admitted, and allowing the respondent to prove his claim *ex parte*, and from a consequential decree dated June 3, 1958, ordering the respondent to pay to the appellant Shs. 1459/72 and the appellant to pay to the respondent on the respondent's counterclaim Shs. 4812/25 with interest and costs. On October 31, 1958, we allowed the appeal with costs and set aside the order and the decree and ordered that the suit be listed for hearing by the Supreme Court and that the costs of the proceedings in the Supreme Court to date be reserved to the judge who hears the suit, with liberty to apply. We now give our reasons for this decision.

The history of the matter is, briefly, as follows:

On January 4, 1957, the appellant filed a plaint against the respondent in which he claimed Shs. 3,599/40 being the price of materials provided, goods sold and delivered and work and labour done at the respondent's request together with interest and costs. This was a claim for work and labour done and materials supplied by the appellant in repairing and supplying parts for the respondent's harvester and for expenses incidentally incurred.

On March 11, 1957, the respondent filed a defence and counterclaim in which he admitted items of the appellant's claim amounting to Shs. 1,459/72, but denied one item in the appellant's statement of account and pleaded further that the work charged for in certain of the appellant's invoices had been done so negligently and improperly that it was of no value, and that the respondent's harvester had been rendered unfit for use following delivery by the appellant; and the respondent counterclaimed for expenses incurred in having the alleged defective work of the appellant put right. The counterclaim amounted to Shs. 4812/25, which the respondent claimed together with costs and interest. In his reply, dated April 18, 1958, the appellant denied the respondent's allegations of negligence and bad workmanship and maintained his original claim.

On April 23, 1958, the suit came on for hearing before the Supreme Court. Mr. Bryan Todd appeared for the plaintiff (appellant) and Mr. Carson Gentles for the defendant (respondent). Mr. Todd applied for an adjournment stating that the appellant had become bankrupt. We have been informed that a receiving order but no adjudication order has been made. Mr. Todd stated to the learned judge that the Official Receiver had instructed him to continue with the case. This we understand to have been a general instruction and not merely an instruction to attend and apply for an adjournment. Mr. Todd explained to the judge that the case had been set down on March 27, 1958, and that he had written twice to the Official Receiver asking for the attendance of Mr. Finaughty who was now on his way from Dar-es-Salaam, but would not be able to arrive until the following day. Mr. Todd offered to pay the costs of the day in any event. Mr. Gentles, for the respondent, argued that O. IX, r. 19, of the Civil Procedure (Revised) Rules, 1948, applied and that the terms of that rule were mandatory. He pointed out that the hearing date had been fixed twenty-five days previously and the cause list had been sent out. He submitted also that O. IX, r. 17, applied in respect of the counterclaim and that the court might proceed on that *ex parte*. He contended that there was not sufficient evidence that the plaintiff was unable to appear.

In reply to this submission, Mr. Todd argued that the plaintiff had appeared through him and that it was open to the court to consider an adjournment; the creditors' interests were important and they would suffer if the suit were dismissed.

The learned judge made a ruling, an extract from which is as follows:

> "The plaintiff's advocate has argued vigorously that the plaintiff has appeared because he has appeared as his advocate. I do not for one moment believe that this is the intention of O. IX, r. 19, but that the intention is that if the plaintiff is not sufficiently interested to attend and prosecute his claim and the defendant is ready to go ahead then the court must dismiss the suit except in so far as it is admitted. Assuming, however, that I am incorrect in this reading of the relevant rule I would still not exercise any discretion I may have, and I do not consider I have this discretion, in favour of the plaintiff in all the circumstances. The plaintiff's agent, the Official Receiver, who has to give his consent before the plaintiff may continue the suit, has had ample notice and it was for him to notify

> the plaintiff and ensure his attendance. On both grounds therefore I do not allow any adjournment in this case.
>
> "Shs. 1,459/72 of the claim is admitted. There will be judgment for the plaintiff for Shs. 1,459/72 with costs on this amount upon the defendant's admission and the suit is dismissed so far as it relates to the remainder with costs on the part of claim dismissed to the defendant.
>
> "As regards the counterclaim by analogy with O. IX, r. 17, since the defendant stands in the position of a plaintiff on his counterclaim I do not consider that there is any evidence of non-service of the hearing notice or insufficient time accorded to the plaintiff or inability to appear to justify me in either directing a fresh hearing notice or postponing the hearing. The suit will proceed *ex parte* on the counterclaim."

When this ruling had been delivered, counsel for the plaintiff (the appellant) asked permission to withdraw, and withdrew. The defendant (respondent) and his son then gave evidence in support of the counterclaim and, as already mentioned, the learned judge gave judgment for the defendant for Shs. 4,812/25 on his counterclaim with the usual interest and costs. A decree was drawn up accordingly. It is against that judgment and decree that this appeal was brought.

At the outset, we called upon Mr. Carson Gentles, counsel for the respondent, to support the learned judge's decision that the appellant had not appeared by his advocate in the court below and we drew attention to O. IX, r. 11, which reads:

> "11. Where a day has been fixed in a summons for the defendant to appear and answer the claim, the parties shall be in attendance at the court house in person, or by their respective advocates or recognised agents and the suit shall then be heard . . ."

Mr. Gentles conceded that a defendant might appear by an advocate; but contended that such advocate must be "duly instructed". He referred to O. V, r. 1 (2) (*c*), and the form "Summons for Disposal of Suit" in Appendix A to the Civil Procedure (Revised) Rules, 1948. That form calls on the defendant to appear in court

> "in person or by an advocate duly instructed, and able to answer all material questions relating to the suit or who shall be accompanied by a person able to answer such questions".

These words appear to be taken from an Indian form which depends upon O. V, r. 1 (2) (*b*) and (*c*) of the Indian Civil Procedure Rules which permit a defendant to appear

> "by a pleader duly instructed and able to answer all material questions relating to the suit, or by a pleader accompanied by some person able to answer all such questions".

Kenya O. V, r. 1 (2) departs from this wording and omits any reference to the requirements of the Indian rule that the pleader must be able to answer all material questions relating to the suit or be accompanied by a person able to answer such questions. The Kenya rule merely permits a defendant to enter an appearance or appear in person, by a recognised agent or by an advocate duly instructed. Mr. Gentles contended that if a defendant must appear by an advocate duly instructed and able to answer all material questions relating to the suit, this must also apply to a plaintiff. In the first place, we did not think that we should read into r. 2 of O. V words which do not appear in it merely because they appear in a form in the Appendix, and, in the second place, we thought it would be unsafe to assume that because a form lays down certain requirements for a defendant, the same requirements must necessarily apply to a plaintiff. In any event, there was nothing to show that Mr. Todd, when the

plaintiff appeared by him was not duly instructed and able to answer all material questions relating to the suit. He was not prepared to give evidence in support of the plaintiff's claim; but that is not the function of an advocate. We were of opinion that an advocate is "duly instructed" within O. V, r. 2, when he is instructed generally to conduct the case on behalf of the party and is not merely instructed for the purpose of some interlocutory application, e.g. to attend and apply for an adjournment.

Mr. Gentles referred us to the note on p. 643 of Mulla's Commentary on the Indian Code of Civil Procedure (12th Edn.), where the learned author expresses an opinion that an appearance by a pleader does not, like an appearance by a party in person, mean mere presence in court; it means

> "appearance by a pleader 'duly instructed and able to answer all material questions relating to the suit' or by a pleader 'accompanied by some person able to answer all such questions' (O. V, r. 1); hence a party cannot be said to 'appear' by a pleader if the pleader appears at the hearing and says that although he has filed his warrant to act, he has not received any instructions from his client with regard to the case and is therefore unable to go on with the suit. Similarly a party cannot be said to 'appear' by a pleader if the pleader has no instructions other than to apply for an adjournment, and on the adjournment being refused, withdraws from the suit, stating that he had no further instructions to go on with the suit."

This passage depends upon provisions of the Indian rule which, as already pointed out, is not the same as the Kenya rule. In any event, the examples cited by Mulla do not represent the facts of the present case. In the present case, Mr. Todd appeared for the plaintiff and he had received general instructions to go on with the case; but he was unable to do so because the plaintiff was not present to give evidence. This is not at all the same as being unable to proceed because he had no instructions to do so. In our opinion, the appropriate action for the court then to take, if it did not wish to grant an adjournment, was not to say that the plaintiff had not appeared when manifestly he had by his advocate, but to call upon the plaintiff to prove the unadmitted part of his claim. Upon his failure to do so because the plaintiff was not present in person, the court could have dismissed the unadmitted portion of the claim and proceeded to call upon the defendant (as it did) to prove the counterclaim, but not *ex parte*. With respect, we think that the learned judge was in error in making an order under O. IX, r. 19 and r. 17 on the basis that the plaintiff had not appeared. We observe that in *Robinson v. Chadwick* (1) (1878), 7 Ch. D. 878, Fry, J., made a similar order under the corresponding English rule of procedure. On the other hand, in *Din Mohamed v. Lalji Visram & Co.* (2) (1937), 4 E.A.C.A. 1, where a defendant had appeared by an advocate who had been unable to proceed with the defence because of the absence of his client and had withdrawn, having been refused an adjournment, it was held that the case had not been heard *ex parte*. We are bound by that decision and, in any event, are not prepared to do violence to the plain words of O. V, r. 1 (2) (*c*) and O. IX, r. 11.

In our opinion, in the present case the plaintiff did appear by his advocate and r. 19 and r. 17 of O. IX had no application. Accordingly, we allowed the appeal with costs, and, as already mentioned, set aside the judgment and decree and made the further order stated above.

Appeal allowed. Case remitted to the Supreme Court for hearing.

For the appellant:
BRP Todd
Lawrence Long & Todd, Nakuru

For the respondent:

J Carson Gentles
J Carson Gentles, Nakuru

R v Bagonza s/o Andrea Kakukunyi
[1958] 1 EA 661 (HCU)

Division:	HM High Court for Uganda
Date of judgment:	23 October 1958
Case Number:	123/1958
Before:	Lyon J
Sourced by:	LawAfrica

[1] Criminal law – Trial – Murder – Two indictments – First indictment read in presence of persons summoned as assessors – Crown then elects to proceed on second indictment – Second indictment alleging another murder then read – Whether knowledge of persons summoned as assessors that accused charged with two murders likely to prejudice accused.

Editor's Summary

At the trial of the accused for alleged murder, there were two indictments. Before assessors were empanelled, but in the presence of those summoned as assessors, the trial judge read the first indictment. Crown counsel then interposed to state that he would proceed on the second indictment. The judge then read and explained the second indictment to the accused, who pleaded not guilty, and two assessors were then empanelled. Defence counsel then objected that since these assessors had heard the first indictment read, they would know throughout the trial that the accused had been charged with two murders. Crown counsel submitted that since he intended to enter a nolle prosequi on the first indictment, this could be explained to the assessors and the accused would not consequently be prejudiced in any way.

Held – justice must not only be done, but must be shown to be done, and accordingly it would be better to summon other assessors who knew nothing of the first indictment.

Case adjourned to enable fresh assessors to be summoned.

No cases referred to in judgment

Judgment

Lyon J: Mr. Pandit for this accused has applied that the hearing should not proceed with the two assessors who were empanelled. It is necessary then to set out the course of the proceedings so far. I read the first indictment, dated September 15. Mr. Kalubya then interposed and said: "I proceed on the second indictment". I thereupon read the second indictment, dated September 16. I explained it. The accused said he understood it and pleaded not guilty. Two assessors, Mr. Luyima and Mr. Tamale, were then

empanelled. Another four assessors were in attendance today; all of them were unfortunately also in court when the first indictment was read. I asked Mr. Luyima and Mr. Tamale to leave the court while arguments were heard. Mr. Pandit's submission may be summarised in this way: If these two assessors or, indeed, any of the six on this sessions list were retained, they would know throughout the trial that this accused had at one time been charged with two murders and not one.

Mr. Kalubya stated that he intends to enter a nolle prosequi on the first indictment and asserts that when that is explained to the two assessors they would not be prejudiced in any way. I am inclined to agree; but it has often been said that justice must not only be done, but must manifestly be shown to be done; and if there is any shade of doubt that the assessors might be prejudiced at the outset of a trial, then it is better to obtain other assessors who know nothing of the first indictment.

I have inquired whether it is possible to obtain such assessors today, but it is not possible.

For these reasons this case is adjourned until November 4, 1958.

Order accordingly.

For the Crown:
SK Kalubya (Crown Counsel, Uganda)
The Attorney-General, Uganda

For the accused:
SV Pandit
SV Pandit, Kampala

Zaveri and another v Durlabhji Govindji and another

[1958] 1 EA 662 (HCZ)

Division:	HM High Court for Zanzibar at Zanzibar
Date of judgment:	12 December 1958
Case Number:	9/1958
Before:	Windham, CJ
Sourced by:	LawAfrica

[1] Rent restriction – Death of tenant – Sons of tenant residing with her at her death – Agreement between sons as to who should be tenant – One son held out as tenant – Whether Rent Restriction Board must declare that son to be tenant – Rent Restriction Decree, 1955, *s.* 2 (1) (*Z.*).

Editor's Summary

Both appellants and the second respondent resided with their mother until her death in certain premises of which the deceased was statutory tenant and the first respondent was landlord. After the death, the first respondent applied to the Rent Restriction Board for possession of the premises and arrears of rent. In

this application the second respondent was treated by the board and acknowledged himself as the tenant. The board made an order granting the application, whereupon the second respondent appealed to the High Court, alleging for the first time, that his two brothers, the present appellants, ought to have been joined with him as co-tenants. This appeal was dismissed. The appellants then applied to the board for a declaration that they jointly, or alternatively the first appellant alone, were the tenants and not the second respondent. The application was dismissed, the board finding on the evidence that the three brothers had agreed among themselves upon their mother's death that the second respondent should become the tenant and should be treated as such. The appellants appealed again.

Held – by operation of the agreement between the two appellants and the second respondent on their mother's death that the latter should be the tenant, under which the second respondent was held out as being tenant, the matter was concluded and the second respondent became the tenant without the board declaring him so, and the board's dismissal of the application was correct.

Appeal dismissed.

No cases referred to in judgment

Judgment

Windham CJ: The two appellants and the second respondent are the sons of a deceased lady, Jenabai Esmailji, who at her death was statutory tenant of certain dwelling premises of which the first respondent was and is the landlord. After her death the first respondent made an application before the Rent Restriction Board against the second respondent, whom they treated as having now become the tenant and who acknowledged himself as the tenant, for an order for possession of the premises and for recovery of arrears of rent. The board granted this relief. The second respondent appealed to the High Court against their order, alleging for the first time that his two brothers, the present two appellants, ought to have been joined with him as co-tenants. The appeal was dismissed. The two appellants, who had not been parties to those proceedings, then applied to the board to declare that they jointly, or in the alternative the first appellant alone, were the tenants, and not the second respondent. The board, after hearing considerable evidence, gave a reasoned decision dismissing their application. From that decision this

appeal lies. In the appeal the second respondent has aligned himself with the appellants.

The board made certain findings of fact based on such of the evidence before them as they considered to be true, and having perused the record I would not interfere with those findings even if I had the power to do so, which in view of s. 11 (1) of the Rent Restriction Decree, 1955 (which precludes an appeal on questions of pure fact), I have not. Among them are two findings in particular. One is that while the first appellant was living in the premises with the deceased when she died, the second respondent was also living there when she died, though he was also living in other premises, with his wife, spending a day or two in the one then a day or two in the other. The other finding, based on abundant circumstantial evidence, is that the three brothers agreed among themselves upon their mother's death that the second respondent should become the tenant and should be treated as such.

In view of these findings of fact two points emerge. First, even if in the circumstances it was incumbent upon the board to decide at all who became the tenant on the deceased's death, as the appellants contend that it was, by reason of the definition of "tenant" in s. 2 (1) of the Decree, then it has been established that, for the purpose of that definition, not only the first appellant but also the second respondent was a member of the deceased's family "who was residing with her at the time of her death"; and the fact that the first appellant was residing there more continuously does not prevent the second respondent's more interrupted residence there from still being a "residing" for that purpose. Accordingly, even if it fell to the board to decide who was the "tenant" as so defined, then the board's declaration that the second respondent, and not either of the appellants, had become the tenant, was an exercise of discretion falling entirely within the framework of the definition in s. 2 (1), which provides that "tenant" shall include

> "such member of the" [deceased] "tenant's family so residing as may be decided upon by a board".

But the second point which emerges from the board's findings of fact, when coupled with what I agree with learned counsel for the first respondent to be the proper interpretation of the definition of "tenant", is that, since the three brothers had already agreed among themselves which of them was to be the tenant, the landlord (first respondent) was entitled to treat that person as the tenant without either side applying to the board at all to decide who the tenant was. In the corresponding definition of "tenant" in s. 12 (1) (*g*) of the English Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the words "in default of agreement" appear between the words "such member of the tenant's family so residing with him as may be decided" and the words "by the county court". But the absence of those words from the Zanzibar definition cannot in reason be held to imply that whenever a wifeless or woman tenant dies an application must be made to the board to decide who the tenant shall now be, even where there is no dispute at all on that point or where it has been agreed among the possible claimants for the tenancy who the tenant shall be. That would be absurd. Rather is it the case that the words "in default of agreement" must have been omitted because (like an implied term in a contract) they "go without saying".

I therefore hold that, by operation of the agreement between the two appellants and the second respondent on their mother's death that the latter should be the tenant, an agreement on the strength of which he was held out to the first respondent (the landlord) as the tenant, the matter was concluded and he became the tenant without the necessity of the board's so declaring him; and nothing in the second respondent's later change of attitude can alter the

position. The board's dismissal of the appellants' application that one or both of them be declared the statutory tenant or tenants to the exclusion of the second respondent was therefore correct, and this appeal must be dismissed. The appellants will pay the costs of the first respondent. There will be no order for the costs of the second respondent.

Appeal dismissed.

For the appellants:
DF Karai
DF Karai, Zanzibar

For the first respondent:
KS Talati
Wiggins & Stephens, Zanzibar

The second respondent in person.

SK and GK Vora trading as Shantilal K Vora & Co v The Commissioner of Customs and Excise

[1958] 1 EA 664 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	30 October 1958
Case Number:	15/1958
Before:	Law J
Sourced by:	LawAfrica

[1] Customs – Importation of prohibited goods – Whether Customs laws relative to the importation of prohibited goods being penal and taxing should be interpreted strictly or liberally – The East African Customs Management Act, 1952, *s.* 15 (1) *and the Second Schedule thereto.*

Editor's Summary

The appellants imported certain cigarette lighters, manufactured in Japan, bearing the word "Japan" in very small letters and the words "Fisker. Mark of Quality. CANADA" in larger letters. These lighters were seized by the Customs Authorities under s. 158 of the East African Customs Management Act, 1952, on the ground that the importation of such lighters was prohibited by s. 15 (1) and the Second Schedule of the Act. The appellants' suit against the respondent claiming the release of the lighters or Shs. 11,650/- was dismissed by the District Court, and on appeal against that decision it was submitted,

for the appellants, that the Act is both a penal and a taxing statute, and that its provisions relating to importation of prohibited goods must be strictly construed.

Held –

(i) those parts of the East African Customs Management Act, 1952, which deal with prohibited imports are clearly designed for the protection of the public and must, therefore, be construed liberally rather than literally.

(ii) the inscription of the words “Fisker. Mark of Quality. CANADA” on the lighters imparted a special character of British manufacture to them and accordingly they were prohibited imports within s. 15 (1) and the Second Schedule of the Act.

Appeal dismissed.

Case referred to:

(1) *Simpson v. Teignmouth and Shaldon Bridge Co*., [1903] 1 K.B. 405.

Judgment

Law J: This is an appeal by the plaintiffs in Civil Case No. 424 of 1958 in the District Court at Tanga against the dismissal of their suit against the Commissioner of Customs and Excise, the present respondent. The appellants in that suit claimed the release of 517 dozen cigarette lighters which had been seized on importation by the Customs authorities in Tanga, or Shs. 11,650/-, the value of the said lighters. The lighters were seized on January 14, 1958, the reason for their seizure being stated in the respondent's "Notice of Seizure" as follows:

> "that the said cigarette lighters bear the name CANADA and are there-fore prohibited imports according to s. 15 and the Second Schedule of the Act (meaning the East African Customs Management Act) and are therefore seized in accordance with s. 147 of the said Act".

The suit now under appeal was then instituted by the appellants under s. 161 (3) of the Act. The respondent's defence to the claim is clearly set out in para. 4 of his written statement of defence as follows:

> "The defendant states that the cigarette lighters, the goods in question in this case, were manufactured in Japan but bear the words 'MARK OF QUALITY CANADA' on their base, which words are calculated to impart to the said goods a special character of British manufacture, when they are not of such manufacture. The goods are therefore prohibited goods the importation of which is prohibited, and having been imported they are liable to forfeiture and seizure under the East African Customs Management Act. Their seizure by the servants of the defendant was accordingly proper and lawful."

Section 15 (1) of the Act reads as follows:

> "The goods specified in head A of any of the parts of the Second Schedule are prohibited goods and the importation thereof is prohibited."

By s. 147 of the Act, imported prohibited goods are liable to forfeiture, and by s. 158 may be seized whether or not a prosecution has been or will be taken.

Paragraph 4 of head A of the Second Schedule reads as follows:

> "4. Manufactured articles bearing the name, address, or trade mark, of any manufacturer or dealer, or the name of any place in the United Kingdom, or in any member country of the Commonwealth, calculated to impart to such articles a special character of British manufacture and which are not of such manufacture."

The grounds of appeal relied on in this appeal are:

(1) that the learned resident magistrate should have held that Canada is not the name of any place in any member country of the Commonwealth, and

(2) that he should have held that the words "Mark of quality Canada" on the base of the cigarette lighters were not calculated to impart to the said goods a special character of British manufacture when they are not of such manufacture.

It is not in dispute that the lighters are of Japanese manufacture, and that they bear the word "Japan" in very small letters on the side of the trigger. On the base of the lighters, in larger letters, appear the words "Fisker. Mark of Quality. CANADA".

In dealing with the matters covered by the second ground of appeal, the learned trial magistrate held that the inscription on the base of the lighters imparted a special character of British manufacture which

was false. I entirely agree with that finding and adopt the learned magistrate's reasoning which led

to it. There can be no doubt that an ordinary purchaser, reading the inscription on the base of the lighter, would be misled into believing that the country of manufacture was Canada, and that the inscription thereby imparted to the lighters a special character of British manufacture which was false. The only object of a Japanese manufacturer in putting the word "Canada" on his lighters can be to mislead purchasers as to the country of origin of lighters. The second ground of appeal therefore fails.

The first ground of appeal is more substantial, and depends on the construction, as part of a statute, of para. 4 of head A of the Second Schedule to the Act, which declares to be prohibited goods

> "manufactured articles bearing . . . the name of any place . . . in any member country of the Commonwealth . . . calculated to impart etc."

Mr. Master has strongly submitted, for the appellants, that the East African Customs Management Act is both a penal and a taxing statute, and that its provisions must be strictly construed, especially where as in this case they are clear and unambiguous. He concedes that Canada is a member country of the Commonwealth, but points out that para. 4 above does not apply to manufactured articles of foreign origin which bear the name of a member country of the Commonwealth, but only to such articles as bear the name of any place in any such country. The lighters, the subject of this appeal, bear the word "Canada" and not the name of any place in Canada, therefore, Mr. Master submits, they do not come within the provisions of para. 4. This ingenious argument was presented to the learned trial magistrate, who dealt with it in his judgment as follows:

> "I have now to consider whether the word 'Canada' falls within the scope of para. 4 of the Second Schedule. It is, of course, strictly true that Canada is a member country of the Commonwealth and not a place in a member country. But I think a strict interpretation like this would make nonsense of the Act. Canada is a place in the Commonwealth. The legislature was intending to prevent goods being passed off as having Commonwealth origin when they did not in fact do so. It would be nonsense to say a lighter labelled 'Ontario' or 'Quebec' was prohibited, but not one labelled 'Canada'. It is surely not usual for the towns of origin to be specified on goods, unless in conjunction with the manufacturer's address; it is not usually 'London', 'Paris' or 'Berlin' which is inscribed, but 'England', 'France' or 'Germany'. For these reasons I am of the opinion that the provisions of para. 4 apply to inscriptions which denote origin within the Commonwealth, and the name of a member country of the Commonwealth, being a place within the Commonwealth, must surely denote such origin.
>
> "In my view, therefore, the provisions do apply where the word objected to is 'Canada'."

The question which now has to be decided is whether the learned trial magistrate was justified in interpreting para. 4 of Sch. 2 of the Act in accordance with what he deemed to be its intention rather than in accordance with a strict literal construction. In my opinion the learned magistrate's decision can be upheld on two grounds. Firstly, on a literal construction, all the places in Canada together constitute Canada as a whole, and to inscribe an article as originating in Canada necessarily involves the proposition that it was manufactured at a place in Canada. Secondly, if I am wrong as regards the first point, then I agree with Mr. Livingstone that those parts of the East African Customs Management Act which deal with prohibited imports are clearly designed for the protection of the public and must therefore be construed liberally rather than literally. The object of s. 15 and Sch. 2 of the Act is to

protect the public from the importation of articles of an obscene or dangerous nature, or which being of shoddy foreign manufacture are sought to be disguised and passed off as articles of superior British manufacture. To quote from the judgment of the Earl of Halsbury, L.C., in *Simpson v. Teignmouth and Shaldon Bridge Co*. (1), [1903] 1 K.B. 405 at p. 413:

> "It is satisfactory to find that Lush, J., who decided in *Taylor v. Goodwin* that a person riding a bicycle at a dangerous pace might be convicted of furiously driving a carriage, was the same judge who decided in *Williams v. Ellis* that a bicycle was not a carriage within the particular Act of Parliament under which it was sought to tax it, because it marks the distinction which the learned judge seems to have taken between an enactment which is contemplated as being for the protection of the public, and which must therefore be given the widest possible scope, and a taxing Act."

In my opinion the above extract is applicable to the present case, and the learned magistrate was right in giving a wide interpretation to the terminology used in para. 4 of Sch. 2 of the East African Customs Management Act, an interpretation which was in accordance with the clear intention of the legislature.

It follows that in my view this appeal must fail, and I order accordingly. I have some sympathy for the appellants, who have been the victims of a typical piece of Japanese commercial dishonesty, but fortunately for them both advocates have agreed that whatever the result of this appeal, each party will bear his own costs, and I accordingly make no order as to costs.

Appeal dismissed.

For the appellants:
KA Master QC and *JM Dave*
JM Dave, Dar-es-Salaam

For the respondent:
HB Livingstone (Senior Assistant Legal Secretary, East Africa High Commission)
The East Africa High Commission

Umedgir Motiger Gosai v Mrs Kusumben Umedgir Gosai
[1958] 1 EA 668 (SCK)

Division:	HM Supreme Court of Kenya at Mombasa
Date of judgment:	3 December 1958
Case Number:	10/1958
Before:	Edmonds J
Sourced by:	LawAfrica

[1] Jurisdiction – Divorce – Petition for restitution of conjugal rights – Parties married in India – Wife under sixteen when married – Whether court has jurisdiction to entertain petition regarding marriage

outside Kenya – Whether marriage valid – Marriage, Divorce and Succession Ordinance (*Cap.* 149), *s.* 3 (1), s. 4 *and s.* 5 (*K.*).

Editor's Summary

The petitioner and the respondent, both Hindus, were married in India. The respondent was under the age of sixteen years at the time of the marriage. The petitioner petitioned the Supreme Court for an order for restitution of conjugal rights. On a preliminary point it was contended for the respondent that the marriage having taken place outside the Colony, the provisions of s. 4 and s. 5 of the Hindu Marriage, Divorce and Succession Ordinance did not apply, and therefore the court had no jurisdiction to entertain the petition. It was further submitted that the proviso to s. 3 (1) of the Ordinance, which requires that to validate the marriage the age of the girl must be sixteen applied and the marriage must be held to be null and void and the petition therefore incompetent.

Held –

(i) the provisions of s. 4 (1) of the Hindu Marriage, Divorce and Succession Ordinance are of general application to all Hindu marriages whether contracted in the Colony or India.

(ii) the court had jurisdiction to entertain the petition, and as the parties were admittedly married in India, where the law recognises the marriage of a girl under the age of sixteen years, the proviso to s. 3 (1) of the Ordinance could affect the validity of the marriage.

Preliminary submissions overruled.

Case referred to:

(1) *Basant Kaur v. Ratan Singh s/o Nagina Singh Mistry* (1952), 25 K.L.R. 24.

Judgment

Edmonds J: This is a ruling on the preliminary submissions made on behalf of the respondent that this court has no jurisdiction to entertain the petition for an order for restitution of conjugal rights.

The admitted facts in so far as they are relevant to the issues are that the petitioner and the respondent are Hindus, that the petitioner was born in India on January 18, 1929, and the respondent in Kenya on August 16, 1939, that they were married at Baroda in India on September 27, 1954, and that the respondent was under the age of sixteen years at the time of her marriage. It is contended for the respondent that the marriage having taken place outside the Colony, the provisions of s. 4 and s. 5 of the Hindu Marriage, Divorce and Succession Ordinance (Cap. 149) do not apply, and that therefore this court has no jurisdiction to entertain the petition. It was further contended that if the Ordinance was held to give jurisdiction, then as the respondent was under the age of sixteen years at the time of her marriage, the proviso to s. 3 (1) applies and the marriage must be held to be null and void and the petition therefore incompetent. For the petitioner it is contended that s. 4 (1) of the

Ordinance gives the court jurisdiction to entertain petitions for the restitution of conjugal rights in Hindu marriages, no matter where the parties were married, but it is argued for the respondent that s. 4 (1) is governed by s. 3 (1) and that the Ordinance relates only to marriages of Hindus in the Colony.

Section 3 (1) provides as follows:

> "3(1) The marriage in the Colony of Hindus whether domiciled in the Colony or not, who are not related to each other in any of the degrees of consanguinity or affinity prohibited by the law of the religion of either party to the marriage, shall, if the marriage is contracted in the manner customary in the Colony among persons professing the religion of either party to the marriage, be deemed for all purposes to be a valid marriage:
>
> Provided that from and after the commencement of this Ordinance no boy under the age of eighteen years and no girl under the age of sixteen years shall be capable of contracting a valid Hindu marriage."

and s. 4 (1) provides:

> "4(1) A petition for restitution of conjugal rights may be presented by a Hindu to the court, and the court, on being satisfied that the allegations contained in the petition are true and that there is no legal ground why a decree for restitution of conjugal rights should not be granted, may make the decree accordingly."

In support of the respondent's contention my attention was drawn to the judgment of Bourke, J., in *Basant Kaur v. Ratan Singh s/o Nagina Singh Mistry* (1952), 25 K.L.R. 24. In that case the plaintiff claimed under s. 9 of the Ordinance, a monthly sum as maintenance out of her late husband's estate. Section 9 (1) makes provision for succession to property of deceased Hindus. It was contended for the defendant in that case

> "that even if the plaintiff was lawfully wedded to the deceased, such marriage taking place out of the Colony, it is not a marriage that can be recognised as valid under the law of Kenya and accordingly this court is not competent to grant relief dependent upon the plaintiff's status as a widow",

and it would appear that the learned judge accepted that contention, for the following passage appears in his judgment:

> "The marriage alleged in this case admittedly did not take place in the Colony and so cannot be deemed for the purpose of succession or for any other purpose to be a valid marriage".

The ratio decidendi in that case was whether for the purpose of succession the marriage was valid, and I must regard the learned judge's opinion that the marriage was invalid "for any other purpose" as being obiter and, with respect, I think his view went beyond the provisions of the Ordinance. To hold that marriages between Hindus which take place or have taken place outside the Colony are not regarded by the courts as valid marriages for any purpose is, I think, erroneous, and indeed was not the position even before the Ordinance came into force. It is further my view that the effect of the provisions of s. 3 (1) was not to make marriages between Hindus within the Colony valid at the expense or to the exclusion of marriages contracted elsewhere. Prior to 1946 the courts of Kenya had no jurisdiction to entertain petitions for restitution of conjugal rights, nullity, etc., in respect of Hindu marriages, but in January

of that year, the Hindu Marriage, Divorce and Succession Ordinance was promulgated

> "to regularise the position regarding the marriage, divorce and law relating to succession, of Hindus, and to enable decrees for the restitution of conjugal rights and orders for separation, maintenance and custody of children to be made".

The purpose of the Ordinance was therefore solely directed to such regularisation. Thus, to regularise the position of a Hindu marriage within the Colony, s. 3 (1) was enacted in order to deem such marriage to be valid provided the conditions therein set out were satisfied. Section 4 was then enacted in order to give jurisdiction to the Supreme Court to entertain petitions for the restitution of conjugal rights, and there is nothing in the section which can be said to make it dependent upon or subject to s. 3. Had the legislature intended to give jurisdiction only in cases where the marriage had taken place in the Colony, it would have so stated. It has not done so, and I think the provisions of s. 4 (1) are of general application to all Hindu marriages, whether contracted in the Colony or in India. The provision of s. 5, I think, fortifies this conclusion:

> "5. The court in the exercise of the jurisdiction conferred by sub-s. (1) of s. 4 of this Ordinance shall apply the law and custom which would be applicable to the person seeking relief if he were seeking such relief in India."

I accordingly rule that this court has jurisdiction to entertain this petition, and as the parties were admittedly married in India, where the law recognises the marriage of a girl under the age of sixteen years, the proviso to s. 3 (1) cannot affect the validity of the marriage.

Preliminary submission overruled.

For the petitioner:
IS Patel
AB Patel & Patel, Mombasa

For the respondent:
KM Pandya
KM Pandya, Mombasa

Re the Estate of Petit (deceased)

[1958] 1 EA 671 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	10 October 1958
Case Number:	162/1958
Before:	Miles J
Sourced by:	LawAfrica

[1] Probate – Practice – Application for grant of probate – Order made by judge admitting will to probate – Caveat lodged before form of grant of probate signed by judge – Validity of caveat – When is probate granted – Indian Probate and Administration Act, 1881, *s.* 70 *and s.* 76.

Editor's Summary

An order that the will of P. be admitted to probate was made by the judge. Before the form of grant of probate was signed by him, but after the seal of the court had been affixed thereto a caveat was lodged by the advocates of T. It was submitted on behalf of the executor that the "grant" takes place when the judge makes the order admitting the will to probate.

Held –

(i) the grant of probate is the form prescribed by s. 76 of the Indian Probate and Administration Act, 1881, and not the order of the judge.

(ii) the grant is complete when the seal is affixed and therefore the caveat was not lodged in time and was of no effect.

Order accordingly.

Judgment

Miles J: This case raises the validity of a caveat which has been lodged in opposition to the grant of probate of the will of Bertha Petit, deceased. The position is that on August 27, 1958, I made an order that the will be admitted to probate. Before the form of grant of probate was signed by me, but after the seal of the court had been affixed thereto a caveat was lodged by Messrs. Hamilton, Harrison and Matthews on behalf of one, Yvonne Gabriel Tonnet, and the question now arises whether this is effective.

It is necessary to refer to the relative provisions of the Indian Probate and Administration Act of 1881. Section 70 provides that:

> "A caveat against the grant of probate or letters of administration may be lodged with the district judge or a district delegate".

Section 76 provides:

> "Whenever it appears to the judge or district delegate that probate of a will should be granted, he shall grant the same under the seal of his court in manner following:
>
> > "I, ..., judge of the district of
> >
> > hereby make known that on the day of
> >
> > in the year the last will of
> >
> > late of, a copy whereof is hereunto annexed, was
> >
> > proved and registered before me, and that administration of the property and credits of the said deceased, and in any way concerning his will, was granted to,
> >
> > the executor in the said will named, he having undertaken to administer the same and to make a full and true inventory of the said property and credits and exhibit the same in this court within six months from the date of this grant or within such further time as the court may from time to time appoint, and also render to this

> court a true account of the said property and credits within one year from the same date or within such further time as the court may from time to time appoint.
>
> "The day of
>
> "

The form of grant which is used in this court substantially follows the provisions of this section. It is, incidentally, headed "Grant of Probate".

The question in this case is when is probate "granted"? Is it granted (*a*) when the judge makes the order admitting the will to probate or (*b*) when the seal of the court is affixed to the grant or (*c*) when the seal having been affixed the grant is signed by the judge?

If this were a case in England the answer would be clear, since r. 44 (6) of the Non-Contentious Probate Rules, 1954, provides that:

> "The registrar shall not allow any grant to be sealed if he has knowledge of an effective caveat in respect thereof: Provided that no caveat shall operate to prevent the sealing of a grant on the day in which the caveat is entered".

This proviso clearly implies that the actual sealing of the grant is the decisive point in time in determining whether the caveat was effective.

In England, however, the grant of probate in non-contentious cases is an administrative and not a judicial act. The will is lodged in the Principal Probate Registry with the Inland Revenue affidavit and the executor's oath and in due course in the absence of a caveat the registrar affixes the seal.

In this country, even in non-contentious cases the grant of probate or letters of administration is a judicial act.

It is contended by Mr. Marsh, on behalf of the executor that the "grant" takes place when the judge makes the order admitting the will to probate. Everything which follows, he says, namely, the affixing of the seal on the grant and the signature of the grant by the judge is purely administrative machinery for carrying into effect the decision of the judge and it is to be noted that the formal grant is invariably back-dated to the date of the order of the judge, irrespective of the date when it is actually signed.

Mr. Marsh points out that there is no express provision in s. 76 that the grant of probate should be under the hand of the judge in addition to being under the seal of his court.

I think there can be no doubt that the grant of probate is the form prescribed by s. 76 and not the order of the judge. The question then is whether the form of grant requires the signature of the judge? It is significant that the form of probate is contained, not in a schedule to the Act but in a section of the Act itself. If the legislature had intended that the grant should be signed by the judge it would have said so. To hold that the grant should issue under the hand of the judge would be to read into the section words that are not there. In my opinion the section means what it says and no more. The form of grant used in this court provides for the signature of the judge but it would appear to be strictly unnecessary.

I hold accordingly that the "grant" is complete when the seal is affixed and it follows therefore that the caveat in this case was not lodged in time and is of no effect.

Order accordingly.

For the executor:
KJET Marsh
Shapley Barret Allin & Co, Nairobi

For the caveator:
KA O'Connor
Hamilton Harrison & Mathews, Nairobi

Prince Kesi Kagoro v R
[1958] 1 EA 673 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	3 November 1958
Case Number:	259/1958
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Street traffic – Motor vehicle – Permitting use of vehicle on road whilst in dangerous mechanical condition – Permitting vehicle to be driven without valid driving permit – What constitutes "permitting" – Traffic Ordinance, 1951, *s.* 27 (2), *s.* 50 *and s.* 50 (6) (*U.*).

Editor's Summary

The appellant and his son were tried together, each on two counts for traffic offences. Both were convicted. Count 1 charged the appellant with permitting a vehicle to be used on a road in a dangerous mechanical condition contrary to s. 50 of the Traffic Ordinance. Count 2 charged the appellant with permitting his son to drive this vehicle without a valid driving permit, contrary to s. 27 (2). The evidence for the prosecution was merely the evidence of one police constable and a report on the condition of the vehicle which adequately proved that the vehicle was in a dangerous mechanical condition. The appellant who was not represented gave evidence denying that he had permitted his son to drive the car on the occasion in question, but he admitted being the owner. The magistrate found that the appellant had both his son and the motor vehicle under his control and that he permitted his son to drive it. On appeal the respondent did not seek to support the conviction on the second count, but he submitted that the conviction on the first count could be sustained by virtue of s. 50 of the Ordinance, which *inter alia* makes the person responsible for maintaining a vehicle liable for its use whilst in a dangerous mechanical condition.

Held –

(i) there was nothing in the prosecution evidence that in any way established that the appellant had permitted his son to use the vehicle and the mere fact that the driver of the car was the son of the appellant did not mean that the son's use of the car was with the appellant's permission.

(ii) where a charge expressly avers “permitting” the use of a vehicle, evidence of the owner’s responsibility for the maintenance of a vehicle is not sufficient for the purposes of s. 50, as a substitute for evidence of permitting its use.

Appeal allowed.

Judgment

Sir Audley McKisack CJ: The appellant and his son were jointly tried, on a charge containing four counts, for offences against the Traffic Ordinance, 1951. Counts 3 and 4 charged the son with driving a vehicle without being the holder of a valid driving permit, and with using the vehicle when it was not insured as required by the Ordinance, respectively. He pleaded guilty to those two counts. Counts 1 and 2 related to the appellant, the first charging him with permitting a vehicle to be used on a road in a dangerous mechanical condition, contra s. 50 of the Ordinance, and the second with permitting his son to drive the same vehicle while the latter was not the holder of a valid driving permit, contra s. 27 (2).

The appellant is recorded as pleading not guilty to the charge, which presumably means that he pleaded not guilty to both count 1 and count 2, although a separate plea to each count was not recorded, as it should have

been. The learned trial magistrate makes no reference in his judgment to count 2, except that in the last paragraph of the judgment he has written:

> "I find A. 1 (the appellant) guilty of the offence with which he is charged and convict him on both counts."

The rest of the judgment deals solely with the count of permitting the son to drive the vehicle when it was in a dangerous mechanical condition. The magistrate, after convicting the appellant, imposed a sentence of a fine of Shs. 400/-, or four month's imprisonment in default. He should, however, have imposed a separate penalty in respect of each of the two counts.

The evidence for the presecution was extremely sketchy. There was nothing more than the evidence of one police constable, and a report on the condition of the vehicle, which was put in under s. 122 of the Traffic Ordinance. That document adequately proved that the vehicle was in a dangerous mechanical condition but, for the purposes of count 1, the prosecution had also to prove that the appellant permitted it to be used on a road. No evidence was given by the prosecution witness to prove that the appellant was the owner of the vehicle, other than the fact that the appellant's son pointed out the appellant as being the owner. And I can find nothing in the prosecution evidence that in any way establishes that the appellant had permitted his son to use the vehicle on the occasion which formed the subject of the charge. The appellant was not represented at the trial. Had he given no evidence himself, there would certainly have been no evidence on which he could have been properly convicted. He did, however, give evidence, in which he denied having permitted his son to drive the car on the occasion in question, but admitted to being its owner. But this admission of ownership was not sufficient of itself to fill the gap in the prosecution case on the question of permitting. The appellant called a witness to support his assertion that the car was not in the appellant's possession at the material time but was in a garage for the purpose of being repaired, and that the son must himself have taken the car from the garage. This witness, however, contradicted the appellant on this point, and said the car had been delivered from the garage to the appellant some days before the date of the offence.

The magistrate believed this defence witness, and disbelieved the appellant, on that point, and states in his judgment:

> "I am satisfied that A. 1, who has both his son and his motor vehicle under his control, permitted his son to drive it."

I find nothing in the evidence, however, to show that the appellant did have his son "under his control" in respect of the driving of the car on this occasion. The mere fact that the driver of the car was the son of the appellant does not mean that the son's use of the car on this occasion was with the father's permission.

Another unsatisfactory feature of the judgment is the magistrate's statement that his view of the appellant's guilt was

> "reinforced by the fact that A. 1 has once before been convicted of allowing his son to drive his motor vehicle when he was not the holder of a driving permit."

Even if such evidence were admissible upon the present charge, I can find nothing in the evidence to prove that conviction. In cross-examination the appellant is recorded as admitting that his son had been convicted of driving the car on a previous occasion without a driving permit, but it is not recorded that the appellant had been convicted of permitting that offence.

Mr. McMullin for the Crown does not seek to support the conviction on count 2 (which relates to

permitting the son to drive without being the holder

of a driving permit), but submits that the conviction on count 1 can properly be sustained by virtue of sub-s. (6) of s. 50 of the Traffic Ordinance, 1951. That sub-section reads as follows:–

> "(6) For the purpose of sub-s. (5) of this section not only the persons mentioned in sub-s. (3) of s. 2 of this Ordinance shall be deemed to use a vehicle on the road but also in the case of a contravention of sub-s. (1) of this section any person who is shown to the satisfaction of the court to be responsible for the maintenance of the vehicle and in the case of a contravention of either sub-s. (2) or (3) of this section any person who is shown to the satisfaction of the court to have been responsible for the loading of the vehicle."

Sub-s. (3) of s. 2, which is referred to in the above sub-section, is as follows–

> "(3) For the purpose of this Ordinance a person shall be deemed to use a vehicle on a road if he causes or permits it to be so used or if he drives it on the road."

The position therefore appears to be that, if a vehicle in a dangerous mechanical condition is used on a road, the following persons may be convicted in respect of such user–

(*a*) the person driving the vehicle,

(*b*) the person who causes or permits it to be driven, and

(*c*) the person responsible for the maintenance of the vehicle.

It is true that, in the evidence given by the appellant, there was material on which the trial court could well have come to the conclusion that he was the person responsible for the maintenance of the vehicle. But it was not on that basis that he was charged. The particulars in count 1 (as amended in ink – though in what circumstances or at what stage this amendment was made is not revealed) expressly state that the appellant "did permit the said vehicle to be used on the road when . . .", etc. The particulars did not say anything about his being responsible for the maintenance of the vehicle, nor did it simply charge him with using the vehicle on the road. In the latter case this would have been sufficient to make admissible evidence concerning his responsibility for maintenance, because s. 50 (6) says that the person responsible for maintenance is deemed to use the vehicle on the road.

I am thus of the opinion that where a charge expressly avers "permitting" the use of a vehicle, evidence of responsibility for maintenance of the vehicle is not sufficient, for the purposes of s. 50, as a substitute for evidence of permitting its use. For that reason alone the conviction on count 1 cannot stand and, as there was likewise no evidence of "permitting" in relation to count 2, the conviction on that count must also be quashed. The appeal is accordingly allowed and the fine paid by the appellant must be refunded to him.

Appeal allowed.

The appellant did not appear and was not represented.

For the respondent:
AM McMullin (Crown Counsel, Uganda)
The Attorney-General, Uganda

Associated Contractors Ltd v The Commissioner of Income Tax

[1958] 1 EA 676 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	24 November 1958
Case Number:	70/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court for Uganda–Sir Audley McKisack, C.J

[1] Income tax – Company – Avoidance or reduction of tax – Shares of company with loss for tax purposes acquired by parent company – Profitable asset transferred by parent company to subsidiary company – Direction by Commissioner that loss should be disregarded in computing tax payable by subsidiary company – Onus of proof – Test for determining purpose of transactions – Whether direction appropriate – The East African Income Tax (*Management*) *Act,* 1952, *s.* 14 (1) (*j*), *s.* 23, *s.* 77 *and s.* 78.

Editor's Summary

The Liverpool Uganda Company (Africa) Limited (the parent company), a holding company with wholly owned subsidiaries, in May, 1953, agreed to purchase as from October 1, 1953, a profitable coffee estate called Kamundu Estate. The appellant company had an issued share capital of £100,000 in £1 shares of which, in the middle of 1953, the parent company owned 19,275. At that time the appellant company had lost half of its capital, had disposed of its main business of building and contracting, had ceased to carry on any business and had an accumulated loss for tax purposes of about £30,000. In June, 1953, the directors of the appellant company decided to call an extraordinary general meeting to wind up the company volutarily. The parent company then made an offer to purchase for Shs. 9/75 each all the shares of the appellant company not already held by the parent company. This offer was accepted by the shareholders of the appellant company and, at the extraordinary general meeting, it was decided not to proceed with the proposed winding up. All but one of the shares of the appellant company were subsequently transferred to a wholly owned subsidiary company of the parent company, the one remaining share being transferred to a nominee of that subsidiary company. On October 1, 1953, the appellant company took possession of Kamundu Estate, and in that month executed a formal agreement for the purchase of the estate. The profit of the appellant company from its acquisition of Kamundu Estate was sufficient to absorb its accumulated loss of about £30,000. In April, 1957, the Commissioner of Income Tax, being of the opinion that one of the main purposes for these transactions was the reduction of liability to tax, issued a direction under s. 23 of the East African Income Tax (Management) Act, 1952, that in computing the income of the appellant company chargeable to tax for any accounting period ending on or after August 1, 1953, the provisions of s. 14 (1) (*j*) should not apply to losses incurred prior to August 1, 1953. The effect of this direction was that the accumulated loss of about £30,000 was not taken into account when computing the tax liability of the appellant company; if it had been taken into account, there would have been a reduction in the amount of tax payable of some £7,000. The appellant company appealed against the direction to the Kampala Local Committee, which set aside the direction. The Commissioner appealed to the High Court and the direction was restored. The High Court held that the onus lies upon the taxpayer to prove that avoidance or reduction of liability to tax is

not the main purpose, or one of the main purposes, for the transaction. The appellant company appealed against the decision of the High Court on

the grounds that the onus of proof did not lie on the taxpayer, that the main purpose, or one of the main purposes, for the transactions was not the avoidance or reduction of tax and that the direction was inappropriate in general and also in particular as it resulted in disallowing such of the benefit of the accumulated loss as was proportionate to the parent company's share holding in the appellant company before the transactions in question.

Held –

(i) the High Court was correct in holding that the onus was on the taxpayer.

(ii) on the assumption, but without deciding the point, that the subjective element of purpose in the minds of the actors is the final and determining consideration, there was evidence sufficient to support the finding of the High Court that the hope of tax reduction was one of the main purposes of the transactions.

(iii) the direction must be that adjustments shall be made as respects liability to tax so as to counteract the avoidance or reduction of liability to tax which would otherwise be effected; and as the direction had precisely that effect it was appropriate.

(iv) as the appellant company was about to be wound up before the transactions in question, with the result no one would have obtained any benefit from the accumulated loss for tax purposes, and as the effect of the transaction was to save not part, but the whole of the accumulated loss for the benefit of the appellant company, the direction was not inappropriate in applying to the whole of the accumulated loss.

Appeal dismissed.

Case referred to in judgment:

(1) *Crown Bedding Co. Ltd. v. Inland Revenue Commissioners*, [1946] 1 All E.R. 452.

(2) *Newton v. Commissioner of Taxation of the Commonwealth of Australia*, [1958] 2 All E.R. 759.

Judgment

Briggs V-P: read the following judgment of the court: This was an appeal from a decree of the High Court of Uganda reversing a decision of the Kampala local committee given under s. 77 of the East African Income Tax (Management) Act, 1952. The committee had set aside a direction made against the appellants under s. 23 of the Act. The High Court, on appeal by the Commissioner, restored the direction, and the taxpayer appealed to this court. We dismissed the appeal with costs and now give our reasons.

The facts are fully set out in the judgment of the learned Chief Justice and it is not necessary to repeat them in detail. Summarised they amount to this, that Liverpool Uganda Company (Africa) Ltd., to which we will refer as "the parent company", in early 1953 owned 19,275 out of 100,000 issued £1 shares in the taxpayer, which had then lost half its capital, had disposed of its business as building contractor, and was moribund and about to be wound up, but had about £47,000 in cash assets, and had an agreed loss for income tax purposes of about £30,000. The parent company was at that time in negotiation for the purchase of Kamundu Estate, a coffee estate near Kiambu. The parent company made an offer of Shs. 9/75 per share to all other shareholders in the taxpayer and this was accepted. The parent company

transferred its own 19,275 shares, and caused the remaining 80,725 shares to be transferred to or to the nominee of Liverpool and East Africa Ltd., its wholly-owned subsidiary. The parent company then caused Kamundu coffee estate to be purchased by,

or transferred to, the taxpayer as its nominee under the concluded contract for sale. The direction of the Commissioner was that–

> ". . . in computing the income of Associated Contractors Limited chargeable to tax under s. 8 of the East African Income Tax (Management) Act, 1952, for any accounting period the terminal date of which falls on or after August 1, 1953, the provisions of s. 14 (1) (*j*) of the East African Income Tax (Management) Act, 1952, shall not apply to losses incurred by the company prior to August 1, 1953."

Before the direction was given the taxpayer had made sufficient profits from the coffee estate to absorb the taxation loss and, if income-tax had been reduced thereby, the taxpayer, and through it the parent company, would have benefited to the extent of some £7,000 reduction of tax. The Commissioner, treating the acquisition of the beneficial interest in the 80,725 shares and of the beneficial interest in the 80,725 shares and of the beneficial interest in the coffee estate as linked transactions by and for the benefit of the taxpayer and the parent company, was of opinion that "one of the main purposes" of the transactions was to obtain this benefit of £7,000 reduction of tax.

The direction was attacked both on the ground that that was not the main, or one of the main, purposes of the transactions and on the ground that the adjustments directed to be made were inappropriate. The first ground might seem to be one of fact and therefore, under s. 78 (10), not open before us, but counsel's submission raised questions of misdirection by the learned Chief Justice and were thus correctly based. The learned Chief Justice rightly placed the onus on the taxpayer, and a ground of appeal submitting that this was wrong was abandoned. The primary facts were not in dispute, save as regards the direct evidence of the chairman as to his state of mind. The question was what inference should be drawn from other facts, and whether that direct evidence could be accepted. The chairman admitted that the taxation loss was "an attraction", but said that to obtain it was not one of the taxpayer's, or the parent company's, main purposes in effecting the transactions in question.

The learned Chief Justice was impressed by the suggestion that the objects of the taxpayer were such as to make it unsuitable for carrying on the business of a coffee estate, and went so far as to say that it was doubtful whether the objects extended to cover this. It seems that the learned Chief Justice's attention was not drawn to para. (*h*) and para. (*x*) of cl. 3 of the memorandum of association. These make it abundantly clear that such a business was intra vires and there is nothing in the form of the memorandum which would cause any practical difficulty. Nor should the name of the taxpayer be considered "unsuitable". It could have been changed to "Kamundu Estates Ltd.", but this was not thought desirable. We thought this consideration should not have weighed with the court to any substantial extent.

The learned Chief Justice next stated that the taxpayer had no assets when taken over, and referred to the balance sheet as at July 31, 1953. In a sense, though not literally, this may be correct. The taxpayer had at that date come under control of the parent company and had lent its cash assets of £48,100 odd to Liverpool and East Africa Ltd. It owed about £1,100 to three creditors, and had written off preliminary and formation expenses of about £1,450. For 80.7 per cent. of the assets less liabilities – that is £47,000 – the price paid was about £39,350; but 80.7 per cent. of £47,000 is only about £37,900. It may or may not be accident that the excess of the price over the value of the net assets was about £1,450 and the preliminary expenses written off were also about £1,450. Whether or not the matter was so expressed or discussed, the fact remains that the other shareholders received approximately this amount over and above the clearly ascertainable value of their shares. In this sense it is clear that the parent company did not get any special bargain by taking over the moribund company at a low price. No argument appears

to have been addressed to either court on this basis, but the question is one of mere arithmetic. Put in another way, and disregarding the cost of the intended winding up, the cash value of the shares in the taxpayer was not more than Shs. 9/40 when the parent company agreed to pay Shs. 9/75 for 80,725 of them. The difference of 35 cents represented the value of the taxpayer to the parent company as a mere structure–with its taxation loss.

The learned Chief Justice was impressed by the point that the parent company had other subsidiaries which could have run the coffee estate. We were not. We accepted the evidence of the chairman that the group's policy would have required the formation of a new company to run Kamundu estate, if the tax-payer had not been acquired for this purpose. There were good reasons for this policy, and to this group the formation of another new company would present no difficulty; but, assuming £100,000 to be a suitable nominal capital, there is no reason to suppose that the preliminary and formation expenses of a new company would have been more than £1,450, and they might have been less. And it must be remembered that the transfer of the 80,725 shares attracted substantial stamp duty. We agreed therefore with the learned Chief Justice that the transactions in question did not appear to have been dictated by any considerations of convenience or economy on these lines, though we arrived at this conclusion by different reasoning.

A more difficult question was raised by the chairman's evidence that before the transactions took place the parent company was advised by its auditor that in his opinion it was highly improbable that the taxation loss of £30,000 would in the circumstances be deductible, since the past and proposed future activities of the taxpayer were quite different, and that he, the chairman, had believed such advice to be correct. The auditor gave evidence that to the best of his recollection he had advised that the loss would not in his opinion be deductible under the terms of "the East African Act as it then stood", though the matter was not free from doubt. It was suggested at first by counsel for the taxpayer that this opinion must have been based on the auditor's expectation that a direction forbidding deduction would be issued, as it now has been, under s. 23. We thought, however, and counsel later conceded, that the words "the East African Act as it then stood" made it clear that the auditor had based his opinion, not on s. 23, but on the words "in any trade, business, profession or vocation" which formerly appeared in s. 14 (1) (*j*), but were repealed by the amending Act, No. 14 of 1954. This was confirmed by the chairman's description of the advice he received and the grounds therefor. We were relieved at this, for we were not obliged to consider the somewhat Gilbertian proposition that, if a taxpayer is advised and honestly believes that in consequence of a proposed transaction a direction will be made to prevent reduction of tax resulting therefrom, that advice and belief will operate to prevent such a direction being made at all, and he will thus obtain the reduction. We were, however, obliged to consider whether, if the chairman's evidence were accepted at its face-value, the appeal would have to be allowed on the footing that "the subjective element of purpose in the minds of the actors" is the final and determining consideration. Those words were used by Lord Greene, M.R., in *Crown Bedding Co. Ltd. v. Inland Revenue Commissioners* (1), [1946] 1 All E.R. 452 at 453, in discussing the effect of the English Act of 1944, which amended and extended the operation of s. 35 of the 1941 Act. They suggest, though it was not then so decided, that under the section as it previously stood "purpose" must be understood in the subjective sense, and the section in that form was substantially in pari materia with the East African s. 23. We have been unable to find any case decided in England on s. 35 in its original form, and the later cases largely depend on the words "main benefit which might have been expected to accrue" in s. 33 (3) of the 1944 Act. No similar provision appears in the East African Act. It may well be that between 1941 and 1944

it was generally accepted in England that the subjective test was paramount, and that this imposed so difficult a task on the Crown that directions could seldom be effectively given. This would be consistent with the provision making s. 33 of restrospective effect. We considered the recent case of *Newton v. Commissioner of Taxation, Australia* (2), [1958] 2 All E.R. 759, where the Australian tax avoidance section was considered by the Privy Council and the subjective test was rejected; but the differences of wording between that section and s. 23 are so great that the decision did not materially assist us. We assumed, without deciding the point, that the subjective test is paramount in East Africa. The question was therefore whether the chairman's evidence could be accepted. We would remark that we did not share the Chief Justice's surprise that the group's auditor, and not its solicitor, should have been asked to advise on this matter. Many chartered accountants specialise in income-tax work and are expert in it.

On considering the evidence, two points were immediately apparent. The auditor's opinion left room for hope that the reduction might be obtained: and the chairman still regarded the taxation loss as "an attraction". It could only have been an attraction if the hope of obtaining the reduction was in being and operated on the chairman's mind. We thought that this, having regard to the circumstances of the particular transactions, was sufficient to entitle the learned judge to find that the hope of tax reduction was one of the main purposes of the transactions. It is true that the chairman said that he would still have carried out the transactions if there had been no hope of tax reduction, and in re-examination he said,

> "The offset possibilities (were) not such an attraction after advice received. I mean it was not an attraction at all, by reason of the advice, which we accepted."

The learned Chief Justice decided that, in face of other material facts, the chairman's

> "recollection of what was in his mind and in the minds of his colleagues in 1953"

could not carry much weight. We thought there was evidence to support this finding and we saw no reason to disagree with it.

On the other main ground of appeal, that the direction was inappropriate, the local committee gave no reasons for their decision in favour of the taxpayer, and the question was, we considered, one of law. The direction must be that

> "adjustments shall be made as respects liability to tax . . . so as to counteract the avoidance or reduction of liability to tax which would otherwise be affected (sic: qu. 'effected') by the transaction or transactions."

We agreed with the learned Chief Justice that the direction given in this case had precisely that effect, and in that sense was "appropriate." Counsel for the appellants suggested various other forms of direction which might have been given, but they all appeared to us to suffer from the fatal defect that they would not, or might not, have effectively deprived the taxpayer of the whole of the benefit of which he was intended to be deprived. They would not therefore effectively "counteract" the reduction.

The final ground of appeal was that the taxpayer should not have been deprived of that part of the benefit which would be proportionate to the parent company's original holding. This submission was superficially attractive, but it could only proceed from an unrealistic view of the facts. Before the parent company took over, the taxpayer was about to be wound up and, if it had, no one could ever have enjoyed any benefit from any part of the taxation loss.

The effect of the take-over was to save not part, but the whole, of the taxation loss for the benefit of the taxpayer and the parent company, and this was rightly reflected in the direction. The appeal thus failed on all grounds.

There was, however, one point arising on the form of the direction, as opposed to its substance, which was not taken by the appellant taxpayer. It may be thought that a direction by the Commissioner that a provision of statute law shall not apply in a particular case is an arrogation of the powers of the legislature. It would perhaps have been preferable to have directed that a loss deductible under s. 14 (1) (*j*) should be deemed not to have existed in this case. The effect would of course be the same.

Appeal dismissed.

For the appellant.
JA Macdougall
Ennion & Macdougall, Nairobi

For the respondent:
JC Summerfield (Deputy Legal Secretary, East Africa High Commission)
The Legal Secretary, East Africa High Commission

Samson v R
[1958] 1 EA 681 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	11 December 1958
Case Number:	180/1958
Before:	Forbes V-P, Gould JA and Sir Owen Corrie Ag JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Seychelles–Rassool, Ag. C.J

[1] Criminal law – Trial – Application for statutory legal aid six days before trial – Counsel assigned to accused – Counsel being unable to consult accused applies to withdraw – Accused unrepresented at trial – Whether accused unfairly deprived of benefit of legal aid – Legal Aid (*Criminal Proceedings*) *Ordinance*, 1957, *s.* 2 (*S.*).

Editor's Summary

The appellant was convicted on a charge of possession of property suspected of having been stolen or unlawfully obtained contrary to s. 310 of the Penal Code. On the day of the trial the advocate, who had only a few days before been appointed to defend the appellant under the Legal Aid (Criminal

Proceedings) Ordinance, 1957, asked the court for leave to withdraw on the ground that he had had no time to see his client. The trial judge ruled that, as the accused who had been in custody for some time had only applied for legal aid six days prior to the hearing, the application for legal aid was made too late. The trial then proceeded and the appellant was convicted.]

Held – the effect of the judge's ruling was unwarrantably to deprive the appellant of the legal aid which had already been assigned to him, and the intention of the Legal Aid (Criminal Proceedings) Ordinance, 1957, had thereby been frustrated.

Appeal allowed. Case remitted for re-trial.

Case referred to in judgment:

(1) *Galos Hired and Another v. R.*, [1944] 2 All E.R. 50; [1944] A.C. 149.

(2) *R. v. Kingston,* 32 Cr. App. R. 183.

(3) *Robert Confait v. R.*, [1957] E.A. 555 (C.A.).

Judgment

The following judgment was read by direction of the court: This was an appeal from the conviction of the appellant by the Supreme Court of Seychelles on September 16, 1958, on a charge of possession of property suspected of having been stolen or unlawfully obtained, contrary to s. 310 of the Penal Code of Seychelles. The appellant did not appear at the hearing before this court but, by his advocate, presented his case in writing under r. 39(1) of the Eastern African Court of Appeal Rules, 1954. We allowed the appeal on November 27, 1958, quashed the conviction and sentence and ordered a re-trial of the charge upon which the appellant was convicted, for reasons which we now proceed to give.

Only a short point is involved and it is one which does not touch the merits of the case so far as the actual evidence is concerned, upon which, in view of the order we have made, we express no opinion. The record shows that when the appellant was before the court on August 25, 1958, Mr. Valabhji appeared and asked leave to withdraw from the case as he had been appointed only on August 21, 1958, and had not had time to see his client, the appellant. Apparently the appointment of Mr. Valabhji as advocate for the appellant had been made, pursuant to the provisions of the Legal Aid (Criminal Proceedings) Ordinance, 1957, but the appellant, upon being asked, said that he did not think of applying for aid until August 19, 1958. The learned Acting Chief Justice ruled as follows:

> "This accused is in custody since July 17, 1958. His application for legal aid has been made on August 19, six days before the hearing which he knew from the beginning. In view of Mr. Valabhji's request and the fact that the cause list is full until November, 1958, I consider that accused's application for legal aid has been made too late and to adjourn this case to November is out of question."

Without examining the validity of the grounds upon which Mr. Valabhji asked leave to withdraw, we consider that the effect of this ruling was unwarrantably to deprive the appellant of the legal aid which had already been assigned to him. If it was the case that no date was available until November (and it is noted that some amount of time was eventually made available on September 6) the court could at least have granted an immediate short adjournment to enable Mr. Valabhji to obtain instructions, or if that was for some reason not possible have offered the appellant, who would perhaps have had to remain in custody, the option either of an adjournment to November or of proceeding without legal assistance.

The law on this subject is firmly laid down by the Privy Council in the case of *Galos Hired and Another v. R.* (1), [1944] A.C. 149, which, together with *R. v. Kingston* (2), 32 Cr. App. R. 183, was discussed and acted upon by this court in *Robert Confait v. R.* (3), [1957] E.A. 555 (C.A.), which also was an appeal from the Seychelles. In *Hired's* case (1) an advocate had been assigned under the Poor Persons Defence Ordinance, 1939, of the Somaliland Protectorate, not for the trial of the appellants but to conduct their appeal. Due to circumstances beyond the advocate's control he was unable to attend the hearing, and the appeal was dismissed after the appellants had conducted their case in person. In their judgment their lordships stated that the assignment of counsel had been made of no effect. They also said at p. 155:

> "They will add that there does not appear to have been any special reason why the hearing of the appeal should not have stood over for a few days to enable Mr. Manilal to attend, and their lordships are informed that he, in fact, arrived in British Somaliland on July 2, 1942, so that a comparatively short adjournment would have enabled him to attend and to argue the case on appeal."

and

> "Just as a conviction following a trial cannot stand if there has been a refusal to hear the counsel for the accused, so, it seems to their lordships, an appeal cannot stand where there has been a refusal to adjourn an appeal in which the appellant was entitled as of right to be heard by a counsel assigned to him by the Government who was unable, without any default on his part, to reach the court in time to conduct the appeal. The result is that the appeal to the Protectorate Court of Appeal, which appears to have been properly lodged, has not been effectively heard."

We do not think that anything turns upon the fact that under the Somaliland Ordinance the particular appellants were entitled as of right to have an advocate assigned. The assignment in the present case was made presumably under s. 2 (2) (*b*) of the Legal Aid (Criminal Proceedings) Ordinance, 1957, which is a discretionary section but once the discretion had been exercised and an advocate assigned, the appellant was entitled to his services; to deprive him of them, in circumstances in which the possibility of ensuring their continued availability had not been fully investigated, or indeed investigated at all, was to negative the intention of the Ordinance.

The case of *R. v. Kingston* (2) is not quite so much in point. It was not one of the assignment of legal aid but one in which counsel, who had been briefed for the accused, failed to put in an appearance. The Court of Appeal held that in those circumstances it would have been quite right of the assistant recorder to refuse to adjourn as it was a jury case (which the present one was not) and it would have been quite wrong to waste the jury's time for the convenience of counsel. It was held, however, that the assistant recorder was wrong in not adopting a suggestion that one of the counsel present should hold the brief and conduct the defence. On that ground the conviction was quashed and the court said at p. 188:

> "Now, it seems to us that that was tantamount to depriving the appellant of the right which she had of being defended by counsel."

For the reasons given we considered that the intention of the Legal Aid (Criminal Proceedings) Ordinance, 1957, had been negatived and the appellant unnecessarily deprived of its benefit and we allowed the appeal.

Appeal allowed. Case remitted for re-trial.

The appellant did not appear and was not represented.

For the respondent:
JP Webber (Crown Counsel, Kenya)
The Attorney-General, Seychelles

For the appellant:
FA Rene, Victoria

Andrea s/o Kulinga and others v R

[1958] 1 EA 684 (CAD)

Division: Court of Appeal at Dar-Es-Salaam

Date of judgment: 1 December 1958

Case Number:	158/1958
Before:	Sir Kenneth O'Connor P, Forbes V-P and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika–Harbord, J

[1] Criminal law – Trial with assessors – Failure of trial judge to sum up or to sum up at any length to assessors – Criminal Procedure Code, s. 283 (1) (*T.*).

Editor's Summary

The appellants were convicted of conspiracy to murder and soliciting the use of witchcraft and their appeals against sentences and convictions were dismissed as without substance. The only point of procedure calling for comment was the failure of the trial judge to sum up, or to sum up at any length, to the assessors.

Held –

(i) whilst under s. 283 (1) of the Criminal Procedure Code there is no obligation on the trial judge in Tanganyika to sum up the evidence for the assessors the court endorsed the view expressed in *Washington s/o Odindo v. R.* (1954), 21 E.A.C.A. 392 that "it is very sound practice . . . to do so except in the very simplest cases".

(ii) the instant case was essentially one where the assessors should have had the benefit of a careful summing-up if any weight was to be attached to their opinions and the failure of the trial judge to do so largely negatived the value of the assessors.

Appeals dismissed.

Case referred to in judgment:

(1) *Washington s/o Odindo v. R.* (1954), 21 E.A.C.A. 392.

(2) *Miligwa s/o Mwinje and Another v. R.* (1953), 20 E.A.C.A. 255.

Judgment

The following judgment was read by direction of the court: The appellants were convicted by the High Court of Tanganyika sitting at Mwanza of (1) conspiracy to murder, contrary to s. 215 of the Penal Code of Tanganyika, and (2) soliciting the use of witchcraft, contrary to s. 7 and s. 5 (1) of the Witchcraft Ordinance (Cap. 18 of the Laws of Tanganyika). The first appellant was sentenced to seven years' imprisonment on each count; the second appellant to 18 months' imprisonment on each count; and the third appellant to four years' imprisonment on each count. The sentences in the case of each appellant were ordered to be served concurrently. Against these convictions and sentences the appellants appealed to this court.

The appellants were not represented at the hearing of the appeals, but after hearing Crown Counsel we dismissed all the appeals. We were satisfied that the learned trial judge dealt adequately with the relevant

law and facts in his judgment, and there is nothing in his judgment which calls for comment.

There is, however, one aspect of the trial upon which we do desire to comment, namely, the failure of the learned judge to sum up, or to sum up at any length, to the assessors. The learned judge's note on the subject is as follows:

> "Note: I do not avail myself (other than very briefly) of the permission in s. 283 (1) (C.P.C.) but proceed to put to the assessors the following questions."

The learned trial judge then proceeded to take the opinion of each assessor as to the guilt or otherwise of each accused upon each count. The opinions given were to the effect that none of the accused was guilty upon any count.

It is true that under s. 283, sub-s. (1) of the Tanganyika Criminal Procedure Code a trial judge is not under a statutory obligation to sum up to assessors. On this point we prefer the decision of this court in *Washington s/o Odindo v. R* (1) (1954), 21 E.A.C.A. 392, following as it does the express words of s. 283, to the dictum in *Miligwa s/o Mwinje and Another v. R.* (2) (1953), 20 E.A.C.A. 255, 256, that s. 283 (1) "requires the judge to sum up the evidence to the assessors". Nevertheless we wish to endorse the view expressed by this court in *Washington s/o Odindo v. R.* (1), that "it is a very sound practice . . . to do so except in the very simplest cases". The opinions of assessors can be of great value and assistance to a trial judge, but only if they fully understand the facts of the case before them in relation to the relevant law. If the law is not explained and attention not drawn to the salient facts of the case, the value of the assessors' opinions is correspondingly reduced. The instant case was essentially one where the assessors should have had the benefit of a careful summing-up if any weight was to be attached to their opinions. The failure of the learned trial judge to sum up largely negatived the value of the assessors. The learned judge dismissed the assessors' opinions in one sentence:

> "Having carefully weighed all the evidence on both sides together with the negative replies of the three Wazinza assessors, I see no reason to doubt, and I accept the evidence of Constable Hamisi, a person quite outside these inter-tribal disputes."

It seems to be implied that inter-tribal prejudice had biased the assessors' minds. This may have been true and may be a valid reason for discarding opinions which, when received, are considered perverse; but it is not a valid reason for dispensing beforehand with a summing-up.

Appeal dismissed.

The appellants did not appear and were not represented.

For the respondent:
JG Samuels (Crown Counsel, Tanganyika)
The Attorney-General, Tanganyika

For the appellant:
Patel & Mann, Mwanza

Agathine v R
[1958] 1 EA 686 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	9 December 1958
Case Number:	135/1958
Before:	Forbes V-P, Gould JA and Sir Owen Corrie Ag JA

Sourced by: LawAfrica

Appeal from: H.M. Supreme Court of Seychelles–Rassool, Ag. C.J

[1] Jurisdiction – Appeal against sentence – No right of appeal – Criminal Procedure Code, s. 301 (*d*) (*S.*) *– Criminal Procedure Code* (*Amendment*) (*No.* 2) *Ordinance,* 1957, *s.* 4 (*S.*).

Editor's Summary

The appellant was convicted by a magistrate of being in possession of property reasonably suspected of having been stolen and failing to give a satisfactory account of how he came by it, contrary to s. 310 of the Penal Code. The magistrate considered that in view of the appellant's previous convictions his powers of punishment were inadequate and committed the appellant to the Supreme Court for sentence. The appellant was duly sentenced by the Supreme Court and then appealed against the sentence under s. 301 (*d*) of the Criminal Procedure Code which had been replaced by s. 4 (1) (*b*) of the Criminal Procedure Code (Amendment) (No. 2) Ordinance, 1957. The court treated the appeal as being under the new section which provides:

> "Any person convicted on a trial held by the Supreme Court or by the Court of Assize may appeal to Her Majesty's Court of Appeal for Eastern Africa."

Held –

(i) s. 4 (1) (*b*) of the Criminal Procedure Code (Amendment) (No. 2) Ordinance, 1957, confers no right of appeal to the Court of Appeal for Eastern Africa where the conviction was had in a magistrate's court.

(ii) the Court of Appeal can only exercise the jurisdiction conferred on it by the laws of the territory concerned, and in the absence of any provision conferring jurisdiction the appeal was incompetent.

Appeal dismissed.

Case referred to:

(1) *R. v. Nealon* (1950), 17 E.A.C.A. 120.

Judgment

Forbes V-P: read the following judgment of the court: This was an appeal against sentence imposed by the Supreme Court of Seychelles. We dismissed the appeal as incompetent and now give our reasons.

The appellant was convicted in a magistrates' court of being in possession of property reasonably suspected of having been stolen and failing to give a satisfactory account of how he came by it, contrary to s. 310 of the Penal Code. The learned magistrate then concluded that, in view of previous convictions admitted by the appellant, his powers of punishment were inadequate, and he committed the appellant to the Supreme Court for sentence under s. 90 of the Courts Ordinance. The Supreme Court imposed a sentence of eighteen months' imprisonment, and it was against this sentence that the appellant appealed.

The appeal purported to be under s. 301 (*d*) of the Seychelles Criminal Procedure Code, and in accordance with that provision the memorandum of appeal sought the leave of this court to bring the

appeal against sentence. Section 301 of the Criminal Procedure Code was repealed and replaced by s. 4 of the Criminal Procedure Code (Amendment) (No. 2) Ordinance, 1957

(No. 23 of 1957), and no longer contains a para. (*d*). Provision similar to para. (*d*) of the old section is, however, contained in para. (*b*) of sub-s. (1) of the new section, and we treated the application as being under the new section. The relevant portion of that section provides,

> "301 (1) Any person convicted on a trial held by the Supreme Court or by the Court of Assize may appeal to Her Majesty's Court of Appeal for Eastern Africa–
>
>
>
> (*b*) Against the sentence passed on his conviction with the leave of such Court of Appeal, unless the sentence is one fixed by law."

It will be noted that only a person "convicted on a trial held by the Supreme Court or by the Court of Assize" is entitled to bring an appeal under the section. Here the appellant was convicted by a magistrates' court. It seemed to us that the section conferred no right of appeal to this court where the conviction was had in a magistrate's court but sentence was passed by the Supreme Court in accordance with the provisions of s. 90 of the Courts Ordinance. Nor were we able to find any other provision in the laws of the Seychelles which could be construed as giving the appellant a right of appeal to this court. Section 90 of the Courts Ordinance (as replaced by s. 12 of the Courts (Amendment) Ordinance, 1955 (No. 8 of 1955)), is silent on the subject; and s. 285 of the Criminal Procedure Code (as replaced by s. 3 of the Criminal Procedure Code (Amendment) (No. 2) Ordinance, 1957) deals solely with appeals to this court from decisions of the Supreme Court in its appellate jurisdiction. We are not aware of any other provision relevant to the matter.

This court can only exercise the jurisdiction conferred on it by the laws of the territory concerned (Eastern African Court of Appeal Order-in-Council, 1950, s. 16; *R. v. Nealon* (1) (1950), 17 E.A.C.A. 120), and in the absence of any provision conferring jurisdiction in the instant case we were obliged to dismiss the appeal as incompetent. The absence of provision for appeal against sentence by a person sentenced by the Supreme Court under the procedure prescribed by s. 90 of the Courts Ordinance is a gap in the appellate system of the Seychelles which we desire to bring to the attention of the authorities.

We would add that, in the instant case, we should not have felt inclined to interfere with the sentence in any event, had we had jurisdiction to do so.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:
JP Webber (Crown Counsel, Kenya)
The Attorney-General, Seychelles

Pool v R
[1958] 1 EA 688 (HCU)

Division: HM High Court for Uganda at Kampala

Date of judgment: 3 November 1958

Case Number: 223/1958

Before: Sir Audley McKisack CJ

Sourced by: LawAfrica

[1] Criminal law – Forgery – Charge laid under wrong section – Whether conviction should be quashed by the appellate court – Penal Code, s. 326 *and s.* 327 (*U.*) *– Criminal Procedure Code, s.* 331 (2) (*ii*) (*U.*).

Editor's Summary

The appellant was convicted on three counts alleging forgery, uttering a false document and obtaining money by false pretences. The charge of forgery was laid under s. 327 of the Penal Code which provides a sentence of life imprisonment for the forgery of certain specified documents, but the forged document in the instant case came within the provisions of s. 326. It was submitted for the appellant that where the offence has been charged under a wrong section the conviction should be quashed by the appellate court.

Held – the charge ought to have been laid under s. 326; in view of the provisions of s. 331 (2) (ii) of the Criminal Procedure Code the appeal against conviction would be allowed but a conviction under s. 326 would be substituted.

Meek v. Powell, [1952] 1 K.B. 164 distinguished.

Appeal allowed. Conviction under s. 326 substituted.

Case referred to:

(1) *Meek v. Powell*, [1952] 1 All E.R. 347; [1952] 1 K.B. 164.

Judgment

Sir Audley McKisack CJ: The appellant was convicted on three counts, for forgery, uttering a false document, and obtaining money by false pretences, respectively. He was sentenced to six months imprisonment on each count, to be served consecutively. He appeals against the conviction on the forgery count only, and against all the sentences.

The forgery charge was laid under s. 327 of the Penal Code. That is the section which provides a sentence of life imprisonment for the forgery of certain specified documents (wills, banknotes, etc.). The preceding section (No. 326) provides the general punishment for forgery, which is three years save where some other provision of the Code specifies a different punishment. The particulars of the count for forgery in the instant case state that the document forged was the duplicate copy of a railway consignment note. Clearly this is not one of the documents specified in s. 327, and the charge ought to have been laid under s. 326. This error escaped notice by all concerned at the trial, and the appellant was convicted for contravening s. 327. The learned trial magistrate has noted on the record that, after judgment and sentence had been pronounced, he observed the error but considered it could be rectified only on revision or appeal.

Mr. Lubogo for the appellant relies on *Meek v. Powell* (1), [1952] 1 K.B. 164, where the Court of

Criminal Appeal held that Quarter Sessions had been correct in quashing a conviction where the information charged an offence under a repealed section, notwithstanding that the repealed section had been re-enacted in identical terms by a later Act. At p. 167, Lord Goddard, C.J., said as follows:

> "If this were a conviction on indictment, and the indictment had charged an offence under the wrong section, although the court had power to amend the indictment before the trial and put the right section in, it seems clear that if the conviction took place without the indictment being amended, the Court of Criminal Appeal would have no option but to quash the conviction. That seems to have been decided in *R. v. Taylor*, where a wrong section had been referred to in the indictment; although the particular section had been repealed and replaced by another section the Court of Criminal Appeal held that, as the wrong section had been mentioned in the indictment, the indictment must be quashed."

Mr. Lubogo contends that, as the instant case is also one where the offence has been charged under the wrong section, the conviction should accordingly be quashed by the appellate court.

When Lord Goddard referred to "the wrong section" he was speaking of a section which had been repealed. There is clearly a distinction between that position and the one in the instant case where the charge has been laid under a section which is not a repealed section, but is one which imposes a heavier penalty than is appropriate to the particular article in respect of which the offence is alleged to have been committed. Moreover, I do not consider that the appellant (who was represented at the trial by Mr. Lubogo) can have been misled or prejudiced, since the particulars of the offence state, with great particularity, the document alleged to have been forged.

Clearly the conviction ought not to have been had under s. 327 and, in view of the provisions of s. 331 (2) (ii) of the Criminal Procedure Code, my proper course is to allow the appeal against that conviction and find the accused guilty of contravening s. 326 of the Penal Code.

As regard the sentences, although the amount of money involved was certainly small, the appellant was in a position of trust and a lenient sentence would be inappropriate. I therefore maintain the sentence which was passed on the forgery charge and affirm the sentences on the two other counts.

Appeal allowed. Conviction under s. 326 *substituted.*

For the appellant:
D Lubogo
D Lubogo, Kampala

For the respondent:
AM McMullin (Crown Counsel, Kenya)
The Attorney-General, Uganda

Odeke s/o Taram v R
[1958] 1 EA 690 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	29 December 1958
Case Number:	314/1958
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Criminal law – Charge – Accused charged with being in a building by night with intent to commit a felony – Accused actually found in enclosed compound – Whether compound is a building – Penal Code, s. 285 (*f*) (*U.*).

Editor's Summary

The appellant was convicted of and sentenced for being in a building at night with intent to commit a felony therein contrary to s. 285 (*f*) of the Penal Code. The evidence was that a night-watchman, at 11 p.m., found the appellant in the enclosed compound of his employer's house or shop. On appeal the question of law in issue was whether the appellant was in a "building" for the purposes of s. 285 (*f*).

Held – a compound surrounded by a wall or fence cannot be said to be a building for the purposes of s. 285 (*f*).

Appeal allowed. Conviction under s. 286 (1) substituted.

Judgment

Sir Audley McKisack CJ: The appellant was convicted of being in a building by night with intent to commit a felony therein, contra s. 285 (*f*) of the Penal Code. He has appealed on grounds of fact, which are without substance, but there is also a point of law to be considered. The evidence was that a night-watchman, at 11 p.m., woke up and found the appellant in the compound of his employer's house or shop–it is not clear which. The compound was stated by the witness to be an "enclosed" one. The appellant was seen in close proximity to the motor car of the witness's employer and he was armed with a stick. He came up to the night-watchman and aimed a blow at him, which the night-watchman warded off. The latter struck the appellant with a panga and the appellant ran away, but he collapsed and was found bleeding in the road. The question is whether the appellant was in a "building", since that is a necessary ingredient of the offence created by s. 285 (*f*). Mr. Few for the Crown felt unable to support the learned magistrate's view that an enclosed compound was a building for this purpose. I am of the same opinion. I do not think that a compound surrounded by a wall or fence (there is no evidence as to the means by which the compound was "enclosed") can be said to be a building for the purposes of s. 285 (*f*) any more than a garden, similarly enclosed, of a house could be said to be such a building. That being so, the conviction cannot stand, but Mr. Few asks me to substitute a conviction of contravening another paragraph of the same section, viz., para. (*b*), which makes it an offence to be found armed with a dangerous or offensive weapon or instrument by night, being so armed with intent to break or enter a building and commit a felony therein. I am not, however, satisfied that the evidence is sufficient to establish that intent. It is just as likely that his intentions were directed to the car as to an entry into any building. Mr. Few also says that the evidence would, in any event, support a conviction under s. 286, which deals with criminal trespass. That offence is committed by any person who unlawfully enters another person's property

with intent to commit an offence, and I agree with Mr. Few that the evidence does support a conviction of that nature.

I accordingly allow the appeal to the extent of substituting a conviction of contravening s. 286 (1) of the Penal Code and, since the maximum sentence which can be imposed for that offence is three months' imprisonment, I set aside the sentence of eighteen months' imprisonment passed by the trial magistrate and substitute a sentence of three months' imprisonment.

Appeal allowed. Conviction under s. 286 (1) *substituted.*

The appellant did not appear and was not represented.

For the respondent:
HSS Few (Crown Counsel, Uganda)
The Attorney-General, Uganda

Mulji Kanji Mehta v Karsandas Pitamber & Brothers
[1958] 1 EA 691 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	23 October 1958
Case Number:	227/1958
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Execution – Order for attachment of salary of judgment – debtor – Non-compliance by employer – Application to bring employer on the record as a party and for issue of notice to employer to show cause – Whether plaintiff entitled to relief claimed – Civil Procedure Rules, O. 19, *r.* 45 (*U.*) *– Indian Civil Procedure Rules, O.* 21, *r.* 48.

Editor's Summary

The plaintiff obtained an order for attachment of the salary of a partner in the defendant's firm. The order was served on the defendant's employer, who failed to comply with the order. The plaintiff then made an application to the court to bring the employer on the record as a party and for an order that a notice be issued requiring the employer to show cause why the amount of the debtor's salary which should have been paid over to the plaintiff should not be recovered by attachment of the employer's property.

Held –

(i) the application to bring the employer on the record as a party was misconceived.

(ii) the plaintiff was entitled to an order that notice be issued to the employer to show cause in terms of the application.

Order accordingly.

Case referred to in judgment:

(1) *Sombhai Patel & Co. v. Hirji Pooja and Another*, Uganda High Court Civil Case No. 194 of 1950 (unreported).

(2) *Niadar Mal v. Biddulph* (1912), 14 I.C. 737.

Judgment

Sir Audley McKisack CJ: After judgment had been obtained against the defendant in this case, an order was obtained against his employer, the Vijay Ration Store Ltd., under O. 19, r. 45, attaching one

moiety of his salary. The order attaching the salary was served on the employer on March 28, 1958, but, according to an affidavit filed on behalf of the judgment-creditor, the employer has not obeyed the order. The present application by the judgment-creditor is that the court should "bring the Vijay Ration Store Ltd. on the record as a party", and, further, that notice be issued requiring that company to show cause why the amount of the debtor's salary which should have been paid over to the judgment-creditor should not be recovered from the company by attachment of its property.

As a precedent for this procedure Mr. C.D. Patel, for the judgment-creditor, referred me to *Sombhai Patel & Co. v. Hirji Pooja and Another* (1), Uganda High Court Civil Case No. 194 of 1950 (unreported). In that case, where there had also been an attachment of the judgment-debtor's salary and the order had not been complied with, Low, J., made the following order:

> "That M. Musa trading as Uganda Furniture Works be put on the record as a defendant and that notice to show cause why execution should not issue be issued."

When, subsequently, Musa appeared to show cause before Ainley, J., the latter observed in a written ruling:

> "Musa has now been 'joined as a party', whatever that might mean exactly, and he has been called on to show cause why his property should not be attached to satisfy the court's order . . ."

It will be seen that Ainley, J., had doubts about that part of the order made by Low, J., which purported to join the employer (Musa) as a party. I also have doubts as to the necessity or propriety of such an order. Mr. Patel has referred me to Chitaley and Rao's Code of Civil Procedure (6th Edn.), Vol. 3, p. 2994. Order 19, r. 45 of the Uganda Rules is to the same effect as O. 21, r. 48 of the Indian Rules, but with one important difference. Both provide for the attachment of salary of a judgment-debtor by means of an order of the court, of which notice is to be given to the person whose duty it is to disburse the salary, and they go on to provide that the employer shall be bound by the order and shall be liable for any sum paid in contravention of the provisions of the rule. The difference between the Uganda and the Indian rule, however, is that the latter applies only to the employee of a Government, a railway company or a local authority, whereas the Uganda rule applies not only to a public officer or servant of a railway company or local authority, but also to any person privately employed. The comment in Chitaley and Rao on sub-r. 3 of the Indian rule (which makes the employing authority liable for payments made in contravention of the rule) is as follows:

> "The effect of this sub-rule is that any sum paid by a disbursing officer in contravention of this rule can and should be recovered directly from the Government or the railway company or the local authority, as the case may be. But no order for recovery thereof can be made without bringing the Government or the railway company or the local authority on the record as a party."

In a footnote to the last sentence in this passage a case reported in Indian Cases is cited as an authority, *Niadar Mal v. Biddulph* (2) (1912), 14 I.C. 737, but, unfortunately, this report is not available here. In Sarkar's Code of Civil Procedure (7th Edn.), Vol. 2, p. 1393, there is the following comment on the same sub-rule, and the same case is referred to:

> "When an officer commanding, refuses to comply with an order under this rule, the civil court should proceed to recover from Government the

> sums which should have been paid from judgment-debtor's pay leaving the Government to settle up as it pleases with its officer and the judgment debtor; *Oakes & Co., Ltd. v. Discarcie*, 5 I.C. 802: 10 P.R. 1910. No order can be made against Government without bringing it on the record. Therefore Government money cannot be attached on an application in which the debtor alone is impleaded; *Niadar v. Biddulph*, 14 I.C. 737: 98 P.R. 1912."

This latter comment appears to me to shed a little more light on the subject than the comment in Chitaley as to "bringing the Government on the record as a party". One can see the necessity for a step of this nature where the order attaching salary has been served (as the rule requires) on the disbursing officer of the Government or other public authority, and not on the Government or authority itself, but the position is surely different where the employer is a private person or a commercial company. In the last-mentioned cases the order attaching salary would be made in respect of that person or company, and would be served on that person or company. Nothing further seems necessary in the way of bringing such an employer on the record before he is required to show cause.

I am of opinion, therefore, that the first part of the application now before me is misconceived, and I accordingly make no order in respect of it. As to the second part of the application, which asks for the issue of notice to show cause, it is contended by Mr. Pinto for the Vijay Ration Store Limited that proceedings in this matter should be stayed by reason of the judgment-debtor having since been made bankrupt. A receiving order was made on October 10, 1958. I am unable to agree with this contention. The payments of salary which the judgment-creditor says that the employer failed to make were in respect of a period antecedent to the receiving order, and the judgment-creditor is now seeking to enforce the order for attachment of salary against the property, not of the judgment-debtor, but of his employer. Consequently, I do not consider it is open to me to order, under s. 11 of the Bankruptcy Ordinance (Cap. 29), a stay of the present proceedings.

I accordingly order that notice be issued to the Vijay Ration Store Limited to show cause in the terms of the application. The judgment-creditor will have his costs of this application.

Order accordingly.

For the plaintiff:
CD Patel
Patel & Patel, Kampala

For the employer:
SA Pinto
SA Pinto, Kampala

Mulji Kanji Mehta v Karsandas Pitamber & Brothers

[1958] 1 EA 694 (HCU)

Division: HM High Court for Uganda at Kampala

Date of judgment: 8 December 1958

Case Number: 227/1958

Before: Lewis J

Sourced by: LawAfrica

[1] Execution – Attachment of salary of judgment-debtor – Non-compliance with order by employer – Application requiring employer to show cause why the sum paid in contravention of order should not be recovered from him – Money advanced on account of salary by employer to employee – Whether employer has a lien on or can claim set-off against employee's salary – Civil Procedure Rules, O. 19*, r.* 45 (*U.*).

Editor's Summary

The plaintiff obtained an order for attachment of salary of a partner in the defendant firm. The order was served on the employer, who failed to comply with the order. The plaintiff then obtained an order requiring the employer to show cause why the amount of the debtor's salary which should have been paid over to the plaintiff should not be recovered by attachment of the employer's property. It was argued on behalf of the employer that an employer on whom a notice of attachment of servant's wages had been served is entitled to claim that he himself has a lien on such wages.

Held – there is no such thing as a lien on wages; the employer must pay to the plaintiff a moiety of the debtor's salary from the date when the order for attachment was served upon the employer.

Order accordingly.

Case referred to in judgment:

(1) *M. P. De Mello v. Shah* (1932), 14 K.L.R. 125.

(2) *Sombhai Patel & Co. v. Hirji Pooja and Another*, Uganda High Court Civil Case No. 194 of 1950 (unreported).

Judgment

Lewis J: This was an application by the plaintiff requiring Vijay Ration Store Ltd. to show cause why the sum paid in contravention of this court's order to attach one moiety of the defendant's salary should not be recovered from them.

The matter arose in this way. On June 28, 1957, the plaintiff obtained judgment against the defendants for Shs. 3,048/63, interest and costs. On March 22, 1958, the plaintiff applied under O. 8 for execution of his decree by attachment of the salary of Purshottam Pitamber (partner in the defendant firm), payable to him by Vijay Ration Store Ltd. The order was made on March 24 and served upon Vijay Ration Store Ltd. on March 26. On August 28, the plaintiff applied for an order that Vijay Ration Store Ltd. be made a party on the record, and that a notice be issued requiring them to show cause why the amount paid in contravention of the order to attach salary, be not recovered from them. On November 23, 1958, the plaintiff applied for an order calling upon Vijay Ration Store Ltd. to show cause why the sum paid in contravention of the order made on March 24 should not be recovered from them by attachment of their property.

On October 23, the application to make Vijay Ration Store Ltd. a party was dismissed, but the application to show cause was granted. On November

28, Harjivan Chhaganlal Joshi, a director of Vijay Ration Store Ltd., filed an affidavit without leave, and improperly in my view, stating that the defendant owed them Shs. 16,033/52 in respect of advances made to him on account of salary to be earned by him from March, 1958, to August, 1959. The employers claimed a lien and set-off to the extent of this sum.

At the hearing H. C. Joshi was cross-examined on his affidavit. It appeared that the deponent knew that the defendant was heavily indebted at the time his company employed him; that the so-called advances were given so that the defendant could pay his creditors; that more than Shs. 10,000/- had been advanced since the court order; and that the defendant had filed his petition in bankruptcy. The books showing the defendant's account, and written by him, were produced, but as they were in Gujerati I was not much wiser.

Mr. Pinto, for Vijay Ration Store Ltd., on the authority of *M. P. De Mello v. Shah* (1) (1932), 14 K.L.R. 125, argued that an employer on whom a notice of attachment of a servant's wages had been served, is entitled to claim that he has a lien on such wages. Incidentally, there is no such thing as a lien on wages.

Mr. C.D. Patel, for the plaintiff, argued that the Uganda case of *Sombhai Patel & Co. v. Hirji Pooja and Another* (2), Uganda High Court Civil Case No. 194 of 1950 (unreported), on O. 19, r. 45, should be followed in preference to the Kenya case.

In the Kenya case the employer claimed a lien on wages in respect of a debt incurred before the order of attachment. In the Uganda case the employer paid the employee's salary for a time and then stopped for 2½ months. The employer said that the employee left suddenly owing him a lot of money and that he should therefore be allowed to set-off the 2½ months' salary in reduction of what the employee owed him. Ainley, J., held that the employer had no right of set-off. Ainley, J., was of the opinion that a person against whom an order has been made under O. 19, r. 45 becomes the debtor of the judgment creditor rather as a garnishee becomes a debtor after a garnishee order nisi has been made absolute. However, a garnishee, as Ainley, J., observed, has a right of set-off existing at the date of the order nisi. I agree that the decision of Ainley, J., should be followed and not the decision in the Kenya case.

In the case before me the employers admitted advancing the defendant some Shs. 10,000/- after the date of the court's order. Further, they made no objection to the order when it was served upon them on March 26. I am therefore satisfied that if Vijay Ration Store Ltd. had a genuine claim against the defendant on March 26 they would have taken steps to bring the matter to the notice of the court.

I am satisfied that it looks as if Vijay Ration Store Ltd. allowed the defendant to make fictitious entries in their books for the purpose of defeating the execution creditor. The result is that Vijay Ration Store Ltd. must pay to the plaintiff a moiety of the defendant's salary from March 26 until today. I make this Shs. 450/- monthly for 8½ months, namely, Shs. 3,825/-.

The plaintiff is also entitled to the taxed costs of the proceedings as from March 26 and these must be paid by Vijay Ration Store Ltd.

Before concluding I would like to say that in future applications under O. 19, r. 45, for attachments of salary, the employer and debtor should be served with a notice to show cause why such an order should not be made. This would serve to avoid hardship in genuine cases of set-off.

Order accordingly.

For the plaintiff:
CD Patel
Patel & Patel, Kampala

For the employer:
SA Pinto
SA Pinto, Kampala

Mandavia v The Commissioner of Income Tax
[1958] 1 EA 696 (PC)

Division:	Privy Council
Date of judgment:	1 December 1958
Case Number:	7/1957
Before:	Lord Tucker, Lord Somervell of Harrow and Lord Denning
Sourced by:	LawAfrica
Appeal from:	Appeal from E.A.C.A. Civil Appeal No. 31 of 1956 on appeal from H.M. Supreme Court of Kenya–Cram, J

[1] Income Tax – Assessment – Notice requiring return of income within specified time – Request from taxpayer for further time for returns refused – Assessments made before minimum time allowed for returns expired – Whether assessments ultra vires and void – East African Income Tax (*Management*) *Act*, 1952, *s.* 40, *s.* 59 (1) *and* (3), *s.* 71 *and s.* 72.

Editor's Summary

The appellant had resided in Kenya since 1921. Prior to 1953 he had not been served with notices calling for any return of income, and he had made no returns. The appellant claimed that he had approached the revenue authorities in 1943, and that in 1950 he gave oral notice that he was chargeable to tax for that and eight previous years. As a result, correspondence ensued, information was asked for and some was given, and on May 26, 1953, the Commissioner sent notices by post requiring returns of income to be made within a specified time (which time could not, under s. 59 of the East African Income Tax (Management) Act, 1952, be less than 30 days after service of the notices). The appellant, who was in England, replied, asking for time to be extended until he returned to East Africa, which might be at the end of July. In his answer to this letter the Commissioner intimated his intention to issue, without delay, estimated assessments, and to add penalties thereto. These assessments were issued on June 26 (thus being made less than 30 days after the date of service of the notices) and the penalties added were triple the tax. The appellant appealed and claimed that the assessments were ultra vires and void, because they were made before the time allowed under s. 71 of the East African Income Tax (Management) Act, 1952, had expired. The courts below held the assessments were properly made under s. 72 of the Act, which

was an alternative to s. 71 and under which an original assessment could be made, whether or not a notice requiring a return of income had been issued.

Held –

(i) an opportunity to make a return should be a condition precedent to assessment; s. 71 of the Act provides how all original assessments are to be made, and s. 72 deals with the re-opening of cases which had been settled under the normal procedure.

(ii) before making the assessments, the time allowed under s. 71 must elapse, and since it had not done so, the assessments were ultra vires.

Appeal allowed. Assessments set aside.

Judgment

Lord Somervell: This is an appeal from the judgment of the Court of Appeal for Eastern Africa which varied, on the appellant's appeal, a decree of the Supreme Court of Kenya which had dismissed the appellant's appeal against assessments to income tax for the years 1943 to 1951 subject to remitting treble additional tax for the year of assessment 1951.

Over the earlier years in issue in this case the Kenya Income Tax Ordinance, 1940, was in force. As from January 1, 1951, that Ordinance was replaced by the East African Income Tax (Management) Act, 1952. It is common ground that there is no relevant difference so far as the present case is concerned and their Lordships were referred, as were the courts below, to the sections of the 1952 Act.

It is convenient to set out s. 40 (1), (2) and (3), s. 59 (1) and (3), s. 71 and s. 72 before coming to the facts.

Section 40 of the Act provides as follows:

"(1) Any person who:

(*a*) makes default in furnishing a return, or fails to give notice to the Commissioner as required by the provisions of s. 59, in respect of any years of income shall be chargeable for such year of income with treble the amount of tax for which he is liable for that year under the provisions of s. 36 to s. 39 inclusive; or

(*b*) omits from his return for any year of income any amount which should have been included therein shall be chargeable with an amount of tax equal to treble the difference between the tax as calculated in respect of the total income returned by him and the tax, properly chargeable in respect of his total income as determined after including the amounts omitted,

and shall be required to pay such amount of tax in addition to the tax properly chargeable in respect of his true total income.

"(2) If the Commissioner is satisfied that the default in rendering the return or any such omission was not due to any fraud, or gross or wilful neglect, he shall remit the whole of the said treble tax and in any other case may remit such part or all of the said treble tax as he may think fit.

"(3) The additional amounts of tax for which provision is made under this section shall be chargeable in cases where tax has been assessed by the Commissioner under the provisions of s. 72 as well as in cases where such income or any part thereof is determined from returns furnished."

Section 59 (1) of the Act provides:

"The Commissioner may, by notice in writing, require any person to furnish him within a reasonable time, not being less than thirty days from the date of service of such notice, with a return of income and of such particulars as may be required for the purposes of this Act with respect to the income upon which such person appears to be chargeable."

Section 59 (3) of the Act provides:

"Where any person chargeable with tax has not furnished a return within nine months after the end of the year of income, it shall be the duty of every such person notwithstanding that no notice has been served upon such person under sub-s. (1) to give notice to the Commissioner before October 15 in the year following the year of income that he is so chargeable."

Section 71 of the Act provides:

"(1) The Commissioner shall proceed to assess every person chargeable with tax as soon as may be after the expiration of the time allowed to such person for the delivery of his return.

"(2) Where a person has delivered a return, the Commissioner may:

(*a*) accept the return and make an assessment accordingly; or

(*b*) if he has reasonable ground for thinking that the return is not a true and correct return, refuse to accept the return and, to the best of his judgment, determine the amount of the income of the person and assess him accordingly.

"(3) Where a person has not delivered a return and the Commissioner is of the opinion that such person is liable to tax, he may, according to the best of his judgment, determine the amount of the income of such person, and asses him accordingly, but such assessment shall not affect any liability otherwise incurred by such person by reason of his failure or neglect to deliver a return."

Section 72 of the Act provides:

"Where it appears to the Commissioner that any person liable to tax has not been assessed or has been assessed at a less amount than that which ought to have been charged, the Commissioner may, within the year of income or within seven years after the expiration thereof, assess such person at such amount or additional amount as, according to his judgment, ought to have been charged, and the provisions of this Act as to notice of assessment, appeal and other proceedings under this Act shall apply to such assessment or additional assessment and to the tax charged thereunder:

"Provided that:

(*a*) where any fraud or wilful default has been committed by or on behalf of any person in connection with or in relation to tax for any year of income, the Commissioner may, for the purpose of making good to the revenue of the Territories any loss of tax attributable to the fraud or wilful default, assess that person at any time;

(*b*) an objection to the making of such assessment or additional assessment on the ground that the time limited for the making thereof has expired shall only be made on objection or appeal as provided for under the provisions of this Act."

On the view which their Lordships take no question as to penalties arises at present. It would therefore be undesirable to deal with facts which on that issue may hereafter require consideration.

The appellant has been resident in Kenya since 1921. According to his own statement he approached the revenue authorities in 1943. This was disputed but it is not disputed that prior to 1953 he was not served with notices under s. 59, nor did he make returns of his income. The appellant in 1950 gave oral notice to the respondent that he was chargeable in respect of 1950 and the previous eight years. As a result of that interview there was correspondence and information was asked for and some of it given. The machinery of the Act was not set in motion until May 26, 1953. On that day the respondent wrote asking for information and a deposit of £2,000. The letter also contained the following paragraph:

"As you do not appear at any time to have made a return of total income and claim for allowances, I am sending under separate cover forms covering years of assessment 1943 to 1953. These should be completed and submitted to me along with the accounts of your professional activities and of your property dealings as set out in preceding paragraphs."

No previous notice requiring a return having been sent, the "time allowed" within s. 71 would be the minimum of thirty days in accordance with s. 59 (1). The appellant was at that time in England and replied asking for time until he could get back to East Africa, which might be by the end of July. The answer to this letter was as follows:

"Ref. No. 70.

E.A. Income Tax Department,
Nairobi.
15th June, 1953.

Mr. G. R. Mandavia,
68, St. Mark's Road,
London, W. 10.

Dear Sir,

I have to thank you for your letter of the 4th June, and have noted your explanation concerning your absence from Kenya. I have further noted that there is no prospect of your being able to return before the end of July next. In these circumstances, and in order that there may be no undue delay in collection of duty, I propose to submit estimated Income Tax assessments for all years for which, on the basis of the figures which you have already submitted, you would appear to be liable. These assessments will, of course, be subject to adjustment on final agreement of liability.

In view of the fact that you were clearly liable and must have been aware of the fact that you were liable to taxation for a considerable period before any approach was made to this Department, I propose to have the assessments made with the addition of penalties. The quantum of the penalties will also be subject to adjustment at the discretion of the Commissioner when your liability has finally been established.

The notices of assessment will be issued to your Nairobi address and you will presumably be advised of their receipt and be able to give formal notice of appeal if you so desire.

I am unable to agree that you are not in a position to pay any deposit. On your own showing you have substantial properties in Nairobi, from which presumably you could obtain funds. In these circumstances I would repeat my request for a payment on account of £2,000. If this is sent to me at this address, it will be brought to account against the estimated assessments which it is proposed to raise, and final payment will be adjusted at a later date.

Yours faithfully,

REGIONAL COMMISSIONER."

The assessments referred to were made on or before June 18. They were post-dated June 26 but nothing turns on that. Assessments were often post-dated to allow the taxpayer more time.

The taxpayer submitted that these assessments were ultra vires and void in that they were made before the "time allowed" by s. 71 had expired. This is admitted by the respondent if the power to make these assessments has to be found under that section. The respondent justifies the assessments under the words of s. 72.

> "Where it appears to the Commissioner that any person liable to tax has not been assessed . . . the Commissioner may assess such person at such amount as, according to his judgment, ought to have been charged."

The assessments contained triple penalties under s. 40 in addition to the tax. Being made 'under s. 72 the proviso was relied on as justifying those assessments which related to years more than seven years from the time of the assessments.

Both courts below held that the assessments were properly made under s. 72. The learned judge remitted the triple penalties for 1951 because the appellant had given notice of his liability to tax for that year and supplied some figures. The appellant appealed. The Court of Appeal confirmed the assessments in respect of the tax and a penalty equal to the amount of the tax. As regards the further penalties the court remitted them to the Supreme Court for retrial by another judge.

The question of ultra vires is a difficult one and their Lordships have been much assisted by counsel on each side.

The appellant before the Board submitted that:

(1) Section 72 did not apply until the machinery under s. 71 had been put into operation and that the assessments were therefore ultra vires.

(2) Alternatively that if s. 71 and s. 72 were alternatives the respondent had elected to give notice under s. 59 and could not then operate s. 72 during the currency of the "time allowed."

(3) That the Court of Appeal had not judicially considered the question of wilful default or neglect under s. 40 and s. 72 or alternatively that in any event the whole sum assessed as penalties should be remitted to the Supreme Court.

If he succeeds on his first submission points (2) and (3) do not arise.

The arguments on the first point may be summarised as follows.

The appellant submitted that s. 71 (1) lays down the procedure which has to be followed in all cases. The words "time allowed", and this is not disputed, refer to the time allowed for the furnishing of the return under s. 59 (1). If therefore the Commissioner believes someone to be assessable or possibly assessable he must serve a notice. If a return is made and is accepted the Commissioner proceeds under s. 71 (2) (*a*). If he does not accept the return then he proceeds under s. 71 (2) (*b*). If no return is delivered then s. 71 (3) applies. In no case can he assess until the "time allowed" has expired.

There may be cases in which the return and particulars show that no tax is chargeable and no assessment is therefore made. The return is accepted or not disputed but does not lead to an assessment.

Coming then to s. 72, it is submitted for the appellant that the cases in which the person has not been assessed will be those referred to in the last paragraph, but in which at some later date additional information makes it appear to the Commissioner that an assessment ought to have been made. In other words s. 72 is dealing only with cases where subsequent information leads either to an assessment for the first time or to an additional assessment. It has no application to cases in which the machinery of s. 59 (1) has not been operated.

The respondent relies on the general words of s. 72. They cover he submits any case in which a person has not been assessed whether he has had a notice and "a time allowed" under s. 59 and s. 71 or not. He conceded that it would be contrary to the scheme of the Act to operate s. 72 in current cases. Section 59 and s. 71 were clearly intended to be the normal machinery. But if a year or longer had elapsed following the year of income s. 72 was properly available. It seemed impossible to formulate any precise limit of time before which the use of s. 72 would be ultra vires. The Court of Appeal accepted the argument that the two sections overlap over the whole period:

> "If the department were to abandon altogether the practice of requiring returns to be made, and began to assess in every case by guesswork under s. 72, the courts might not be slow to say that the powers given by the Act were being abused. But where powers given to a department of Government, or other statutory

authority, are capable of being, through

> perversity, misused, it does not follow that they are likely to be misused, and much less does it follow that they should be construed in an unnaturally restricted sense merely because of the theoretical danger of misuse."

Their Lordships have come to the conclusion that the construction submitted by the appellant is right for the following reasons.

If the power to make an assessment under s. 72 applies to the making of an original assessment their Lordships are unable to imply a term restricting it to back cases or making it ultra vires to operate it at any time.

One would expect an opportunity to make a return to be a condition precedent to assessment. This is supported by the provisions for personal allowances in Part VI of the Act. If the respondent is right any person can be assessed without having any such opportunity. There would be two concurrent jurisdictions one providing reasonable protection for the taxpayer and the other providing no protection quoad the original assessment, apart from a right to appeal.

Such a construction seems to their Lordships inconsistent with the general and mandatory provisions of s. 71. That section is providing how all original assessments are to be made.

Section 72 deals *inter alia* with additional assessments, with cases in which, owing presumably to subsequent information, the revenue desires to reopen what had apart from s. 72 been settled. Having regard to the wording of s. 71 it seems to their Lordships necessary to restrict the words as to assessing for the first time in s. 72 to cases in which the machinery of s. 59 (1) having been operated no assessment has been made. So far as the taxpayer is concerned after he had made his return or had an opportunity of doing so, it was settled that he was under no liability to tax for that year. Subsequent information leads the revenue to reopen the matter and decide that he ought to be assessed.

Section 72 is dealing with the reopening of cases which had been settled under the normal procedure.

This explains the fact that s. 72 contains a *prima facie* limitation of seven years whereas s. 71 contains no limitation. On the respondent's argument this seems inexplicable. On the other argument it seems reasonable that there should after a certain time be no reopening of what has been settled unless there has been fraud or wilful default.

The construction also gains support from the words "ought to have been charged", when they occur for the second time in s. 72. They there apply to "such amount" as well as "such additional amount".

Before making the assessments therefore the "time allowed" under s. 71 had to elapse. It is common ground that it did not and their Lordships will humbly advise Her Majesty that the appeal be allowed and the assessments set aside. The respondent must pay the appellant's costs throughout.

Appeal allowed. Assessments set aside.

For the appellant:
Dingle Foot, QC and *Peter MB Rowland* (both of the English Bar)
AL Bryden & Williams, London

For the respondent:
F Heyworth Talbot, QC and *Roderick A Watson* (both of the English Bar)

Charles Russell & Co, London

General trading Co Ltd v IN Patel and others trading as Nakasero Automobiles

[1958] 1 EA 702 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	18 December 1958
Case Number:	93/1958
Before:	Sir Kenneth O'Connor P, Forbes V-P and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda–Sheridan, J

[1] Pleading – Counterclaim – Action for declaration that bill of sale void and for damages for seizure of goods – Counterclaim that if bill of sale void plaintiffs indebted in liquidated amount for goods sold and delivered – Whether liquidated claim can be set-off or counterclaimed against unliquidated amount – Civil Procedure Rules, O. 8, *r.* 14 (*U.*) *– English Rules of the Supreme Court, O.* 21, *r.* 7.

Editor's Summary

The respondents sued for a declaration that a bill of sale was void, and damages for the allegedly unlawful seizure of the goods and chattels described therein. In their statement of defence the appellant company denied that the bill of sale was void, but that if it were not valid it took effect as an agreement. In addition, by what was described as a "counterclaim and set-off", they counterclaimed, if the bill of sale were held to be void, the sum of Shs. 32,225/-, being the balance of the price of goods sold and delivered. The respondents then applied for an order that the appellant company be refused leave to avail itself of the counterclaim under the provisions of O. 8, r. 2. The trial judge, considering that the exclusion of the counterclaim might save calling a considerable body of evidence with a consequent saving of expense and time, allowed the application. On appeal it was submitted for the appellant company that in making the order the judge based himself on incorrect premises.

Held –

(i) the judge although exercising discretionary power in making the order, had exercised it upon the wrong premises.

(ii) whilst a liquidated claim cannot be set off against an unliquidated claim the same rule does not apply to a counterclaim, which may be for a liquidated or unliquidated amount.

(iii) although the appellant's pleading was headed "Counterclaim and Set-off", it was essentially a counterclaim, and the case for having the counterclaim heard with the action was overwhelmingly in favour of the appellant.

Appeal allowed. Case remitted for hearing of the claim and counterclaim.

Case referred to in judgment:

(1) *Hall v. Fairweather* (1901), 18 T.L.R. 58.

(2) McCreagh v. Judd, [1923] W.N. 174.

Judgment

Gould JA: read the following judgment of the court: This was an appeal from an order of the High Court of Uganda dated October 17, 1958, whereby it was ordered that a counterclaim which had been filed by the appellant (defendant company) in the action could not conveniently be disposed of in the action and the appellant was refused permission to avail itself of it. Having heard counsel for both sides we allowed the appeal with costs in this court and costs of and arising out of the application in the court below, set aside the order made and remitted the case to the High Court for

continuance of proceedings on the claim and counterclaim. For this decision we now give our reasons.

On the plaint three named partners in a firm called "Nakasero Automobiles" claimed a declaration that a certain bill of sale was void and damages for the allegedly unlawful seizure of the goods and chattels described therein. It was alleged that a number of promissory notes given pursuant to an agreement for sale which preceded the bill of sale constituted a defeasance or condition not written on the same paper; it was alleged further that the consideration was not truly stated inasmuch as it was shown as "now paid to the borrower by the said lenders" whereas it was in fact

> "a debt due for goods sold and delivered on or about December 4, 1956, as per copy of the sale agreement annexed hereto and marked 'N.A. 6'";

it was alleged also that the method of setting out the interest charged and the description of the chattels did not comply with the law and that for all these reasons the bill of sale was void. The copy of the sale agreement annexed to the plaint indicates that the chattels described therein were sold by the appellant to the partnership trading as Nakasero Automobiles which appears then to have consisted only of the first and second respondents, and that payment of the price was to be made by eighteen instalments for which promissory notes were to be given and the price was to be secured by a bill of sale.

The statement of defence denied that the bill of sale was void, alleged that it was valid and that if it were not it took effect as an agreement. The acceptance of promissory notes was admitted and it was claimed that a number of them had been dishonoured by non-payment and that a balance of Shs. 32,225/- remained owing. The counterclaim which was the subject matter of the application appealed from was then set out and is as follows:

"COUNTERCLAIM AND SET-OFF.

"8. If it be held that the bill of sale is void and that the defendant company is not thereunder or otherwise entitled to sell the said goods, defendants claim from plaintiffs the sum of Shs. 32,225/- the balance of the price of goods sold and delivered and interest admitted by para. 9 of the plaint. Defendant company claims to set off the said sum against any sum which may be awarded to plaintiffs upon their claim.

"Wherefore defendant company claims:

(1) That plaintiff's claim be dismissed.

(2) Alternatively judgment for Shs. 32,225/- less any damage awarded to plaintiffs.

(3) Costs and interest."

The respondents filed a reply of which the only paragraphs relevant to the arguments advanced before this court were:

"2. They deny that they have admitted a sum of Shs. 32,225/- or any other sum in para. 9 of the plaint as alleged or at all."

"5. The plaintiffs will contend that the defendants would be entitled to make their claim, if any, only on promissory notes referred to hereinbefore and not on any of the agreements referred to in the plaint."

"6. The counterclaim for the sum of Shs. 32,225/- claiming the said sum against all the plaintiffs is bad in law as the plaintiff No. 3 has never been a party to any obligations to the defendants as alleged or at all."

The respondents applied to the court for an order that the appellant be refused leave to avail himself of the counterclaim under O. 8, r. 2 of the Civil Procedure Rules which is as follows:

> "2. A defendant in an action may set off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross-action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross-claim. But the court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to defendant to avail himself thereof."

Having heard argument the learned judge in the court below made the order appealed from and the essence of his decision is contained in the passage from the order:

> "Here the issue is the validity of the bill of sale. To decide that issue first will narrow the field of inquiry and might save calling a considerable body of evidence as to the dealings between the parties with a consequent saving of expense and time. If the plaintiffs' claim fails that may well be an end of the matter."

It should be observed before we pass to the consideration of the substance of the appeal that r. 12 of O. 8 of the Civil Procedure Rules also gives the court power to exclude a counterclaim from an action at its discretion, but that an application under that rule may only be made "at any time before reply". It was not submitted before us that the present application was not properly brought under O. 8, r. 2, which contains no such limitation, and we do not therefore deem it necessary to express any opinion as to the effect of this apparent duplication.

Counsel for the appellant argued before this court that the learned judge, in finding that the exclusion of the counterclaim might save calling a considerable body of evidence with a consequent saving of expense and time, based himself on incorrect premises. He contended that the bulk of the evidence necessary to enable the court to consider the counterclaim would be produced as an essential part of the respondents' case. The counterclaim was for the balance of the price of goods sold and delivered, indebtedness for which it was claimed was admitted in the plaint. This would be a matter of construction, but in any event the document which evidenced the sale of the goods was the sale agreement referred to in para. 9(1) of the plaint. This was a document which, in order to establish the truth of the allegation in that paragraph, it would be necessary for the respondents themselves to prove.

In reply to this argument counsel for the respondents made two submissions. In the first place he contended that para. 5 of the reply, above set out, would result in the appellant having to prove the promissory notes in question and that a lot of evidence would have to be adduced as to their stamping, presentation, possible endorsement and to show if they were due. This argument is difficult to follow as the counterclaim is not at the moment based on promissory notes. Even if the appellant subsequently sought leave by way of amendment to rely on them, the majority of the matters mentioned by counsel would be established by the mere production of the notes and proof of the remainder would be unlikely to take any appreciable time. In the second place, counsel submitted that if the appellant relied upon the sale agreement, it contained an arbitration clause entitling the respondent to have the question of their liability referred to arbitration, and he would be embarrassed by having to await its

outcome. The answer to this is twofold. It would appear (though we are not to be taken as deciding the matter) that the respondents by filing a reply to the counterclaim have already waived their right (if any) to arbitrate; secondly, if the question did arise and the learned judge felt he should stay proceedings on the counterclaim on this account, there would be nothing to prevent him from continuing with the hearing of the claim itself. We saw no merit in the argument for the respondents on this aspect of the matter and accepted the submission of counsel for the appellant as having substance.

A number of other points raised may be briefly disposed of. There is an allegation in para. 6 of the reply that as the third plaintiff was not a party to the various documents, the counterclaim is bad in law. This is completely fallacious. It is not apparent when the third plaintiff became a partner in Nakasero Automobiles, but to suggest that a counterclaim is bad because it may fail against one of three plaintiffs is quite wrong. Order 1, r. 4 of the Civil Procedure Rules is applicable and if authority be needed it is to be found in *Hall v. Fairweather* (1) (1901), 18 T.L.R. 58.

Next it was contended that a liquidated claim could not be set off against an unliquidated one. This is so, on the authority of *McCreagh v. Judd* (2), [1923] W.N. 174, but the same rule does not apply to a counterclaim, which may be for a liquidated or unliquidated amount. Although the appellant's pleading in this regard is headed "Counterclaim and Set-off" we would construe it as essentially a counterclaim, though it indicates willingness to submit to judgment for the balance either way, a power which the court may in any event exercise. See Annual Practice, O. 21, r. 17; Civil Procedure Rules, O. 8, r. 14. In this alternative claim for relief the appellant asked for judgment for the amount of his counterclaim less any damages awarded to the respondents. This of course would be impossible in the case of a set-off in the strict sense as that is a mere defence and would not entitle a person relying on it to judgment for an excess in his favour. We consider that the correct construction of this pleading is as we have stated above.

As the matter appears to this court from a more general viewpoint the case for having this counterclaim heard with the action is overwhelmingly in favour of the appellant. The claim and counterclaim have their origin in the same transaction. The respondents ask for judgment for damages, relying on grounds which, if established, may be good in law, but are in a sense mere technicalities when questions of right and wrong between the parties are considered. They now seek at a very late stage to preclude the appellant from establishing that, if the bill of sale is void, the respondents are still legally indebted to the appellant and would leave the company to the chances of an application to the court to stay execution until it commenced and brought to judgment, a fresh action. We realise fully that the learned judge in the court below was exercising a discretionary power, but we consider that he exercised it upon the wrong premises. He was misled as to the extra time and expense which would be involved if the counterclaim were heard together with the claim. He also failed to consider that if the respondents' claim succeeded and the appellant then brought a fresh action the total time and expense involved would be substantially increased.

For the foregoing reasons we made the order above-mentioned.

Appeal allowed. Case remitted for hearing of the claim and counterclaim.

For the appellant:
RE Hunt
PJ Wilkinson, Kampala

For the respondents:
KG Korde
MP Vyas, Kampala

Lamambutu s/o Makalya and another v R
[1958] 1 EA 706 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	5 November 1958
Case Number:	126/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika–Williams, Ag. J

[1] Criminal law – Evidence – Extra-judicial statements made to district commissioner who was also officer-in-charge of police – Admission of statements by trial judge before court has heard whole evidence as to admissibility – Whether accused prejudiced – Indian Evidence Act, 1872, *s.* 25.

[2] Criminal law – Evidence – Common intent – When court justified in inferring criminal purpose from evidence that native accused carried sticks or spears – Penal Code, s. 23, *s.* 200 (*c*) (*T.*).

[3] Criminal law – Trial – Assessors – of assessors not taken on general issue as to guilt or innocence of accused – Criminal Procedure Code, s. 270 (*T.*).

Editor's Summary

The appellants were convicted of murder. The only evidence implicating them consisted of statements made by them to the district commissioner who was also the officer-in-charge of police in the district. When evidence of the statement made by the first appellant was led, objection to its admissibility was taken by counsel for the second appellant. After hearing argument, but before the district commissioner had been cross-examined, or any other evidence called, the trial judge ruled that the statement was admissible and it was accordingly read to the assessors. Subsequently the second appellant's statement was also admitted, despite objection to its admissibility. The trial judge did not consider whether, since the statements of the appellants were the only substantial evidence implicating them, what the second appellant had said was sufficiently clear and unequivocal as to amount to a confession of a common intention with the first appellant of such a nature as to render him liable to conviction for murder; nor had the trial judge asked the remaining assessor, (the other having fallen ill) to state his opinion on the case as a whole and on the general issue as to the guilt or innocence of the appellants.

Held –

(i) this was not a case where there was ample evidence outside the statements to sustain the decision; on the contrary the court was dependent on them completely and obviously, and accordingly it was

all the more important that the court should have complied fully with the procedural requirements of a trial within a trial; these requirements not having been complied with, the appellate court was not satisfied that there had been no resulting prejudice to the appellants.

(ii) in East Africa where it is the custom for natives to carry with them sticks or spears in almost all circumstances, the inferences as to common intent and criminal purpose to be drawn from them so doing are less strong than in the case of Europeans, say in England, and in each case depend upon the particular circumstances.

(iii) when the opinion of assessors is taken in the form of answers to specific questions, they must also be asked to state their opinion on the case as a whole, and on the general issue as to the guilt or innocence of the accused.

Appeal allowed.

Case referred to in judgment:

(1) *R. v. Ndundu Mwarachubi and Others* (1948), 15 E.A.C.A. 101.

(2) *R. v. Shagenda* (1948), 15 E.A.C.A. 139.

(3) *M'Murairi v. R.* (1954), 21 E.A.C.A. 262.

(4) *Kiyori v. R.* (1956), 23 E.A.C.A. 480.

(5) *R. v. Betts and Ridley*, 22 Cr. App. R. 148.

(6) *R. v. Mughuira and Others* (1943), 10 E.A.C.A. 105.

(7) *R. v. Selemani and Another* (1947), 14 E.A.C.A. 94.

(8) *R. v. Msengi and Another* (1955), 22 E.A.C.A. 500.

(9) *R. v. Chebiegon and Another* (1933), 15 K.L.R. 100.

(10) *R. v. Washington* (1954), 21 E.A.C.A. 392.

Judgment

Sir Kenneth O'Connor P: read the following judgment of the court: On October 23, 1958, the court allowed this appeal which was brought from the conviction of both appellants by the High Court of Tanganyika upon a charge of murder. We now give our reasons for so doing.

The evidence touching the circumstances of the death of the deceased was summarised by the learned trial judge as follows:

> "Sediki s/o Hamisi (P.W. 7) stated that in January, 1956, he was sick at his home at Ruvu Upuni, Arusha District, with the result that his brother Sudi Tumo was looking after his cow and herd of goats, that on a Saturday in February the cow and about half the goats came back by themselves in the afternoon, and that he then searched for his brother and found him in the bush dead with two wounds at the side of his neck at the back. Benedicto s/o Selemaiti (P.W. 5) stated that on a Saturday in the same month he was at his house in the same village when he heard a form of alarm indicating that someone had been killed, that the next day he and others followed cattle tracks which led them the day after to a place where a camp had been made and where there were signs that a goat had been slaughtered and eaten, that they continued the search, following two sets of footprints, as far as Longai where they found some goats and at the same time saw the apparently Masai heads of two men running away, and that they also found the bow and quiver produced which they knew to belong Sudi Tumo. Sadiki identified the bow and quiver as those of his brother and stated that at the time referred to by him a search party went out and brought them back with some of the goats. Benedicto further referred to bringing back a stick which other evidence purports to show was the property of the accused 1, although it has since been lost. Sadiki stated in the lower court that he found what was apparently the same stick by the body of the deceased, but in this court he stated consistently with Benedicto that he found no stick and explained that in the lower court he was only referring to the wounds that he saw being in his view stick wounds."

It is expedient to deal at the outset with the question of the stick last above referred to. Benedicto, who found it near the place where the two "heads" were seen apparently running away, said it was a black stick, some 3 ft. long without any special peculiarities. The "other evidence" mentioned in the above-quoted passage from the judgment as purporting to show that it was the property of the first

appellant, Lamambutu, was evidence given by a police tracker named Kunyinyi s/o Lemuiya who arrested the appellants. He described it as “an ordinary stick used by Masai” and “a big stick like which the Masai are fond of walking with”. Kunyinyi said that the appellant Lamambutu

had claimed it as belonging to him, and also gave evidence of alleged confessions made by each appellant. For reasons relating to the absence of any caution given to the appellants and to possible inducement held out to them, as well as certain features of Kunyinyi's evidence which it is unnecessary to detail, the learned trial judge directed the assessors that the confessions said to have been made to this witness were best ignored, and he expressed similar views in his judgment. The same considerations apply, in our opinion, to Kunyinyi's evidence about the stick, added to which is the fact that it has never been produced in court, for the same witness claims to have lost it at a time when the appellants, having escaped, were not in custody.

If, then, the evidence of Kunyinyi concerning the stick and the alleged statements to him by the appellants is eliminated from consideration (and this was, we think rightly, the approach of the learned trial judge) the only further evidence which could be relied upon as connecting the appellants with the commission of the crime took the form of a statement made by each of them in the presence of Mr. F. B. Townsend, the district commissioner of Masai district. Mr. Townsend was returning from a safari to Kabari and was at Naberera when the two appellants were brought there in custody by the tracker Kunyinyi. They were brought before Mr. Townsend in turn by the court interpreter Simeon, and in each case after the particular appellant had said he wanted to make a statement the usual procedure was gone through. The appellant was informed that Mr. Townsend was a magistrate, that any statement made might be used in evidence and that the appellant was not obliged to make a statement. Inquiry was made as to how long the appellant had been under arrest and he was examined for signs of violence.

Mr. Townsend was the first witness called at the hearing and after he had given evidence to the effect indicated above with regard to the appellant Lamambutu he went on to say that the latter made a statement which was translated, recorded and signed. The statement was tendered in evidence and objection to its admissibility was taken by counsel for the second appellant, Ngwinina, on the ground that the statement was taken by the witness in his capacity as a police officer. The district commissioner was in fact the officer in charge of the police in the Masai district. The law as to the position arising under s. 25 of the Indian Evidence Act where such a dual capacity exists is well settled and is briefly summed up in the following passage from the judgment of this court in *R. v. Ndundu Mwarachubi and others* (1) (1948), 15 E.A.C.A. 101 at p. 102:

> "The fact that in unpoliced areas in East Africa administrative officers do often have to double the posts of a magistrate and a police officer has resulted more than once in this court having to consider whether a confession made to a district officer was admissible. The principle always followed has been that in those territories where s. 25 of the Indian Evidence Act still applies, as it does in Kenya, the words 'police officer' are not to be strictly confined to members of the regular police forces, and that a district officer who has charge of the police in his district may be deemed to be a police officer if he appears to have been acting as such on the occasion in question." [The application of s. 25 in Kenya is now regulated by Ordinance 39 of 1952.]

This decision was followed in the Tanganyika case of *R. v. Shagenda* (2) reported at p. 139 of the same volume.

The learned trial judge heard argument on the objection and ruled forthwith that the statement of the appellant Lamambutu was admissible; it was accordingly read to the assessors. That this ruling was, to put the matter at its lowest, premature is obvious. For one thing the interpreter had not at that stage given evidence, and though that fault may be said to have been

cured later, Mr. Townsend had not yet been cross-examined and no opportunity had been given to the defence prior to the ruling to do so or to call evidence, if it was desired, in the absence of the assessors. That this was a material departure from correct practice is clear. The authorities on the subject were fully considered by this court in *M'Murairi v. R.* (3) (1954), 21 E.A.C.A. 262 and the conclusion then expressed is to be found at pp. 264-5 of the report in the following passage:

> "Having fully reconsidered this aspect of the matter, we think any difficulties in reconciling these decisions can be resolved by applying the only true criterion, namely has the irregularity in fact prejudiced the accused? In this connection we think it necessary to draw attention to one aspect of the matter which has never been specifically referred to in any of the reported cases. It is this: when the court follows the procedure of a 'trial within a trial', the accused may elect to give evidence and may call witnesses limited to the one particular issue of admissibility and, in such case, neither he nor his witnesses can be cross-examined on the general issue. If, however, his opportunity to adduce evidence is postponed until he is called on to make his defence to the charge then, although he may restrict his own evidence-in-chief and that of his witnesses to the particular issue, yet nevertheless both he and they once in the witness-box are exposed to cross-examination on the general issue. There is obviously a very real danger of prejudice here: the defence may be caught on the horns of a dilemma-if no evidence is given the statement will be admitted and a conviction inevitably follow: if the accused goes into the witness-box, the probability is that he will make such damaging admissions under cross-examination that a conviction is almost as inevitable.
>
> "This is an aspect of the matter which this court should always fully consider before deciding that the irregularity has not led to injustice. If there is reason to believe that the appellant has been forced to give evidence on the case generally by the failure of the trial judge to follow the correct procedure and that he has been prejudiced thereby, the effect may well be that the conviction cannot stand and not merely that the disputed statement cannot be looked at."

The procedure to be followed was also indicated in the judgment in *Kinyori v. R.* (4)(1956), 23 E.A.C.A. 480 at 482, from which it may be useful to quote the following:

> "For the avoidance of doubt we now summarise the proper procedure at a trial with assessors when the defence desires to dispute the admissibility of any extra-judicial statement, or part thereof, made by the accused either in writing or orally. This same procedure applies equally, of course, to a trial with a jury. If the defence is aware before the commencement of the trial that such an issue will arise the prosecution should then be informed of that fact. The latter will therefore refrain from referring in the presence of the assessors to the statement concerned, or even to the allegation that any such statement was made unless and until it has been ruled admissible. When the stage is reached at which the issue must be tried the defence should mention to the court that a point of law arises and submit that the assessors be asked to retire. It is important that that should be done before any witness is allowed to testify in any respect which might suggest to the assessors that the accused had made the extra-judicial statement. For example, an interpreter who acted as such at the alleged making of the statement should not enter the witness box until after the assessors have retired. The assessors having left the court, the Crown, upon whom the burden rests of proving the statement to be admissible,

> will call its witnesses, followed by any evidence or statement from the dock which the defence elects to tender or make. The judge having then delivered his ruling, the assessors will return. If the statement has been held to be admissible the Crown witness to whom it was made will then produce it and put it in if it is in writing, or will testify as to what was said if it was oral."

The judgment then goes on to point to the right of an accused person to go into all the evidence again in the presence of the assessors on the question of weight.

We do not intend to lay it down that there can be no case in which objection to the admissibility of an alleged confession has been taken, in which this procedure would not be essential or appropriate. Admissibility might depend upon a pure question of law arising from facts not in dispute. Such a position arose in the case now under discussion when counsel for the appellant Lamambutu (referring to s. 30 of the Indian Evidence Ordinance) objected to the admissibility of the statement of the second appellant as against his client. The learned Trial judge rightly held that in a joint trial, if it was admissible against the maker it must be read in evidence, though it would of course later be incumbent upon him to direct the assessors and himself as to its admissibility and effect as against the other accused.

It is now necessary to consider whether the appellants have been prejudiced by the material irregularity in procedure which took place. It is true that there is no record of either counsel having made specific application for leave to call evidence, but there is in the record no detail at all of what was said during argument when the first objection was taken. It is also true that neither counsel formulated specific objection to the admissibility of the statements made by their own clients, but we think this is immaterial as counsel for the second appellant was fully entitled to object to the admissibility of the statement by Lamambutu, and the whole course of conduct of the trial may well have been affected by its admission at that early stage. Certainly exclusion of one statement would have been followed automatically by the exclusion of the other, for the ground relied upon was common to both.

The course the trial actually took after the admission of the statements, so far as it is relevant to this topic, is that counsel for the second appellant Ngwinina cross-examined the district commissioner concerning his position as a police officer but only elicited a denial that he had taken any active part in the investigation of the alleged crime prior to the taking of the statements. He was also cross-examined, as was the interpreter Simeon, as to the where abouts of the tracker Kunyinyi during the taking of the statements. Counsel for the first appellant, Lamambutu, directed very little relevant cross-examination to these witnesses but later called his client to give evidence on the general issue. In the witness box Lamambutu denied that he had ever made the statement and accused the district commissioner and the interpreter of fabricating it. In so doing he was obviously lying and must have damaged his credit with the court and assessors appreciably. The second appellant did not give evidence.

On the face of the matter it does not seem likely, had the appellants been offered and accepted the opportunity of giving evidence in the absence of the assessors on the question of admissibility, that the statements would have been excluded. The lack of substance in cross-examination indicates that counsel in all probability had no instructions of great materiality. We are, however, unable to say with the certainty that the nature of the case requires, that there was no prejudice. The cross-examination took place, perforce, after the statements were admitted. We are unaware of the nature of the evidence which might have been forthcoming from the second appellant. The first appellant, had he given evidence in the absence of the assessors, might well

have elected not to do so on the general issue. This is not a case in which there is ample evidence outside the confessions to sustain the decision, but on the contrary, one which has always been dependent upon them, completely and obviously. That being so, it is the more important that there should be full compliance with the procedural requirements that have been laid down for the protection of accused persons. In the present case, one in which the admissibility of the statements depended upon issues of fact and law, these precautions were neglected, and as we are unable to say that we are satisfied that there was no resulting prejudice, we have allowed the appeal. It is perhaps fair to say that the attitude of counsel may have contributed to some extent to the conduct of proceedings by the learned judge, but just as the latter is not absolved by absence of objection, from his duty to exclude inadmissible evidence, so we think he should in this case have made sure that the appellants were specifically offered all rights to which they were entitled. This ground alone we considered to be sufficient to serve as a basis for our decision.

Mention ought, however, to be made of two further points. The confessions relied upon were in the following terms:

The appellant Lamambutu:

> "We went from here to Ruvu to steal some sheep. We killed someone there. Deceased was struck twice, once on his neck and once above his ear, by a stick. We took some sheep including a ram and slept at a place called Engamata Olekiria. Next day we came to Longai, we slaughtered a castrated goat. Later we saw that we were being followed, so we left the sheep and ran away. We were later arrested. I was with Ngwinina. We both killed the man,-I do not know who he was."

The appellant Ngwinina:

> "We left here to go on a raid. We said 'Let us go and get some sheep, or at least a ram.' My companion said 'Stay here, perhaps you are afraid.' I replied 'Do not hit any person.' My companion, Lamambutu, approached deceased and struck him twice with a stick, once on the neck, and once above the ear. I ran and saw that Lamambutu had picked up deceased's quiver of arrows. I said 'Why did you hit him, before you took the ram.' My companion said 'You Wandorobo, you like meat. Let us take a sheep.' We took some sheep and drove them away. We left the place where he had killed deceased, and slept at Salal. Next day we slept at Longai. Later, people who were following us saw us, and we ran away. My companion was the leader. I stood some way away while he was killing deceased."

Their statements being the only material remaining evidence implicating the accused the question had to be decided whether, in the case of the second appellant, what he had said was sufficiently clear and unequivocal as to amount to a confession of a common intention with Lamambutu of such a nature as to render him liable to conviction for murder. The relevant provision of the Tanganyika Penal Code is s. 23 which is as follows:

> "23. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

That this is consistent with the English authorities appears clear from the following passage in Russell on Crime (10th Edn.) at p. 1855:

> "It is submitted that the true rule of law is, that where several persons engage in the pursuit of a common unlawful object, and one of them does

> an act which the others ought to have known was not improbable to happen in the course of pursuing such common unlawful object, all are guilty."

This passage of course refers to the law prior to the passing of the Homicide Act, 1957, which is not in force in East Africa.

Many of the English authorities turn upon the issue whether, when there was a common purpose to commit a felony not likely or expected to involve violence or the risk of it, the fatal blow was struck by one of the party with a weapon which the other or others were unaware that he was carrying. *R. v. Betts and Ridley* (5), 22 Cr. App. R. 148 went further in that as far as Ridley knew there was no weapon carried, but though Ridley had only agreed that the victim was to be pushed down and robbed of his bag, and himself was in a motor car at some little distance, he was found guilty of murder when Betts killed the victim with a blow of the fist or with some implement in the fist. That however was held to be a case where Ridley was a party to a common purpose to rob with "some degree of violence", and that Betts in carrying it out had varied it only in the manner of its execution.

In East Africa another factor is often present in cases of this sort in that in certain areas it is the custom for natives to carry with them sticks or spears in almost all circumstances. The inference as to criminal purpose to be drawn from their so doing is accordingly less strong than it would be in the case of Europeans, say, in England. There is little point in the present circumstances in doing more than mention a few of the decisions of this court and to note that they indicate that the answer depends in each case upon questions of fact and the particular circumstances.

The facts in *R. v. Mughuira and Others* (6) (1943), 10 E.A.C.A. 105 were that only one member of a party of nine who intended to commit burglary was armed (with a spear) and though the court noted that it was common practice to carry a spear in the particular part of Tanganyika at night for protection against animals, all were convicted of murder. The court considered that resistance to burglary was to be expected and the overcoming by the burglars of such resistance by violence if necessary might be regarded as the burglars' contemplated reaction to the resistance. There was in that case, however, an additional motive for resistance in the owner in that it was a time of famine and there is a hint in the judgment that the burglary was to be carried through at all costs. At p. 106:

> ". . . the reaction of the burglars was to stand their ground until their burglarious enterprise had been carried through to a successful conclusion."

A different result was arrived at in *R. v. Selemani and Another* (7) (1947), 14 E.A.C.A. 94 in which this court held that to say that when people do the felonious act of burglary together, and one kills an inmate of the house, both are liable to be convicted of murder, is too broad a statement of the law. In that case the accused had gone unarmed and one of the accused seized the bow and arrows belonging to the owner of the house and killed him. The conviction of the other was quashed. More recently, however, in 1955, it was held in *R. v. Msengi and Another* (8) (1955), 22 E.A.C.A. 500, that where two persons went to a shamba by night to steal maize cobs, and were armed with sticks, both were guilty of murder of the night watchman who was unluckily killed by being struck in the throat by a stick thrown by one of the accused. The court held that the fact that they were armed with sticks showed that they were prepared to offer violence in pursuit of their common intention. The court referred only to s. 200 (*c*) of the Penal Code which enacts that malice aforethought is established by evidence proving an intent to commit a felony, and did not enter upon discussion of s. 23 though it can be inferred of course, that it found common intent proved.

R. v. Chebiegon and Another (9) (1933), 15 K.L.R. 100, decided in 1933, was relied upon for the Crown by the learned solicitor-general, as approximating to the facts of the present case. It does so only to the extent that in each case the object of the accused was the theft of goods, but in *Chebiegon's* case (9) there was very clear evidence of a design to use violence and the attacking party was heavily armed. The relevant facts and the law are stated with clarity and force in the following passage from the judgment:

> "As the learned Chief Justice has found that neither of the appellants actually inflicted the fatal wound, it is necessary that the evidence in the case should demonstrate beyond reasonable doubt that the three adventurers set out either with the actually formed intention to murder or with the intention of committing a felony in the prosecution of which it was probable that the victim of that act would suffer violence from one of the weapons carried. It would appear from the evidence that the appellants and their confederate did not open the attack by using their dangerous weapons as they might have done had they intended to murder. It is a fair inference that they hoped, if they did not expect, that three men armed with dangerous weapons would intimidate a fourth man, and thus save them the trouble of inflicting violence upon him. Section 189 of the Penal Code lays it down that malice aforethought is established when death is caused when an intent to commit a felony is evidenced, and we take this to mean for the purpose of this case on the strength of English decisions, and notably in the case of the *Director of Public Prosecutions v. Beard*, [1920] A.C. 479, when the felony involves the employment of violence against the person killed. In this case the conduct of the appellants subsequent to the stone-throwing is certainly indicative of a common intention to use violence with their weapons for the purpose of effecting the theft, and, what is more, violence to the extreme if necessary, or at any rate up to the point of the infliction of dangerous wounds, which is the probable consequence of the use of such weapons as they were carrying against the person of a man standing his ground. Chepsang appears to us to have committed murder and the appellants are equally guilty under s. 22 of the Penal Code."

We think it implied in this passage that if the party had been unarmed and the common purpose had been to frighten and stampede the herd of goats and thereby to steal them, and if one member of the party unexpectedly killed one of the herdsmen, the conclusion of the court as to the guilt of the others would have been different.

As has already been indicated, each case must be decided by the application of the principles of law above discussed to the particular facts. In the present case the confession of Ngwinina makes it clear that the two appellants had a common intention to steal the goats. That being so it is of no avail to him to instruct his companion not to hit any person, if, in the circumstances, the hitting was a probable consequence of the carrying into effect of the common purpose. His claim to have stood at some distance raises the question whether he was near enough to be a participant in the second degree in the sense that he was favouring the escape of or ready to come to the assistance of the other appellant. However that may be, it seems clear that he was at least an accessory before the fact to the theft. It may be that the fact that Lamambutu carried a stick, together with the knowledge that the deceased was armed with a bow and arrows (though it is not certain that Ngwinina knew this at the outset) entailed a probability of conflict and violence sufficient to bring the case within s. 23, but in the circumstances we need express no concluded opinion on the matter. What we desire is merely to make it clear that neither the carrying of a stick by Lamambutu in a place where they are habitually carried, nor the

common purpose to steal goats simpliciter, would necessarily have been sufficient to render Ngwinina guilty of murder.

The remaining point which requires mention though it is not now material relates to the assessors. One had fallen ill during the trial which continued, under s. 270 of the Criminal Procedure Code, with only one. The learned trial judge at the conclusion of his summing-up put the following questions to him and received the answers recorded:

"Q. What view do you take of tracker's evidence?

A. I believe it.

Q. There was no question of his bringing pressure to bear on accuseds?

A. No.

Q. What opinion do you give of accused one's story?

A. He was not forced to give his statement to the magistrate. It should be accepted.

Q. Should the statement of accused two be accepted?

A. Yes, the magistrate would not write down lies."

It would appear that the learned trial judge omitted to comply with the injunction by this court in *Washington v. R.* (10) (1954), 21 E.A.C.A. 392 at p. 393, that when the opinion of the assessors is taken in the form of answers to specific questions, they must also be asked to state their opinion on the case as a whole and on the general issue as to the guilt or innocence of the accused. In the circumstances it will be sufficient if we call attention once more to this requirement.

Appeal allowed.

The appellants did not appear and were not represented.

For the respondent:
WEM Dawson (Solicitor-General, Tanganyika)
The Attorney-General, Tanganyika

Simoni Musoke v R
[1958] 1 EA 715 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	18 December 1958
Case Number:	188/1958
Before:	Sir Kenneth O'Connor P, Forbes V-P and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda at Kampala–Lewis, J

[1] Criminal law – Evidence – Identification parade – Whether reasons for identification should be elicited by questioning.

[2] Criminal law – Evidence – Circumstantial evidence – Tests to be applied before inferring guilt.

Editor's Summary

The appellant was charged, along with one A., on one count of theft of a vehicle and on two counts of robbery with violence. A. was acquitted on all counts, but the appellant was convicted under s. 255 (A) of the Penal Code of theft of the vehicle and of theft on the second and third counts under s. 252. The evidence proved that at about 1 a.m. on January 19, 1958, a blue and white Zephyr car, No. UFJ. 681, was stolen outside a building at Mengo, Kampala. According to B. the appellant attended a funeral ceremony fifty-one miles from Kampala on January 18, and, according to B's evidence in the High Court, the appellant was last seen there at 10 p.m. that day, going away on a bicycle. B., however, at the preliminary inquiry had said that the appellant left the funeral at between 2 and 3 a.m. on January 19. At about 8 a.m. that day the appellant was seen by E. driving a blue and white Zephyr and borrowed from E. a tool to do repairs. E. also said he had seen the appellant wearing a red helmet, like one put in as an exhibit, but did not say the appellant was wearing it then. B. also said that whilst still at the funeral ceremony on January 19 he saw the appellant drive up in a Zephyr, which was white on top, and that the appellant was then wearing a red helmet. Neither B. nor E. noticed the number of the car. On the morning of January 20 two robberies took place, involving three men who were in the stolen Zephyr, and both victims said that one of the men wore a red helmet. At about 2 p.m. that day the same Zephyr stopped outside a bar, and three men got out and had a meal there. The bar owner subsequently identified the appellant and A. as two of the men, but the trial judge rejected the bar owner's evidence of identification on the grounds that no questions were put to this witness to elicit the reasons for the identification. When the stolen car was found outside the bar it contained, amongst other articles, the helmet exhibited at the trial.

Held –

(i) it is not established practice to question a witness who has made an identification at a parade as to his reasons for doing so; comment voluntarily made by the witness is often received in evidence as part of the act of identification, but answers to questions would be of less value and of doubtful admissibility.

(Procedure appropriate for such parades as stated in *R. v. Mwango* (1936), 3 E.A.C.A. 29, approved.)

(ii) had the attention of the trial judge been called to the deposition of B. at the preliminary inquiry, the appellant might well have been acquitted of the charge of theft of the vehicle, and since the second and third counts depended not upon the aggregation of a number of mutually supporting items of circumstantial evidence, but upon the one inference, which was that because the appellant was seen in a blue and white Zephyr and wearing a red helmet on January 19, he must have been the man wearing the red helmet in a similar

car the following day, the evidence fell short of the standard of proof required to prove the guilt of the appellant beyond reasonable doubt.

(iii) in a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. *Teper v. R.*, [1952] 2 All E.R. 447, followed.

Appeal allowed.

Case referred to in judgment:

(1) *R. v. Mwango* (1936), 3 E.A.C.A. 29.

(2) *Teper v. R.,* [1952] 2 All E.R. 447; [1952] A.C. 480.

Judgment

Gould JA: read the following judgment of the court: The appellant was charged jointly with one Aloizio Mukasa on one count of theft of a vehicle and two counts of robbery with violence; at the conclusion of the trial before the High Court, Aloizio Mukasa was acquitted on all charges but the appellant was convicted of theft only under s. 255 (A) of the Penal Code as to the first count and under s. 252 as to the second and third. The reason of the learned trial judge for convicting only of theft on counts two and three is not reasily understood; the only real question was that of identity and the fact that two robberies with violence took place was established by clear evidence. It would seem, therefore, that any person proved to have been present aiding and abetting should have been convicted of aggravated robbery whether or not he participated in the actual violence. However, this matter is now of no importance, as on the appeal to this court, we quashed the conviction and sentence of the appellant on all three counts. We now give our reasons for allowing the appeal.

The facts are shortly as follows. At about 1 a.m. on January 19, 1958, a blue and white Zephyr car, registered No. UFJ. 681, was stolen from outside a building at Mengo. This theft is the subject of the first count. According to the evidence of Bazilio Lule, Mutongole Chief of Kajoji, which was accepted by the learned trial judge, the appellant attended a funeral ceremony on January 18, 1958, and was, according to this witness's evidence in the High Court, last seen there at 10 p.m. on that date when he was departing upon a bicycle. The place at which the ceremony was being held was approximately fifty-one miles from Kampala (and therefore from Mengo) which, on this evidence, would have allowed the appellant some three hours to travel the distance and commit the theft. Estimates of time are, of course, very vague. At the hearing of the appeal we were informed by Crown counsel that at the preliminary inquiry before the magistrate the witness Bazilio Lule, had said that the appellant left the funeral at about 2 or 3 a.m. on the morning of the 19th. Strangely enough this matter was not canvassed at the trial in the High Court; had it been it might have been explained but otherwise must have cast grave doubt upon any possibility of the appellant's participation in the theft. The accused were not represented by counsel in the High Court.

At about 8 a.m. on January 19, 1958, the appellant was seen driving a blue and white Zephyr by a witness Erukana Kalali, who lived in the same village as, and knew, the appellant. The witness lent him a tool to do repairs, and on being asked, the appellant said the car belonged to a friend who was then in it. The witness said that he had seen the appellant wearing a red helmet like one (ex. B) which was shown to

him and which will be referred to again later, but did not say that the appellant was wearing it on this particular occasion. The evidence of Erukana Kalali was also accepted by the learned judge.

It is now necessary to return to further evidence given by Bazilio Lule. The funeral ceremony was apparently continuing on January 19 and at about 10 a.m. the witness saw the appellant drive up in a Zephyr car which was coloured white on top. He could not remember the other colour. The appellant was wearing a red helmet like ex. B. It is to be observed that neither of these two witnesses noticed the number of the car; Erukana Kalali said that it was like UFJ. 681, which he saw outside the court. Bazilio Lule apparently was not asked.

At about 8 a.m. on January 20, 1958, one Mikaeri Nakuzabasajja was cycling towards Katebere when a car stopped and he was violently robbed by three of four men who got out of it. There is sufficient evidence which it is not deemed necessary to relate, but which was accepted by the learned judge, that this car was the blue and white Zephyr No. UFJ. 681, the subject of the first count. The only evidence relevant to identity given in respect of this episode, to which the second count related, was that one of the men concerned wore "a red (brown) motor cyclist's or miner's helmet", and that the witness purported to identify the appellant in the dock.

At about 8.30 the same morning, January 20, one Yofesi Madirasa was robbed of a bag of coffee that he was carrying on a bicycle. The same Zephyr car, No. UFJ. 681, was involved and the complainant said that two of the three men in the car got out and the man in the car was wearing "a helmet of iron and coloured red". This robbery was the subject of the third charge.

At about 2 p.m. on the same day the car in question stopped outside a bar in Mityana and three men descended and had food and drink in the bar. The owner, Nuru Nora Lataya, identified Aloizio Mukasa, whom she had seen twice before, and the appellant. None of the men was wearing a hat. The police arrived at some time later and arrested Aloizio Mukasa, but the appellant was not arrested until March 4, 1958. The car No. UFJ. 681 was found outside the bar and when it was examined on January 22 it contained the helmet ex. B, some coffee beans, a stick, a gunny bag and an iron bar. No fingerprints were found on the car.

It is necessary to advert to the question of the identification of the appellant by Nuru Nora Lutaya. Though this witness identified also Aloizio Mukasa, and picked him out on an identification parade, the learned trial judge rejected her evidence. He may have been influenced by the fact that there is a possible discrepancy in her evidence in that she said she did not know the three men who came from the car and then that she had seen Aloizio Mukasa twice before. The relevant passage in the judgment is–

> "She was never asked, as she should have been, exactly how she knew this accused.
>
> "In these circumstances the evidence of P. 12 as to identification was valueless."

With great respect, we think that it is not within established practice to question a witness who has made an identification at a parade as to his reason for doing so. A comment voluntarily made by the witness is often received in evidence as part of the act of identification, but answers to questions would be of less value and of doubtful admissibility. We are not inclined to accept the view, in spite of certain criticisms contained in a work by Doctor Glanville Williams by which the learned judge was influenced, that the selection of an accused person from a properly conducted parade, the other members of which are demonstrably unconnected with the matter in question, does not sensibly strengthen the identification. Procedure appropriate for such parades was approved by this court in *R. v. Mwango* (1) (1936), 3 E.A.C.A. 29. These considerations do not, however, apply to the case of the appellant who was not identified on a parade as he refused to take part in one, and would for that

reason have had less reason to complain that he was only identified in the dock. In his judgment the learned judge said that the appellant was not visually identified, which can only mean that he rejected the evidence of Nuru Nora Lutaya completely, as, indeed, is indicated by the passage from his judgment above quoted, and also the identification by Mikaeri Nakuzabasajja. We, of course, accepted his finding on this matter and proceeded to examine the remaining evidence implicating the appellant.

On the first count it is limited to the fact that he was seen driving a blue and white Zephyr like UFJ. 681 on the morning after the theft of UFJ. 681. The car was not identified by number and the statement in the judgment that the appellant on January 19 was seen driving UFJ. 681 is unsupported by evidence, other than the most nebulous of inferences to be drawn from the finding of a red helmet in UFJ. 681 three days later. The explanation given by the appellant in his evidence in the court below is that he stayed at Masigi, attending the funeral rites, until 2.30 a.m. on the night of January 18-19 and next morning went to Mityana to buy goods. To carry them he hired a car. The owner said he was going to Masigi so he decided to go there also. They borrowed a tool from Erukana Kulali and all three went together to Masigi. After that he went with a girl and then to his home. He was not cross-examined as to the identity of the man from whom he claimed to have hired the car, or as to the time when he left Masigi on the night of January 18-19. His statement that it was 2.30 a.m. on the 19th is supported by the fact, to which Crown counsel drew our attention, that Bazilio Lule said in the preliminary inquiry that the appellant left at 2 a.m. or 3 a.m.

The evidence implicating the appellant in the second and third counts, after the rejection of the identification by Nuru Nora Lutaya and Mikaeri Nakuzabasajja amounted to nothing more than that on the morning of January 20, when the two robberies were committed, one of the occupants of the car used (UFJ. 681) wore a helmet similar in appearance to the one worn by the appellant some twenty-two hours earlier in a blue and white Zephyr.

We considered that had the attention of the learned trial judge been called to the deposition of Bazilio Lule, he might well have acquitted the appellant of the theft of the car. Without explanation, it cast too grave a doubt upon the prosecution’s evidence in the matter of time and distance. Also, as we have already mentioned, the car itself was not identified beyond doubt as being the stolen one. The second and third counts depended, not upon the aggregation of a number of mutually supporting items of circumstantial evidence but upon one single inference, which was that because the appellant was seen in a blue and white Zephyr and wearing a red helmet on January 19 he must have been the man wearing a red helmet in a car of similar make and colour on the following day. As it appeared to us, this was a probable inference but it fell short of the standard of proof required to prove the guilt of the appellant beyond reasonable doubt. The learned judge did not expressly direct himself that, in a case depending exclusively upon circumstantial evidence, he must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. As it is put in Taylor on Evidence (11th Edn.), p. 74–

> “The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt.”

There is also the further principle, which in view of the doubt as to how long the appellant remained at the funeral ceremony on the night of January 18, 1958, is particularly relevant to the first count, and which was stated in the judgment of the Privy Council in *Teper v. R.* (2), [1952] A.C. 480 at p. 489 as follows:

> "It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

The application of these principles to the facts of the present case might well, we think, have brought the learned judge to the conclusion we have already expressed, viz. that the inferences which might properly be drawn fell short of what was required to establish the guilt of the appellant beyond reasonable doubt. For these reasons we allowed the appeal.

The appellant complained to this court that he had applied to the court below to be permitted to produce a helmet which he said he had in his house and which resembled ex. B. The record indicates that such a request was made, but was not acceded to. The production of such a helmet might have had little evidential value, as the appellant had had plenty of time to acquire one between January 20, 1958, and the day of his arrest. Nevertheless we think his request was a reasonable one, that the production of another such helmet would have had some evidential value, and that where an accused person in custody makes an application to be permitted to produce evidence of such a nature, assistance should, where possible, be given him to do so.

Appeal allowed.

The appellant in person.

For the respondent:
AM McMullin (Crown Counsel, Uganda)
The Attorney-General, Uganda

Kenya Meat Commission v Jackson and Hill and others
[1958] 1 EA 719 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	10 December 1958
Case Number:	801/1955
Before:	Rudd J
Sourced by:	LawAfrica

[1] Cost – Joint defendants – Joinder of third party against its will by second defendant – Costs incurred in third party proceedings – No liability established against third party – Whether second defendant should pay the costs incurred by third party – Civil Procedure (*Revised*) *Rules,* 1948, *O.* 1, *r.* 19 (*K.*).

Editor's Summary

The second defendant moved under O. I, r. 19 for an order as to the costs incurred by the third party joined at the instance of the second defendant. The plaintiff had sued the second defendant for damages for negligence in connection with the erection and installation of certain machinery supplied to the plaintiff by the third party, and which was erected for the plaintiff by the second defendant. The second defendant denied the negligence and claimed contribution or indemnity from the third party for any damages that might be decreed, and instituted third party proceedings against the third party, which in turn denied liability to contribute or indemnify the second defendant. The third party proceedings reached the stage of pleadings on both sides but the trial on the issues raised was, by consent, ordered to be postponed until after the trial on the issues between plaintiff and second defendant. It was eventually decided that the second defendant was not liable in damages to the plaintiff, with the result that the third party proceedings became redundant.

Held –

(i) O. I, r. 19 gives the court a wide discretion as to the order that should be made for the costs of the third party proceedings, but it was not established that the second defendant had a right to indemnity by the third

party, nor that the third party was a proper third party; hence the plaintiffs should not be required to pay the cost of the third party proceedings.

(ii) the third party could not be ordered to pay the costs of the second defendant since it was not established that indemnity or contribution by the third party could, in any circumstances, have been required.

(iii) since the third party had been embroiled against its will, and as liability had not been established as against the third party and the issues raised in the third party proceedings had never been tried or determined, it was not possible to say whether or not the third party was properly joined or whether the proceedings were based upon sufficient foundation; since the second defendant caused the third party to be put into the position of a defendant, the costs of the third party should be paid by the second defendant, but these costs should be taxed on a low rather than a high scale.

Orders accordingly.

Judgment

Rudd J: The matter before the court at present is a motion by the second defendant in the original suit asking the court to decide under O. I, r. 19, what order should be made as regards the costs so far incurred by the third party.

The relevant history may be summarised as follows:

All the parties are corporations. The plaintiff sued the second defendant for damages for negligence in connection with the erection and installation of certain lifts which were supplied to the plaintiff by the third party and which were erected for the plaintiff by the second defendant. As against the plaintiff the second defendant denied that they were guilty of the alleged, or any, negligence, and as against the third party, the second defendant claimed to be entitled to contribution or indemnity for any damages that might be decreed against them. This claim was based on the allegation that the second defendant had acted as local agents for the third party. The second defendant therefore instituted third party proceedings against the third party who denied any liability to contribute or indemnify the second defendant. The third party proceedings reached the stage of pleadings on both sides but the trial of the issues raised was, by consent, ordered to be postponed until after the trial of the issues raised as between the plaintiff and the second defendant.

It has now been decided in effect that the second defendant was not liable in damages to the plaintiff with the result that the issues raised in the third party proceedings no longer required to be decided. In fact, they have fallen away. As I have said, these proceedings reached the stage of completed pleadings on both sides but they never reached the stage of trial or of preparation for trial after the close of pleading. The third party denied that the second defendant was acting as agent for the third party for the erection and installation of the lifts. The third party did not appear at the trial of the issues as between the plaintiff and the second defendant and the order for costs then made as between the plaintiff and the second defendant did not take into account, or refer to, the third party proceedings. In these circumstances, the second defendant now asks for an order as to the costs of the third party proceedings.

In the first place, the second defendant submitted that the plaintiff should be ordered to pay the costs incurred in the third party proceedings on the ground that it was reasonable and proper for the second defendant to take those proceedings for their protection in the event of damages being decreed against

them in favour of the plaintiffs.

Rule 19 gives the court a wide discretion as to the order that should be made for costs of the third party proceedings but it has not yet been established that the second defendant had a right to indemnity by the third party, in fact it has not been established that the third party was a proper third party, and therefore I consider that the plaintiffs should not be required to pay the cost of the third party proceedings and I order that the second defendant should pay the plaintiffs their costs of this motion.

In the second place, it was submitted by the second defendant that if the costs of the third party proceedings were not payable by the plaintiffs then the costs of the third party should not be ordered to be paid by the second defendant.

There can be no question but that the third party cannot be ordered to pay the costs of the second defendant since it has not been established that the third party could, in any circumstances, have been required to indemnify or contribute anything in respect of damages in connection with the erection and installation of the lifts. The question is, therefore, whether the second defendant and the third party should each be ordered to bear its own costs of the third party proceedings or whether the second defendant should be ordered to pay the costs of the third party up to the present date. There appears to be no decided case which is on all fours.

In my opinion, the material circumstances which should be taken into account are as follows.

First, the third party has been embroiled in the matter against its will at the instance of the second defendant.

Secondly, no liability, in any circumstances, has been definitely established as against the third party and the issues raised in the third party proceedings have never been tried or otherwise determined. It is, therefore, not possible to say in the absence of a trial of the issues involved whether or not the third party was in fact a proper third party and I am not prepared to say whether the third party proceedings were brought, or were not brought, upon a sufficient foundation of fact, but it can be said that the second defendant has not established the right which he claimed against the third party.

Thirdly, the basis of third party proceedings under our law is a right to contribution or indemnity which in the events which might have happened has, in fact, not arisen.

In my opinion the second defendant has caused the third party to be put into the position of a defendant and the right to do this has not been established.

Therefore, I consider that in the present case the third party should be paid his costs by the second defendant but, in the circumstances of this case so far as I know them, I think that these costs should be taxed on a low, rather than a high, scale, and that the taxing officer should have particular regard to the fact that the third party proceedings did not develop substantially beyond the stage of pleadings and that he should have regard to the minimum scales which apply to the various items that fall for taxation when taxing the costs of the third party as against the second defendant. The third party will have the normal costs of the present motion to be paid by the second defendant.

There will be orders accordingly.

Orders accordingly.

For the applicant:
JPG Harris

Robson Harris & Co, Nairobi

For the third party:
CF Schermbrucker
Kaplan & Stratton, Nairobi

The Unguja & Pemba Transport Workers' Union v The Registrar of trade Unions

[1958] 1 EA 722 (HCZ)

Division:	HM High Court for Zanzibar at Zanzibar
Date of judgment:	27 November 1958
Case Number:	1/1957
Before:	Windham CJ
Sourced by:	LawAfrica

[1] Trade union – Registered trade union – Accounts – Submission to registrar of annual accounts – Failure to submit accounts – Notice of cancellation of registration – Whether notice effective if accounts submitted before notice expired – Trade Union Decree, 1941, *s.* 21 *and s.* 23 (*Z.*).

[2] Trade union – Breach of statute by officers – Whether breach by officers is breach by union – Trade Union Decree, 1941, *s.* 17 (*Z.*).

Editor's Summary

The appellants, a registered trade union under the Trade Union Decree, 1941, appealed under s. 22 of that Decree against the cancellation of their registration during 1957 by the respondent, under s. 21 of the Decree. Under s. 17 (1) of the Decree the annual accounts of every trade union are required to be submitted to the registrar in respect of each year before January 31 of the following year. No such accounts for 1956 had been submitted by the appellants by January 31, 1957. Despite several reminders by the respondent to the treasurer and secretary of the appellants, requiring submission of the annual statement of accounts, no reply was received. Meanwhile, the labour officer, acting on the respondent's instructions, had been trying from the union's books to assist the appellants in the preparation of its accounts, but their books were inadequate. On May 9 the respondent wrote again, setting out the form in which the accounts should be submitted, and on June 12 wrote to the president of the union, giving one month's notice of cancellation of its registration on grounds specified in the letter, namely, failure to submit accounts as required. This statutory notice expired on July 12. The appellants claimed that by waiting until June 12 before giving notice of cancellation the registrar had waived the earlier failure to submit accounts, that before the notice expired they had submitted accounts and that there was no default by the union, but only by its officers.

Held –

(i) the union had wilfully, and after due notice from the respondent, violated one of the provisions of the Decree, namely the failure to submit accounts, and this violation was a continuing one day by day since the date the accounts were due to be submitted under the Decree;

(ii) the respondent by not giving the appellants the statutory month's notice of cancellation of its registration until June 12 had not waived the appellants' earlier breaches of the Decree;

(iii) since the accounts were long overdue and the appellants had already infringed the requirements of the law, the notice was effective and was not a notice that the appellants' registration would stand cancelled at the end of the month only if within that month the appellants failed to submit accounts.

Appeal dismissed.

Judgment

Windham CJ: The appellants, a trade union duly registered as such on February 1, 1956, under s. 12 of the Trade Unions Decree, 1941, appeal under s. 22 of that Decree against the cancellation of their

registration during the summer of 1957 by the respondent, the registrar of trade unions, in exercise or purported exercise of his powers under s. 21 of the Decree. Under s. 17 (1) of the Decree the annual accounts of every trade union are required to be submitted to the registrar in respect of each year before January 31 of the following year. No such accounts for 1956 were submitted by the appellants by the end of January, 1957. Accordingly on February 4 the respondent sent a letter to their treasurer reminding him of the provisions and requirements of s. 17 and demanding the submission of the annual statement of accounts at his earliest convenience. To this letter there was no reply. The respondent on April 18 sent another letter, this time to the secretary of the appellant union, again drawing attention to the failure to submit the accounts by January 31 as required by the Decree. Meanwhile the labour officer, acting on the respondent's instructions, had been trying, from the union's books, to assist the union in the preparation of its accounts for the preceding year, but their books were inadequate for the purpose and the respondent sent a further reminder on May 9, in which he set out clearly and at length the form in which the accounts should be submitted. At length, having still received no accounts, the respondent on June 12 sent a letter to the president of the union giving one month's notice of cancellation of its registration, as he was empowered to do by s. 21 of the Decree on proof that the union had

> "wilfully, and after notice from the registrar, violated any of the provisions of this Decree."

The grounds for the cancellation, namely the Union's failure to present the accounts for 1956 as required by statute, were specified in the letter. This statutory month's notice expired on July 12, and on that date accordingly, assuming the notice of cancellation to be a good one, the union ceased to be registered. The validity of the cancellation is challenged on appeal.

Now the first question to decide is whether, on June 12 when the notice of cancellation was sent, the union had wilfully, and after notice from the registrar, violated any of the provisions of the Decree. It seems to me very clear that it had. The violation began on January 31, since by s. 17 (1) the accounts were required to be submitted before that date. And thereafter the violation was a continuing one, day by day. That being so, then even if the respondent did not give the union any notice before January 31 that they ought to submit the accounts before that date, his letter of February 4 constituted such a notice as was required by s. 21 of the Decree, since further violation, namely the union's continuing failure to submit the accounts, occurred for over four months after that letter was written. It is suggested that the respondent, by not giving to the union the statutory month's notice of cancellation of its registration until June 12, was waiving its earlier breaches of the Decree, that is to say its failure to submit accounts before that date. But this is clearly not so. The respondent, while reserving his rights, was simply holding his hand and, with commendable patience, was extending to the union all the help and indulgence that he reasonably could, until at last his patience was exhausted. No doubt if the union had submitted the accounts before June 12 he would in the exercise of his indulgence not have given the month's notice of cancellation, although fully entitled to give it at any time after January 31, or at least after a reasonable period following his letter of February 4 in which he drew the union's attention to their default. But nothing in his lenient attitude towards the union's delays up to June 12, nor anything in any of his letters to the union's officials before that date, can be held to constitute any waiver of their default.

It is next contended that the failure to submit the accounts in time was not a violation of the provisions of the Decree by the union itself, as required by para. (*b*) of s. 21 (1) of the Decree, but was rather a violation only by the individual officer of the union who was responsible for submitting them. But,

quite apart from the fact that a trade union can only act through its officials, this contention must fail in view of the wording of s. 17 (3) of the Decree, which, while it makes the individual officer responsible for submitting the accounts guilty of an offence if he fails to do so as required by the section, provides in explicit terms that such a failure to comply with those requirements is also a failure on the part of the trade union itself; it thus becomes a violation of the provisions of the Decree by the trade union for the purpose of paragraph (*b*) of s. 21 (1).

Another point urged for the appellant union is that, within a month following the notice of June 12, namely on July 4, they did at last submit some form of accounts to the respondent. The receipt of these accounts is admitted by the respondent, and he has stated that there is nothing amiss with them in point of form, since the form was that suggested by his own labour officer, though he does not admit them to be true and proper accounts. But this belated submission of what purport to be the union's accounts for 1956 could have no operation on the running of the month's notice which expired on July 12, since that statutory notice of cancellation was not, nor did it legally require to be, a notice that the union's registration would be cancelled at the end of a month only if within that month it failed to submit accounts; rather, it was a notice that, since the union had already infringed the requirements of the law by not submitting accounts in time, its registration would stand cancelled at the end of a month, whatever might happen during that month.

For these reasons I hold that the notice of cancellation of registration dated June 12 was a good one, and that the union ceased to be registered on July 12.

What next occurred was that on July 16, four days after the union had ceased to be registered, the respondent, again from the best of motives and in a last moment endeavour to reprieve the union and to avoid harshness, sent a letter to them purporting to suspend the cancellation of registration which had taken effect four days before, until the checking of the accounts submitted on July 4 could be completed. It is now conceded by the respondent that it was then too late to suspend the operation of the letter of cancellation, since it had achieved irrevocable legal effect on July 12, with statutory legal results. Learned counsel for the appellants has attempted to argue that, while admittedly of no effect as a suspension, the purported suspension must be deemed to be a revocation of the notice of cancellation. But this contention cannot prevail, since if it was too late, as indeed it was, on July 16 to suspend the notice of cancellation because the latter had legal effect on July 12, with all the legal consequences of a cancellation of a registration which are laid down in the Decree, then for the same reason it was too late to revoke that cancellation.

On these grounds this appeal must be dismissed with costs. I cannot, however, conclude without observing that, in the not unlikely event of the respondent's desiring, upon the union's submitting or proving to have submitted satisfactory accounts for 1956, to re-register them as a union should they so desire it, the provisions of the Trade Unions Decree, 1941, would seem to provide no machinery to that end. For a trade union, upon the cancellation of its registration, does not necessarily cease to exist as a trade union. It is true that its members are by s. 14 made criminally liable if they knowingly continue to remain members of it or to act as such; but this in itself presupposes the continued existence of the union, albeit an illegal one for all practical purposes. Accordingly s. 9 of the Decree, which provides for the (original) registration of a trade union within one month of its "establishment" would appear to be inapplicable to the re-registration of a union whose registration has been cancelled, since such a union will already have been established, that is to say in existence as a combination of the kind described in the definition of "trade union" in s. 2 of the Decree, ever since its original formation, for a far longer

Period than the one month which s. 9 prescribes as the period within which a trade union must be registered. This lacuna in the Decree might, I suggest, be brought to the attention of the attorney-general with a view to possible amendment in the interests of trade unions.

Appeal dismissed.

For the appellants:
DF Karai
DF Karai, Zanzibar

The respondent in person:

Abdullahi Ali HY Ogad Omer v R
[1958] 1 EA 725 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	5 November 1958
Case Number:	116/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Somaliland Protectorate–Taylor, J

[1] Criminal law – Murder – Sentence – No record that statutory words of sentence were pronounced – Whether sentence invalid – Criminal Procedure Code, s. 273 (*Som.*).

[2] Criminal law – Murder – Provocation – Failure to put question of provocation to assessors – Whether omission fatal to conviction.

[3] Criminal law – Trial – Assessors – Whether assessors may consult together before giving opinions – Criminal Procedure Code, s. 236 (*Som.*).

Editor's Summary

The appellant was convicted of the murder of his wife and sentenced to death. There had been matrimonial differences which had apparently been resolved by the tribal elders, but the next day the body of the appellant's wife was found about two miles from their home with ten wounds around the neck. The next day the appellant's sister told the police of certain things hidden in the appellant's garden, and the police there found the deceased's bloodstained clothing and effects which she was wearing on the day of the murder. The appellant was arrested and made an extra-judicial statement in which he said that his wife had refused to go home with him, had taken out a knife, but he had disarmed her, whereupon she seized a stick and hit him with it, and there-after he lost his temper and stabbed her. At the trial he

repudiated the statement, and stated that he had suffered from fits for seven years, and that at the relevant time had had a fit, lost his senses and knew nothing until he found himself in jail. The grounds of appeal only stated that the sentence was wrong in law, and on appeal it was submitted that the record only contained a note “sentence of death passed”, and the sentence should have contained the words “hanged by the neck until he be dead”. It was also contended that the evidence of the accused’s state of mind had not been sufficiently considered, that the trial judge had not referred to the question of provocation in his summing-up to the assessors, and that he was incorrect in ruling that the assessors could not be permitted to consult together before delivering their opinions.

Held –

(i) the maximum “omnia praesumuntur rite esse acta” applied and the court was entitled to assume that sentence of death had been passed in proper form.

(ii) there was no evidence other than the appellant's that he had had a fit at or about the time of the death of the deceased, and the absence of signs of a struggle and the consistency of aim shown by ten wounds all around the throat excluded the possibility that the appellant might have had a genuine fit at the time of the killing.

(iii) while it was not correct to remove the question of provocation from the assessors, it was clear that even if the appellant's story had been taken at its face value (and the judge had rejected it), the provocation received could not have justified so brutal a retaliation, and as the judge would clearly have over-ridden the assessors whatever their opinion on the question of provocation might have been, the omission did not affect the result.

(iv) there is nothing in principle against the retirement of assessors for consultation; this is a frequent practice throughout East Africa, but the fact that the assessors were not permitted to retire was not an irregularity affecting the conviction.

Appeal dismissed.

Case referred to in judgment:

(1) *Chacha s/o Wamburi v. R.* (1953), 20 E.A.C.A. 339.

(2) *R. v. Mungu Atosha bin Sija and Another* (1938), 5 E.A.C.A. 143.

Judgment

Sir Kenneth O'Connor P: read the following judgment of the court: The appellant was convicted on July 18, 1958, by the High Court of the Somaliland Protectorate at Hargeisa of the murder, on or about April 24, 1958, of his wife, Ugaso Gulaid, and was sentenced to death. The grounds of appeal only state: "The sentence was wrong in law"; but certain other points requiring consideration arose on the record. On October 24, 1958, we dismissed the appeal and now give our reasons.

Mr. Chanan Singh for the appellant argued that s. 273 of the Criminal Procedure Code of British Somaliland required that a sentence of death should contain the words that the person concerned shall be "hanged by the neck until he be dead" and that there was nothing on the record to show that these words had been pronounced. The record contains a note by the learned trial judge: "Sentence of death passed". We think that the maxim omnia praesumuntur rite esse acta applies and that this court is entitled to assume that the learned trial judge passed sentence of death in the proper form. We thought that this point failed. There are three further points, however, arising on the record which require comment.

The facts of the case, briefly, were that the appellant and his wife had had various matrimonial quarrels and difficulties. On the morning of April 24 their respective tribal elders met in Odweina, a village about twelve miles from the home of the appellant and the deceased, and made an investigation into their matrimonial affairs. It was judged that the appellant should pay Shs. 30/- to his wife as "wound compensation" for injuries which he had caused to her neck by manual rough usage and should undertake on oath to treat her properly in future. On these terms the parties left for home, the appellant having given the necessary oath and paid the money. Next morning the body of the wife was found in scrub some thirty yards from the path about two miles from their home. There were ten wounds near the neck, of which three were deep enough to involve major blood vessels. These wounds were the cause of death

which occurred on the evening of April 24. On the next day a sister of the appellant named Halimo told the police of certain things hidden in straw in the appellant's garden and the police there found a bag containing a woman's

clothing and effects, some of them heavily bloodstained. These were identified as the clothing of the deceased worn at Odweina at the hearing before the elders.

The appellant was arrested on April 27.

On April 28, the appellant, accompanied by his Akil, appeared before a magistrate who recorded an extra-judicial statement. The effect of this was that the appellant and his wife had had matrimonial difficulties. On the way home from Odweina she had refused to go further with him; he had tried to pull her to her feet; she had taken out a knife and tried to stab him; he had caught her hand and tried to drag her on, but she again refused; the appellant had become angry and had threatened her with the knife; she had still refused to go with him and had taken up a piece of wood and struck him with it; the appellant had then lost his temper and had struck her at the base of the throat with the knife; he had returned to his karia and had told his sister Halimo what he had done.

At the trial the appellant repudiated this statement and said that, at the relevant time, he had been attacked by a fit and had lost his senses and knew nothing until he found himself in jail. He said that he had suffered from fits for seven years and called witnesses to establish the fact that he was subject to fits. He said that he did not know what he might have told the magistrate.

Mr. Chanan Singh, for the appellant, attacked the evidence of Halimo and another prosecution witness and stressed the defence evidence regarding the fits and the state of the appellant's mind.

We were of opinion that there was ample evidence upon which the learned judge could find that the crime was committed by the appellant and that there was no evidence but his that he had a fit at or shortly before the time of his wife's death. In any event, the learned judge had found that the absence of signs of a struggle and the consistency of aim shown by ten wounds all round the throat excluded the possibility that the appellant might have been in a genuine fit at the time of the killing. We thought that the decision of the learned trial judge was right.

The learned judge dealt with the issue of provocation as follows:

> "The story of the accused in his evidence at the trial appeared to me to be wholly incredible and one which ought to be rejected. The case for the prosecution, apart from the confession, turns on the evidence of Halimo, the butcher and the barber; if this is accepted, as I think it should be, it is sufficient though not necessarily conclusive. If the evidence of the accused at the trial is rejected, the confession remains and it must be considered as a whole; the question therefore arises whether the exculpatory portions are sufficient to raise a partial defence of provocation because, if the evidence warrants it, that defence ought to be weighed, despite the fact that counsel did not argue it."

We agreed.

The learned judge continued:

> "There can be no question of self defence because, on the accused's own story, he disarmed the woman before she could injure him in any way; the position then was that he held the only knife and she hit him once with a stick; he then stabbed her in the throat not once but ten times. This followed her repudiation of the settlement and refusal to go home and allowance must be made for the 'last straw' doctrine of cumulative provocation but, put at its highest, this could not excuse so grossly excessive a reaction. For these reasons I was of opinion that there was no evidence of provocation on which a verdict of culpable homicide could properly be founded and I did not refer to such a possibility in the summing-up."

With respect, we thought that it was not correct to remove the question of sufficient provocation or no sufficient provocation from the assessors. However, since the learned judge in the next sentence of his judgment found as a fact, as he was entitled to do, that the story that the woman refused to go home at that time and in that situation, was not credible, it is quite clear that he would have overridden the assessors whatever their opinions on the question of provocation might have been. Accordingly his omission to mention provocation in the summing-up did not affect the result. We would add that we agree with the learned judge that, even if the appellant's statement were to be taken at its face value, the provocation received could not have justified so brutal a retaliation by the appellant. We merely point out that this matter should not have been removed from the consideration of the assessors. The question whether or not the retaliation was out of proportion to the provocation was a question of fact which they should have been required to take into consideration before giving their opinions. *Chacha s/o Wamburi v. R.* (1) (1953), 20 E.A.C.A. 339.

The remaining point was one of procedure. Following a submission by the attorney-general the learned judge ruled, on the construction of s. 236 of the Somaliland Criminal Procedure code, that the assessors could not be permitted to consult together before delivering their opinions, though one of them had asked to do so. The attention of the learned judge was not drawn to *R. v. Mungu Atosha bin Sija and Another* (2) (1938), 5 E.A.C.A. 143, in which this court held, upon a similar section in the Criminal Procedure Decree of Zanzibar, that the retirement of assessors is neither illegal nor irregular if after the retirement the judge obtains the individual opinion of each assessor and records it. *Mungu Atosha's* case (2) was decided twenty years ago and it is too late to disturb it. We think that there is nothing in principle against the retirement of assessors for consultation. This is a frequent practice throughout the Eastern African territories, in at least three of which it has statutory sanction. However, the fact that the assessors were not permitted to retire does not amount to an irregularity affecting the conviction, Mitra, The Code of Criminal Procedure (12th Edn.), Vol. 2, p. 1310.

Appeal dismissed.

For the appellant:
Chanan Singh
Chanan Singh & Handa, Nairobi

For the respondent:
AR Hancox (Crown Counsel, Kenya)
The Attorney-General, Kenya

Nizam Din Chur v Devonshire Stores Limited
[1958] 1 EA 729 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	9 December 1958
Case Number:	63/1958
Before:	Sir Kenneth O'Connor P, Briggs V-P and Gould JA

Sourced by: LawAfrica

Appeal from: H.M. Supreme Court of Kenya at Nakuru–Goudie, J

[1] Evidence – Unstamped agreement admitted in evidence – Effect of such admission – Stamp Ordinance (*Cap.* 259), *s.* 19, *s.* 39 *and Schedule, item* 1 *and item* 12 (*K.*) *– Eastern African Court of Appeal Rules*, 1954, *r.* 76 *and r.* 77 *– Indian Evidence Act*, 1872, *s.* 167 *– English Stamp Act*, 1891, *s.* 14 (1) *– Indian Stamp Act*, 1899, *s.* 36 *– English Rules of the Supreme Court, O.* 58, *r.* 10 (2).

Editor's Summary

The appellant appealed against a judgment and decree of the Supreme Court whereby he had been ordered to pay to the respondent the sum of Shs. 8,000/- on an acknowledgement of an agreed balance of account. It was submitted by the appellant that the acknowledgement was unstamped and therefore wrongly admitted in evidence and acted upon by the trial judge, and that this vitiated the decision and that there must be at least a new trial; further, that whether the acknowledgement was treated as an acknowledgement of a debt under item 1 of the Schedule to the Stamp Ordinance (Cap. 259), which was in force at the time, or as a promissory note payable on demand under item 12 of the Schedule, the result was the same, and that under s. 39 of the Stamp Ordinance, the acknowledgement could neither be admitted in evidence for any purpose nor acted upon. The appellant had counterclaimed for an amount due as well as an amount acknowledged and had proved partnership accounts and an oral acknowledgement by the appellant.

Held –

(i) although the acknowledgement had been improperly admitted in evidence and to some extent acted upon by the learned trial judge, the oral evidence and accounts were sufficient to prove the claim without the acknowledgement, and as no substantial wrong or miscarriage of justice was occasioned by the improper admissions of the acknowledgement in evidence a new trial should not be ordered on the ground of misreception of evidence.

(ii) (Briggs, V.-P., dissentiente) a document which is wrongly admitted in evidence is "acted upon" within the meaning of s. 39 of the Stamp Ordinance if it forms part of the total of the evidence which leads the court or judge to a particular conclusion.

Appeal dismissed.

Case referred to in judgment:

(1) *Slatterie v. Pooley* (1840), 6 M. & W. 664; 151 E.R. 579.

(2) *Fatechand Harchand v. Kisan* (1894), 18 Bom. 614.

(3) *Sanders v. Karnell* (1858), 1 F. & F. 356; 175 E.R. 762.

(4) *Ram Rattan v. Parmanand* (1945), 73 I.A. 28.

(5) *Chenbasapa v. Lakshman Ramchandra* (1894), 18 Bom. 369.

(6) *Routledge v. McKay*, [1954] 1 All E.R. 855.

(7) *Salim bin Awadh v. Ramadhan bin Awadh* (1956), 23 E.A.C.A. 55.

(8) *Humphreys v. Dudding* (1861), 2 F. & F. 546; 175 E.R. 181.

(9) *Kastur Bhavani v. Appa* (1881), 5 Bom. 621.

(10) *Akbar Ali v. Bhyea Lal Jha* (1880), 6 Cal. 666.

(11) *Afzal-un-Nissa v. Tej Ban* (1878), 1 All. 725.

(12) *Bowker v. Williamson* (1889), 5 T.L.R. 382.

(13) *Don Francesco v. De Meo*, [1908] S.C. 7.

Judgment

Sir Kenneth O'Connor P: This is an appeal against a judgment and decree dated May 23, 1958, of the Supreme Court of Kenya whereby the appellant (the original defendant) was ordered to pay to the respondent (original plaintiff) Shs. 8,000/- with interest and costs.

The first ground of appeal is to the effect (*inter alia*) that an acknowledgement of an agreed balance of account (which is set out below and which I will call "the acknowledgement") was unstamped and therefore wrongly admitted in evidence and acted upon by the learned trial judge. Mr. Khanna for the appellant argued that this vitiated the decision and that there must be, at the least, a new trial. He contended that whether the acknowledgement was treated as an acknowledgement of a debt under item 1 of the Schedule to the Stamp Ordinance (Cap. 259 of the Laws of Kenya; which was in force at the time) or as a promissory note payable on demand under item 12 of the Schedule, the result was the same. In either case the instrument attracted a twenty cent stamp and was stampable before execution (Stamp Ordinance, s. 19) and subsequent stamping would not cure the defect. He contended that under s. 39 of the Stamp Ordinance the acknowledgement could neither be admitted in evidence for any purpose nor acted upon.

Mr. Gledhill, for the respondent, conceded that the acknowledgement should not have been admitted in evidence; but said that objection should have been taken in the court below when an amendment of the defence might have been made. He contended, however, that an amendment was not really necessary as the defendant (appellant) had counterclaimed for an amount due as well as an amount acknowledged and had proved the partnership accounts and an oral acknowledgement by the appellant.

Section 39 of the Stamp Ordinance, in so far as material, reads:

> "39. No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped:
>
> "Provided that—
>
> (*a*) any such instrument, not being an instrument chargeable with duty of ten cents or twenty cents only (other than a cheque) or a bill of exchange (other than a bill of exchange presented for acceptance, accepted or payable elsewhere than in the Colony) or a promissory note, shall, subject to all just exceptions, be admitted in evidence on payment of the duty. . ."

In order to test the validity of Mr. Khanna's argument, it is necessary to set out the relevant parts of the pleadings and the judgment.

In para. 3 of the respondent's plaint, dated September 4, 1957, it was averred as follows:

> "3. The plaintiffs' claim is against the defendant for the sum of Shs. 8,000/-, due by the defendant to the plaintiffs, particulars whereof are as follows:
>
> As to Shs. 3,526/21 being the balance of the price of goods sold and delivered and cash lent and/or advanced to and work and labour done for the defendant by the plaintiffs, at the defendant's request at Gilgil, during the period 1955 to August, 1956, full particulars whereof have been delivered to the defendant Shs. 3,526/21
>
> And as to the balance of Shs. 4,473/79, being the amount due by the defendant to the plaintiffs as acknowledged

by the defendant in writing to the plaintiffs on August 16, 1956	Shs. 4,473/79
	Shs. 8,000/00"

In his defence the appellant pleaded as follows:

"3. The defendant states that the true position as to the transactions between himself and the plaintiffs is as follows:

Date	Monies Paid by Defendant to Plaintiffs	
April 27, 1956	Shs. 6,324/70	
March 8, 1956	Shs. 495/50	
June 28, 1956	Shs. 400/-	
June 1, 1956	Shs. 507/99	Shs. 7,730/19
Less		
Amount due from defendant to plaintiffs for goods sold and delivered over the period February 2, 1956, to August 30, 1956	Shs. 3,526/21	
Cash paid by plaintiffs to defendant on April 28, 1956	Shs. 1,710/-	Shs. 5,236/21
		Shs. 2,493/98

"4. The defendant states as to the acknowledgement mentioned in para. 3 of the plaint that at the time of making the alleged acknowledgement a servant or agent of the plaintiffs falsely represented to the defendant, who is and was at that time illiterate and unable to read the said acknowledgement, that the said acknowledgement related to the transactions specified in para. 3 hereof. The defendant signed the said acknowledgement on the faith of such representation. A copy of the said acknowledgement is hereunto annexed and marked 'A'. The defendant further states that the alleged firm Gilgil Transport Company referred to in the said acknowledgement has never in fact existed. The defendant further states that if the said Gilgil Transport Company existed (which is denied) there was no consideration for the transfer referred to in the said acknowledgement. The defendant states that the said acknowledgement is void and of no effect."

He counterclaimed for Shs. 2,493/98 and costs.

In his reply and defence to the counterclaim dated November 5, 1957, the respondent joined issue with the appellant and pleaded, *inter alia*, that at all material times the appellant was a partner in the firm of Gilgil Transport Company with one Dhanji Savji, a director of the respondent company and that the respondent company was keeping the accounts of the partnership. The respondent said that the sum of Shs. 6,324/70 which the appellant alleged to have been paid to the respondent was a payment to the credit of the account of the Gilgil Transport Company with the respondent to which account it had been credited and the respondent explained the other items set out in para. 3 of the defence by reference to the account of the Gilgil Transport Company. It denied that the acknowledgement was obtained by false

representations or that it was void and of no effect.

The acknowledgement reads:

"INVOICE 021050

DEVONSHIRE STORES LTD.

GILGIL

Date: 16/8/1956

Mr. Nizamdin s/o Chur

To account of Gilgil Transport Coy. transferred to your account as agreed by you Shs. 4,473/79

Read Shgs. four thousand four hundred seventy three cents seventy nine only.

I understand Mr. Nizamdin s/o Chur agreed your above debts and agreed to pay you on demand.

(Sgd.)

i.e. Nizamdin s/o Chur"

At the hearing the learned trial judge said that the case was a pure question of accounts and he did not consider it advisable to frame issues.

Dhanji Savji gave evidence in support of the allegations contained in the plaint and reply and in the course of his evidence tendered the acknowledgement which was accepted in evidence without objection. Copies of the accounts of the Gilgil Transport Company and the appellant's account with the respondent were also put in. In their final addresses counsel on both sides treated the acknowledgement as an account stated, though counsel for the appellant submitted that it was only presumptive evidence of the amount stated. Counsel for the respondent submitted that it was also an acknowledgement that the amount stated was due.

In his judgment the learned judge said:

> "The plaintiff company, general merchants, carrying on business at Gilgil, are claiming from the defendant, an Asian contractor, the sum of Shs. 8,000/- made up of two items of Shs. 3,526/21 and Shs. 4,473/79 respectively. The first item is said to represent an amount due to the plaintiff company on the defendant's personal account with them for goods sold and delivered, cash lent and work done. The second item is said to represent the acknowledgement in writing (exhibit 5) of a partnership debt agreed by the defendant.
>
> "The defendant admits that he incurred the debt of Shs. 3,526/21 with the plaintiff company and that he signed the acknowledgement, exhibit 5. He denies, however, that the alleged partnership, Gilgil Transport Company, ever existed and says that the written acknowledgement, exhibit 5, was obtained from him by misrepresentation as to the nature and amount of the debt mentioned therein. The defendant further contends that he made a number of payments to the plaintiff company which more than offset the sum of Shs. 3,526/21 admitted by him and he counterclaims for a balance of Shs. 2,493/98 which he alleges is owing to him on balance of his account by the plaintiff company.
>
> "The real issue in this case depends on the question of whether or not the plaintiff company have succeeded in establishing the existence of the alleged partnership which in turn is a pure question of credibility."

The learned judge was unable to see any reason to disbelieve the evidence of the plaintiff (respondent) company's witnesses or to believe that the partnership accounts, notwithstanding certain discrepancies in them, had been invented.

On the other hand, he disbelieved the evidence of the defendant (appellant) including his allegation that he had signed the acknowledgement as a result of misrepresentation by the respondent. I think that the learned judge's conclusions on the evidence were clearly right and that the oral evidence and the accounts were amply sufficient to support them without any question of an acknowledgement.

I am of opinion, however, that the acknowledgement was admitted in evidence in contravention of s. 39 of the Stamp Ordinance. It was admitted for the purpose of proving an acknowledgement by the respondent of a debt due on an account stated, and it was, at least, to some extent, "acted upon" by the learned judge. The learned judge admitted the document as an exhibit in the case; he referred to it three times in his judgment; and he devoted a passage in his judgment to refuting the defence story that the acknowledgement was obtained by misrepresentation. The acknowledgement might have been excluded without affecting the result; but in fact it was received in evidence and formed part of the ratio decidendi. In the ordinary and grammatical sense of the words, the acknowledgement was "acted upon" by the learned judge at least to some extent. Fortunately, for the objection is quite without merits, this need not entail ordering a new trial.

I have had the advantage of reading the judgment of the learned Vice-President (as he then was). He has apparently laboured under the mistaken impression that a rough draft of mine written while I was confined to bed without access to any authorities other than those which had been cited by the learned counsel and stated to be tentative only was my final judgment. He had left the Colony before I read his judgment or had an opportunity of correcting this impression. As this case may be cited as a precedent, I must now make it clear what my views in fact are.

I agree with the learned Vice-President, that, as no substantial wrong or miscarriage of justice was occasioned by the improper admission of the acknowledgement in evidence (r. 76 of the Rules of this court and s. 167 of the Indian Evidence Act), a new trial should not be ordered on the ground of misreception of evidence.

The main point upon which I find myself in disagreement with the learned Vice-President is in his interpretation of "acted upon" in s. 39 of the Stamp Ordinance. As I understand his judgment, he interprets the words "No instrument . . . shall be acted upon" as applying only to instruments upon which an action is brought, or without which the action could not succeed, which are, in his phrase, "of the essence of the action" or "themselves capable of determining the result of the proceedings". This would be a very restricted interpretation of the words "No instrument shall be acted upon" and, with respect, I should require authority before I could agree with such a curtailment of the ordinary meaning of the words of the section. I have found no such authority. In my opinion, an instrument is "acted upon" by a judge when it is taken into consideration by him and forms part of the ratio decidendi of the case. The learned Vice-President finds support for his proposition in *Slatterie v. Pooley* (1) (1840), 6 M. & W. 664; 151 E.R. 579; and *Fatechand Harchand v. Kisan* (2) (1894), 18 Bom. 614. In *Slatterie v. Pooley* (1) it was decided that a parol admission by a party to a suit is always receivable in evidence against him, although it relates to the contents of a deed or other written instrument, and even though its contents are directly in issue in the case. There was no question in *Slatterie v. Pooley* (1) of the deed itself being inadmissible. The objection was merely that the admission did not constitute the best evidence, i.e. it was argued that the contents of a document should be proved by the production of the original which could have been, but was not, produced. In *Sanders v. Karnell* (3) (1858), 175 E.R. 762, Channell, B., said that the doctrine contained in *Slatterie v. Pooley* (1) was not to be extended.

I know of no case where that doctrine has been extended to enable a court to take into consideration a copy of a document attached to pleadings where the document itself is prohibited by statue from being received in evidence or acted upon. However that may be, the question whether a court has "acted upon" a document or not is, in my opinion, a question of fact. I do not say that where a document is not tendered, or is tendered and excluded, or where it is received but consideration of it is excluded, a court might not act merely on an admission of its contents contained in pleadings or in evidence. Those questions can be decided when they arise. That is not what took place here. The court admitted the document itself, took it into consideration, and, to some extent at least, based its judgment upon it. To my mind this amounts to "acting upon" it. That, however, need not be fatal to the respondent's case on appeal if the evidence, excluding consideration of the acknowledgement, was sufficient. *Ram Rattan v. Parmanand* (4) (1945), 73 I.A. 28.

In *Fatechand Harchand v. Kisan* (2) an acknowledgement (admitted on the pleadings) was sought to be put in evidence for the purpose of renewing a period of limitation in respect of a debt.

Sargent, CJ., said (18 Bom. at p. 616):

> "We agree with the joint subordinate judge that this suit is not brought on the acknowledgement (exhibit 13) but is a suit for goods sold and delivered, the claim in respect of which was not disputed at the trial by the defendants except as regards interest which was not allowed. The case of *Chenbasapa v. Lakshman* which was a suit on the hundis improperly stamped, does not, therefore, apply.
>
> "As regards the question of limitation, exhibit 13, although for want of a proper stamp it could not be 'acted upon' as an acknowledgement of a particular sum being due, might, we think, without violating the intention of the Stamp Act, be used for the collateral purpose of showing an acknowledgement of an existing liability in respect of goods sold."

Apparently it was held that the acknowledgement was admissible in evidence for the collateral purpose of renewing the period of limitation. If so, it is quite clear that that part of *Fatechand's* case (2) and all previous Indian cases where acknowledgements were held to be admissible in evidence for a collateral purpose are overruled by *Ram Rattan v. Parmanand* (4). There their lordships held that no instrument chargeable with duty and unstamped could be admitted for any purpose, whether collateral or otherwise. In any event, in *Fatechand's* case (2) it was expressly stated that the acknowledgement, for want of a proper stamp, could not (notwithstanding that the document had been admitted in the pleadings) be "acted upon" as an acknowledgement of a particular sum due, which was the purpose for which the acknowledgement was tendered and received in the present case. I agree that *Fatechand's* case (2) may show, if authority for that proposition is needed, that an acknowledgement of a debt is, in the ordinary way, merely evidence of it; but, with respect, I cannot see that it at all supports the proposition that the court does not act upon a document if the document is not "itself capable of determining the result of the proceedings". I think that the inference to be drawn from *Fatechand's* case (2) is to the contrary.

Chenbasapa v. Lakshman Ramchandra (5) (1894), 18 Bom. 369, was a suit upon two hundis which were inadmissible for want of impressed stamps. The learned judge allowed the claim, holding that the defendant's admissions in their written statement of defence made it unnecessary to put the hundis in evidence. It was held on appeal, reversing the judge's decree, that a hundi is "acted upon" where a decree is passed on it, whether proved or admitted and that the court could not give effect to it in either case. It is true that this was a suit upon the hundis and, therefore, a stronger case than the present. But

there is nothing in the report which lends support to the proposition that an instrument is only "acted upon" if it is an instrument upon which the suit is brought or which is by itself capable of determining the result of the proceedings.

I agree with the learned Vice-President that if "acted upon" is given the meaning which I have suggested, the two sanctions of not receiving the instrument in evidence and not acting upon it may (in respect of a person having authority to receive evidence, but not in respect of the other persons mentioned in s. 39) overlap. But that is a not uncommon feature of statutory provisions and is not, in my opinion, sufficient to curtail the ordinary meaning of the words used.

In *Routledge v. McKay* (6), [1954] 1 All E. R. 855, upon a section differing somewhat from s. 39 of the Kenya Stamp Ordinance, the Court of Appeal in England held that it was the duty of that court to pay regard to the provisions of the Stamp Act, 1891, s. 14(1). I am by no means sure that the Indian cases to the contrary effect mentioned in Sarkar on Evidence (9th Edn.) at p. 1238 in the commentary on s. 167 of the Indian Evidence Act should be followed in Kenya. There the learned author states that the question of the admissibility of an insufficiently stamped document once admitted as evidence by a court can form no valid ground of appeal. In India, however, there is an express statutory provision to that effect (s. 36 of the Indian Stamp Act, 1899) which apparently does not exist in Kenya. This court would, I think, fall within the wording of s. 39, "any person having by law . . . authority to receive evidence", and in *Salim bin Awadh v. Ramadhan bin Awadh* (7) (1956), 23 E.A.C.A. 55 (by which decision to the extent that it is applicable, we are bound) this court entertained on appeal a stamp objection to a document admitted without objection in the trial court and acted in protection of the revenue by directing it to be stamped. I incline to the view that it is the duty of this court, upon objection being raised before it, to have regard to provisions such as s. 39 occurring in the stamp laws of the relevant territory within the jurisdiction of the court, notwithstanding that the unstamped document may have been admitted in evidence without objection in the superior court. I find it unnecessary, however, to decide this question because, in my opinion, the point is, in this case, covered by r. 77 of the Rules of this court (which was not cited in argument and which I had overlooked in my first draft). Even if the learned judge "acted upon" an unstamped acknowledgement, as in my opinion he did, this was, in the circumstances of this case, an irregularity not affecting the jurisdiction of the superior court or, in any appreciable degree, the merits of the case and, accordingly the decree should not be reversed and no new trial should be ordered. This follows from my previous finding that the oral evidence and the accounts which the learned judge accepted were amply sufficient, without the acknowledgement, to support the conclusions at which he arrived. It is not my view that if their ordinary meaning is given to the words "acted upon", this means that a new trial should always be ordered. Notwithstanding that the judge below has "acted upon" an instrument in the sense which I have indicated, a new trial should not be ordered where it is plain that that irregularity has not affected the merits of the case or the jurisdiction of the superior court.

As to the remainder of the grounds of appeal, I agree with the judgment of the learned Vice-President.

I would dismiss the appeal with costs.

Briggs V-P: I regret to find myself in disagreement with the judgment of the learned President.

I respectfully agree with him that the document admitted in evidence as exhibit 5 and referred to as "the acknowledgement" was liable to stamp duty of twenty cents, was incapable of being stamped under penalty, and in consequence,

being unstamped, was wrongly admitted in evidence. I would also observe that it never could in any circumstances have become properly admissible in evidence, and merely from that point of view, the fact that objection was taken for the first time before us is immaterial.

I differ from the learned President in the view which I take of the effect and consequences of the wrongful admission. Rule 76 (2) of the 1954 Rules of this court, which for the purposes of the present appeal is in pari materia with the relevant parts of the English O. 58, r. 10 (2), provides as follows:

> "(2) A new trial shall not be granted on the ground of improper admission or rejection of evidence unless in the opinion of the court some substantial wrong or miscarriage of justice has been thereby occasioned; and if it appears to the court that such wrong or miscarriage affects part only of the matters in controversy, or some or one only of the parties, the court may give final judgment as to part thereof, or as to some or one only of the parties, and direct a new trial as to the other part only, or as to the other party or parties."

The learned President has quoted the pleadings, and I shall not repeat his words. The essential points are that the plaint alleged and relied on the acknowledgement, but without stating its precise terms. The defence alleged the precise terms of the acknowledgement and admitted execution thereof. The learned President has quoted those terms and I do not repeat them. The defence further alleged (1) that the acknowledgement was executed in consequence of a misrepresentation by the plaintiffs' agent or servant, which must in the circumstances have been fraudulent, (2) that it was made without consideration, and (3) that it was void. There is–and I think this is of importance–no plea of non est factum. The reply by necessary implication admits the terms of the acknowledgement as pleaded in the defence, and denies that it was obtained by misrepresentation, or made without consideration, or void. On the pleadings, therefore, the existence and execution of the acknowledgement, and also its terms, were not and never could be in issue between the parties in this suit.

The causes of action in the suit were several. The item of Shs. 3,526/21 was admitted and nothing turns on it. The sum of Shs. 4,473/79 was not claimed as money due on an account stated and settled, and no adequate particulars of it were given in the plaint, but the parties knew very well what they were dealing with. The defendant made a number of specific allegations concerning distinct and identifiable items and those allegations were specifically met in the reply. The oral evidence subsequently called and the accounts put in evidence showed, with at least as much clarity and precision as is ever to be expected from Indian accounts, that the sum of Shs. 4,473/79, which later formed the subject matter of the acknowledgement, became due because the appellant and one Dhanji Savji, a director of the respondent company, had been partners in a business called Gilgil Transport Company; Gilgil Transport Company owed the respondents Shs. 4,028/37 for money lent or advanced and goods supplied, the partnership was wound up, the appellant was then overdrawn in relation to his partner, and under the terms of the winding-up it was agreed between the partners and the respondents that the appellant should pay to the respondents the amount of Shs. 4,028/37 due to them by Gilgil Transport Company and should also pay to them for credit of Dhanji Savji's personal account with them the sum of Shs. 445/42 due by the appellant to him in final settlement of the partnership accounts. In other words there was a new tripartite contract under which each party gave and received full consideration, the respondents in particular having agreed to release Dhanji Savji from his obligations to them as a partner in Gilgil Transport Company. It was a term of this agreement that the appellant's personal account with the respondents should forthwith be

debited with Shs. 4,473/79. This was done and the acknowledgement recorded the transaction. It created no new rights or obligations, and it was not a document which could itself have been sued on, whether as an account stated and settled, as a contract, as a promissory note, or otherwise. The amount in question was claimed "as acknowledged", but this phrase was merely descriptive. Counsel for the appellant was in my opinion right in submitting that the acknowledgement was "only presumptive evidence" of the amount due. It was an admission and nothing more. And the learned judge was right, in my opinion, in treating as the essential point in the case the existence of the partnership, and in saying that that was a pure question of credibility.

I am unable to see how his decision on that question could possibly have been affected by the production or non-production in evidence of the acknowledgement. Even if it had not been produced, he knew from the pleadings that the appellant had signed a document in those terms, and he was obliged to treat the admission thereby made as an admission of a relevant fact, for what it was worth. No doubt its worth may have been substantial, as soon as the allegations of misrepresentation were dismissed as untrue, and the nature of the transactions showed the allegation of want of consideration to be nonsense. But, whatever degree of weight might properly have been given to the admission on the pleadings, that weight was not increased by reception of the original document in evidence, and would not have been diminished if the document had never been tenderd at all. It was obviously unnecessary to tender the document in evidence, for its terms were not in issue. The learned President states that the document was admitted "for the purpose of proving an acknowledgement by the respondent of a debt . . .". If this was the purpose, I can only say that the purpose was one irrelevant to the matters in issue in the action, since the giving of that acknowledgement was common ground.

The question whether a document is "acted on" in contravention of s. 39 of the Stamp Ordinance was raised in *Chenbasapa v. Lakshman Ramchandra* (5), but that case decides only that, where the cause of action is on the unstamped document itself, an admission of the existence of the document will not support a judgment on it. Clearly, as the court said,

> "a hundi is 'acted upon' where a decree is passed on it, whether proved or admitted".

It the Supreme Court had given, or purported to give, judgment in this case on an account stated and settled between the parties, it would in my view have been wrong. But it did not do so. Judgment cannot be given "on an acknowledgement". But no such cause of action is known to the law. Judgment in this case was based, and was expressly stated to be based, on the oral evidence as supported by the accounts, and was for sums due under oral contracts. I think the decision in *Fatechand Harchand v. Kisan* (2) is helpful in showing that the existence of an acknowledgement is, in the ordinary way, merely evidence for what it is worth, and does not affect the cause of action, but it may be of fundamental and independent importance, e.g. to overcome limitation. In the latter case the court "acts upon" it, but not in the former. It may then be received without being "acted upon", though its reception, even for a collateral purpose, will be improper. *Ram Rattan v. Parmanand* (4). In my respectful opinion those principles are both correct and both applicable to this case. The court must "act upon" a document, if the action could not in law succeed were the document non-existent. In such cases an admission of the document on the pleadings does not remedy matters. In other cases, where the document is not, if I may so express it, of the essence of the action, the court does not act upon it by reason only that its effect and terms are admitted on the pleadings. I think the law is the same in England. *Humphreys v. Dudding* (8) (1861), 2 F. & F. 546, appears to endorse the first principle, and *Slatterie v.*

Pooley (1) the second. I accept that this was a case of wrongful admission of evidence; but, so far from having occasioned any "substantial wrong or miscarriage of justice", I think that in view of the admission on the pleadings it had no material effect whatever, and it would therefore be quite wrong to order a re-trial.

There may be an additional reason for refusing to interfere. Sarkar on Evidence (9th Edn.), 1238, in commenting on s. 167 of the Indian Evidence Act, states,

> "The question of the admissibility of insufficiently stamped document once admitted as evidence by a court can form no valid ground of appeal. An appellate court has no right to refuse to admit on technical ground a document which has been received and read in the court below without objection."

and again, on the same page,

> "When the court of the first instance admitted, without objection, unstamped receipts in evidence, but the appellate court rejecting them reversed the decision–Held that the decision of the lower court was wrongly reversed on appeal, as the irregularity was not one affecting the merits of the case."

Numerous authorities for these propositions are noted. I have unfortunately not been able to refer to many of these, but I find *Kastur Bhavani v. Appa* (9) (1881), 5 Bom. 621, *Akbar Ali v. Bhyea Lal Jha* (10) (1880), 6 Cal. 666, 670, and especially *Afzal-un-Nissa v. Tej Ban* (11) (1878), 1 All. 725, 726, in point. It is the function of the trial judge to protect the revenue (*Bowker v. Williamson* (12) (1889), 5 T.L.R. 382) at least in cases where the liability to duty is clear (*Don Francesco v. De Meo* (13), [1908] S.C. 7), but, in spite of the dictum of the Master of the Rolls in *Routledge v. McKay* (6), [1954] 1 All E.R. 855 at p. 856, I am not persuaded that this is always a function of an appellate court. If it were, there could be no good ground for the undoubted rule in England that a deliberate ruling by the trial judge is final. I think the whole question of stamp objections in this court, and the separate question whether counsel should take such objections, may at some time have to be considered in detail. On any such inquiry the question whether the law requires amendment with a view to protecting innocent persons from fraud might also require attention. Paragraph (*b*) of the proviso to s. 39 might serve as a model.

As regards this case, I am content to rest myself on the points that, in order to justify an order for a re-trial on the ground of wrongful reception of the acknowledgment, there must, in terms of s. 167 of the Indian Evidence Act, have been insufficient evidence to justify the decision had the acknowledgement been excluded, and there must, in terms of r. 76(2), have been some substantial wrong or miscarriage of justice occasioned by its reception. In this case there was in my opinion sufficient evidence to support the decision without the acknowledgment and, since I agree with the learned trial judge in believing the respondents' witnesses and disbelieving the appellant, it follows that I do not think the admission of the acknowledgement resulted in any substantial wrong or miscarriage of justice. I think the small payments made to bring the debt to a round figure of Shs. 8,000/- would alone be almost conclusive in the respondents' favour on the facts. If, contrary to my opinion, the reception of the document in evidence (as opposed to the admission on the pleadings) had any effect at all, it served merely to ensure that justice was done. I am not concerned with the theoretical possibility that another judge might on re-trial take a different view. This is not a criminal case. The worst that can be said to have happened from the appellant's point of view is that the judge, in the absence of objection, saw a document admittedly signed by the appellant and

containing a relevant, and indeed important, admission by him, but an admission which was in any event before the court in another manner, i.e. by admission on the pleadings. It would be an abuse of language to say that this effected either substantial wrong or miscarriage of justice.

As I understand him, however, the learned President, though he might not be willing to grant a re-trial on the ground of the wrongful reception of the acknowledgement, considers that a re-trial should be granted because it was wrongfully "acted upon". If, contrary to my opinion, a document is "acted upon" wherever it is received in evidence and treated as material to the decision of the case, it will hardly ever be possible for an appellate court to say that it was not "acted upon". It must in the great majority of cases be impossible to say, however unimportant the document, that the learned judge attached no weight to it. If that is the position, and if, whenever a document is wrongfully "acted upon" in that sense, a new trial should be ordered, both s. 167 and r. 76(2) must for all practical purposes be dead letters, for though re-trial might be refused on the ground of wrongful reception it would be granted on the ground of wrongful action. I do not think that was the intention of the legislature.

I think my view of the true meaning of the words "acted upon" in s. 39 is supported to some extent by consideration of the other cases in which, under the terms of that section, an unstamped document may not be treated as it would if it were duly stamped. It may not be "acted upon, registered or authenticated" by the official concerned. The words suggest that the document must not be allowed to be effective in itself for the purposes for which it was intended. This is the first sanction which one would expect. To say that it must never be used as evidence of anything is a different sanction, which is separately applied by the words "shall (not) be admitted in evidence for any purpose". When a document is of the essence of the action in the sense I have indicated above, it is subjected to both sanctions, and the prohibition against acting upon it cannot be evaded by an admission on pleadings. Where it is not of the essence of the action in that sense, but would be adduced only as evidence and would not itself be capable of determining the result of the proceedings, it is subjected only to the second sanction, the prohibition against reception. This seems a reasonable and logical distinction. In the latter case, there is no reason for refusing to act on an admission in pleadings.

I should be inclined, if I thought it necessary, to go further. There is no express rule of law that makes it obligatory to grant a new trial where there is a breach of the statutory rule against acting upon unstamped documents. If the document is of the essence of the action, no re-trial will ordinarily be granted, for without it the action must fail. If, however, it is not of the essence, the trial would, on the learned President's view, have been irregular, in that a statutory rule was broken. On the other hand, I do not think that the trial should be treated as either wholly unlawful or without jurisdiction, and in such a case I think the provisions of r. 77 of the Rules of this court should be applied. There would be an "error, defect or irregularity not affecting the merits", for, where the document is admitted on the pleadings, the fact that it is also received and treated as material evidence cannot affect the merits. I would suggest also that, even if there is no admission on the pleadings, the improper treatment of an unstamped document (not being of the essence) as material evidence can never affect the merits of the case to the detriment of the party who signed it, although it may well affect the result of the proceedings. For these reasons I think the grounds of appeal based on the stamp objection fail.

I deal shortly with the other grounds of appeal. As to ground 2, the existence of a partnership at an earlier stage, the dissolution, and the settlement of accounts on winding-up were all clearly proved. They were in the nature of introductory matter showing how the claim arose. Ground 3 in my view fails.

on the facts. Ground 4 is based on false premises. The money was advanced to, and the lorry obtained for, the partnership. The claim for interest was clearly agreed when the tripartite agreement was made. Ground 5 ignores the existence of the tripartite agreement. Ground 6 fails, first, because the illegality, if any, was too remote to affect the respondents. Secondly, there is nothing to show that they, as opposed to Dhanji Savji, knew that the partnership had not properly licensed the lorry, and his knowledge acquired as a partner cannot be imputed to them. Thirdly, the point is taken for the first time in this court and the respondents have had no opportunity to adduce, as they might have done, evidence to meet it. If the matter were thoroughly sifted, it might be found that the claim for Shs. 445/42 which was to go ultimately to Dhanji Savji might stand on a different footing from the rest: but that point was not taken. Ground 7 is based only on a misapprehension of the effect of the accounts and of the oral evidence. We heard the respondents only on the stamp and illegality issues.

I would dismiss the appeal with costs.

Gould JA: I have had the opportunity of reading the judgment of the learned President in this matter and I agree with his reasoning and with the conclusions at which he has arrived. Upon the short point as to whether a document which is wrongly admitted in evidence is "acted upon" within the meaning of s. 39 of the Stamp Ordinance if it forms part of the total of the evidence which leads the court or judge to a particular conclusion, I consider upon the ordinary meaning of the words quoted that it is. It is true that there is a distinction between a negotiable instrument or a contract which, upon judgment being given, is the basis for or superseded by the contract of record, and a document which of its nature can only serve as evidence of a particular fact or facts. It is not to my mind a material distinction for when each is given effect for the purpose for which it was made or will serve, it is acted upon in the ordinary sense of those words.

I agree also that for the reasons given by the learned Vice-President the other grounds of appeal fail and that the appeal should be dismissed with costs.

Appeal dismissed.

For the appellant:
DN Khanna
DN & RN Khanna, Nairobi

For the respondent:
J Gledhill and *LE Long*
Lawrence Long & Todd, Nakuru

Twentsche Overseas trading Co Ltd v Bombay Garage Ltd
[1958] 1 EA 741 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	2 October 1958
Case Number:	604/1958

Before: Sir Audley McKisack CJ

Sourced by: LawAfrica

[1] Practice – Summary procedure – Application for leave to appear and defend – Application made out of time but before plaintiff's application for judgment – Whether court should grant application – Civil Procedure Rules, O. 33*, r.* 3 (*U.*) *– Civil Procedure Ordinance, s.* 99 (*U.*).

Editor's Summary

The defendant applied for leave to defend a suit filed under O. 33 of the Civil Procedure Rules, which provides for summary procedure. This application was filed after the time for leave to appear and defend fixed by the summons had expired, but before the plaintiff's application for entry of judgment was received by the court. It was submitted for the plaintiff that the defendant's application was merely for leave to defend and not for enlargement of time within which to make an application for leave to defend and was therefore not properly before the court; and that the plaintiff was entitled to judgment because of the provisions of O. 33, r. 3, "that in default of such application by the defendant . . . within the period fixed by the summons served upon him the plaintiff shall be entitled to a decree."

Held – in view of the general power to enlarge time conferred by s. 99 of the Civil Procedure Ordinance, which is exercisable retrospectively as well as prospectively, and of the fact that the defendant's application was filed before the plaintiff's application for judgment and also of the fact that the defendant's affidavit accompanying the application disclosed a triable issue, the application should be allowed despite the defendant's delay.

Application allowed.

Case referred to in judgment:

(1) *Adam v. Dilmirkhan* (1938), 1 T.L.R. (R.) 585.

(2) *Cox v. Veasey* (1937), 6 U.L.R. 20.

Judgment

Sir Audley McKisack CJ: This is an application for leave to appear and defend a suit filed under O. 33 (summary procedure). It is supported by an affidavit setting out certain facts which, in my view, indicate that there is a triable issue, and that has not been contested. No affidavit has been filed by the plaintiff to contradict any of the facts in the defendant's affidavit.

It is, however, contended for the plaintiff that this application is out of time and that, consequently, the plaintiff is entitled to judgment under r. 3 of O. 33. The relevant dates are as follows. The defendant was served with the summons on August 21, 1958, and this summons required him to apply for leave to appear and defend within ten days from service of the summons. This period accordingly expired on August 31, but the application for leave to defend was not filed until September 5. On September 6 a letter was received in the High Court from the plaintiff asking for judgment to be entered in default of an application by the defendant for leave to appear and defend within the prescribed period.

Mr. J. C. Patel for the plaintiff says that the defendant's application, being merely for leave to defend, and not for an enlargement of time within which to make an application for leave to defend, is not properly before the court; and that the plaintiff is entitled to judgment because of the provision in r. 3 of O. 33 that:

> "in default of such application by the defendant . . . within the period fixed by the summons served upon him, the plaintiff shall be entitled to a decree . . .".

Mr. Patel refers me to *Adam v. Dilmirkhan* (1) (1938), 1 T.L.R. (R.) 585. It was there held that a written statement of defence filed out of time, and without leave having been obtained to file it out of time, was to be regarded as not being before the court at all. In the instant case, however, we are not concerned with a written statement of defence, but with an application for leave to appear and defend. The Tanganyika case does not appear to me to be really in point. The same applies to a Uganda case relied on by Mr. Haque for the defendant–*Cox v. Veasey* (2) (1937), 6 U.L.R. 20–where it was held that a written statement of defence filed out of time could not be excluded if it was filed before the plaintiff appeared to prove his case, provided the defence disclosed was substantial and there was no desire to obstruct or delay the proceedings. But in the instant case we are not concerned with a pleading which, rightly or wrongly, has been accepted for filing by the registry. It may be that it would have been more regular for the defendant to have combined an express application for enlargement of time within which to apply for leave with his application to obtain the leave. In view, however, of the general power to enlarge time conferred by s. 99 of the Civil Procedure Ordinance and exercisable retroactively as well as prospectively, of the fact that the defendant's present application was filed before the plaintiff's application for entry of judgment was received in the High Court registry, and of my view that the defendant's affidavit discloses a triable issue, I consider my proper course is to grant this application despite the defendant's delay. By reason of that delay, however, I order that each party must bear his own costs in respect of this application. Written statement of defence to be filed within fourteen days.

Application allowed.

For the plaintiff/respondent:
JC Patel
JC Patel, Kampala

For the defendant/applicant:
F Haque
Haque & Gopal, Kampala

Chotabhai M Patel v Chaturbhai M Patel and another
[1958] 1 EA 743 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	8 December 1958
Case Number:	544/1957
Before:	Lewis J

Sourced by: LawAfrica

[1] Bill of sale – Fraud on creditors – Attachment of lorry – Security for bill of sale including lorry – Bill of sale dated subsequent to commencement of action – Validity of bill of sale – English Fraudulent Conveyances Act, 1571 *– English Bills of Sale Acts,* 1878 *and* 1882 *– Civil Procedure Rules, O.* 19, *r.* 55, *r.* 60 (*U.*).

Editor's Summary

The plaintiff, a judgment-creditor, attached the first defendant's lorry, and the second defendant applied to the court preferring a claim to the lorry under a bill of sale dated August 24, 1956, this date being subsequent to the filing of the plaintiff's suits. The lorry was sold pursuant to the attachment, but the second defendant filed a summons under O. 19, r. 55, objecting to the attachment, and the district registrar, taking the view that the plaintiff had failed to show that the bill of sale was not genuine, ordered that the proceeds of sale of the lorry should be subject to the second defendant's claim under the bill of sale. The plaintiff then applied under O. 19, r. 60, to set aside the order of the registrar on the ground that the bill of sale was fraudulently executed for the purpose of defeating the expected execution of his judgments. The evidence disclosed that the chattels given as security in another bill of sale, dated June 8, 1956, were the same as under the bill of sale dated August 24, 1956, except for the said lorry, and that the lorry was also part of the security under another earlier bill of sale. It was submitted for the plaintiff that an execution creditor in Uganda may impeach a bill of sale as a fraudulent transfer of property under the Fraudulent Conveyances Act, 1571. The second defendant claimed that the Act had no application as it was part of the English law of property.

Held –

(i) the object of the Fraudulent Conveyances Act, 1571, being to render voidable dispositions in fraud of creditors, including bills of sale, the Act applies in Uganda.

(ii) since the second defendant could not show that Shs. 15,000/- or any other sum was ever lent to the first defendant, and as the consideration in the bill of sale was not truly set forth the bill of sale was void in respect of the chattels comprised in it under the Bills of Sale Acts, 1878 and 1882.

(iii) the bill of sale dated August 24, 1956, was given for the purpose of protecting the lorry and defrauding execution creditors generally; accordingly the plaintiff had established that the bill of sale was void.

Order of the district registrar set aside.

Case referred to in judgment:

(1) *Alton v. Harrison* (1869), 4 Ch. App. 622.

(2) *Wood v. Dixie* (1845), 7 Q.B. 892; 115 E.R. 724.

(3) *Freeman v. Pope* (1870), 5 Ch. App. 538.

(4) *Re Reis, Ex parte Clough,* [1904] 2 K.B. 769.

(5) *Re Wise, Ex parte Mercer* (1886), 17 Q.B.D. 290.

(6) *Michael v. Gay* (1858), 1 F. & F. 409; 175 E.R. 785.

(7) *Darvill v. Terry* (1861), 6 H. & N. 807; 158 E.R. 333.

For the plaintiff:
A James

The first defendant did not appear and was not represented.

For the second defendant:
MM Patel

Judgment

Lewis J: This is a suit under O. 19, r. 60 of the Civil Procedure Rules to establish a right to property the subject of an attachment. As this, I understand, is probably the first case ever brought under this Order and rule, and the facts are unusual, it is necessary to state them fully.

On June 15, 1956, the plaintiff filed plaints under Summary Procedure, O. 33, against the first defendant, which were served on June 21. At the same time he applied under O. 36, r. 5 (1) (*a*) for an order directing the first defendant to furnish security. The order was made, and on June 18, 1956, the auctioneer, Gaffer Moosa, returned the same, endorsed as follows:

> "The attachment before judgment returned, because both parties settled out of the court. My fees received."

On September 24, 1956, applications for leave to defend the two suits were dismissed and judgments entered for the plaintiff. The claims in each case were for goods sold and delivered. On January 11, 1957, a warrant of attachment and sale of the first defendant's Bedford lorry, No. UFK. 600, was issued and the said lorry was attached on or about January 24, 1957. On February 7, 1957, the second defendant filed an application in the said suits, preferring a claim to the said lorry by reason of a bill of sale dated August 24, 1956, made in his favour by the first defendant to secure the sum of Shs. 15,000/-. On or about February 7, 1957, the said lorry was sold under the said warrant of attachment and sale and realised the sum of Shs. 4,245/-. On February 9, 1957, the second defendant filed a summons under O. 19, r. 55, objecting to the attachment of the said lorry. On April 2, 1957, the learned Jinja district registrar ordered that the proceeds of sale of the said lorry should be subject to the claim of the second defendant under the said bill of sale up to the sum of Shs. 8,450/-.

On April 24, 1957, counsel for the plaintiff applied for execution of these judgments, by the arrest and imprisonment of the first defendant. On May 2, 1957, the first defendant was committed to the civil prison for six months on the ground of bad faith in relation to his property, namely, obstructing or delaying the decree-holder in the execution of his decree. However, no committal orders were issued and on May 16, 1957, the parties came to a settlement.

On April 10, 1958, further applications for the arrest of the first defendant were made, and on May 6, 1958, he appeared before the court on a warrant of arrest. On May 7 the defendant was released on his furnishing security to apply to be declared insolvent within one month.

The plaintiff now seeks to set aside the order of the learned registrar, and does so on the grounds set forth in para. 7, para. 8 and para. 9 of his plaint, para. 10 being abandoned.

The case for the plaintiff is that the bill of sale was fraudulently executed for the purpose of defeating the expected execution of his judgments. At the outset, Mr. M. M. Patel, for the second defendant,

objected to the production of the file in Jinja Civil Cases No. 84 and No. 85 of 1956. I admitted the files as I considered that on an allegation of fraud the court should, so far as possible, be in possession of all the relevant available facts.

A suit of this nature is purely Indian in origin and is governed there by O. 21, r. 62, of the Indian Code of Civil Procedure. Chitaley and Rao's the Code of Civil Procedure (2nd Edn.), p. 1896, has this to say about this suit:

> "The suit contemplated by the rule is a suit to establish the right claimed in the inquiry, that is, the liability or non-liability of the property attached to satisfy the decree under execution, and not the liability of third persons

> to satisfy the decree by the sale of their right, title and interest in the property. The suit is in essence a continuation of the execution proceedings, though the scope of the inquiry is much wider. What is decided in the suit is the question of title and not merely the question of possession. Suits brought under this rule are substantive suits and must be tried like any other suit, subject to the ordinary rules of procedure and evidence. They are not limited by any special standard of evidence or law. The claimant may, if necessary, thrash out his title in the fullest and most ultimate sense."

On the question of what evidence is admissible, it is not clear. A reported case not before me: (1914), 22 I.C. 676, says that the evidence taken in the claim case is not per se admissible in the suit, but is admissible for a limited purpose. However, as fraud is alleged I have, as said, admitted the same evidence as was heard in the claim, or objection, case.

It was not in dispute that the first defendant had executed a bill of sale on June 8, 1956, in favour of Bugerere Saw Mills, Ltd., for Shs. 21,000/- and that the chattels set out in the schedule thereto were the same as in the bill of sale the subject of this action, except as to the said Bedford lorry No. UFK. 600.

Nor was it disputed that lorry No. UFK. 600 was part of the security for an earlier bill of sale in favour of one Daud Jiva. At the hearing of the objection proceedings, only the objector (defendant 2), the plaintiff and the said Gaffer Moosa gave evidence. The learned registrar had this to say about the evidence of the objector:

> "Altogether the objector's evidence was most suspicious. Moreover, he gave his evidence extremely badly. He was not definite in anything and he kept changing his story. Having seen him in the witness-box and having heard what he had to say, I can place very little reliance on his evidence. If any evidence had been called by the judgment-creditor to the contrary and if it had been in any way reliable, I would have rejected the objector's story and accepted the judgment-creditor's evidence. But in fact, the judgment-creditor did not call any direct evidence to the contrary and he could not prove his allegations in any way. This would not have been impossible, for he could, for instance, have called Mr. Korde, to show that the bill of sale had been tampered with. Accordingly, I have no evidence of any fraud or conspiracy, on the part of the judgment-debtor and the objector, nor is there any evidence that the judgment-debtor does not owe the objector Shs. 15,000/-. Indeed, the judgment-debtor has not given evidence at all."

The learned registrar then goes on to state his reasons for allowing the objector's claim:

> "In my opinion it falls to the judgment-creditor to show that the document is not a genuine one. But he has not done this by any positive evidence and he has only succeeded in throwing doubts on the objector's claim. Positively he has merely shown that the judgment-debtor gave his lorry as security to the objector rather than to the judgment-creditor, and that this has resulted in defeating the judgment-creditor's expected execution. That is not sufficient in itself, to impeach the bill of sale, and the judgment-creditor has not shown that this was the sole purpose of the bill of sale."

The first matter for determination is whether the learned registrar applied the right principles when arriving at his decision. What has to be decided in an investigation under O. 19 r. 53, is set out in Chitaley and Rao, p. 1880.

> "What is to be investigated is indicated by the next three following rules, viz. r. 59, r. 60 and r. 61. The question to be decided is, whether on the date of

the attachment, the judgment-debtor or the objector was in possession, or where the court is satisfied that the property was in the possession of the objector, it must be found whether he held it on his own account or in trust for the judgment-debtor. The sole question to be investigated is, thus, one of possession. Questions of legal right and title are not relevant, except so far as they may affect the decision as to whether the possession is on account of or in trust for the judgment-debtor or some other person. To that extent the title may be part of the inquiry. But ultimate questions of trust, or complicated questions like the benami nature of a transaction, are not within the scope of the inquiry and are not intended to be gone into. As pointed out by Mr. Justice Sadasiva Ayyar in *Ramaswami Chetty v. Mallapa*:

> 'in summary proceedings held in accordance with certain statutory provisions intended for speedy disposal of "emergent" disputes, the court may be prohibited from going into complicated questions of title or investigating complicated questions like fraud, trust and so on, while giving the party defeated in the summary inquiry, the right to have the whole matter and all the questions which are in dispute fully investigated in an ordinary regular suit . . . The court is bound to order the release of the attached property if it finds possession in the claimant on his own account, even if there is title and disposing power remaining in the judgment-debtor.'"

In my opinion, the learned registrar clearly applied the wrong principles as he ignored the vital question of possession, which was still in the first defendant. The objector never at any time asserted that he was in possession of the lorry.

However, as this is a suit to establish title rather than possession, I must decide which of the parties now has the legal title to the lorry. Mr. James argued that execution-creditors in Uganda may seek to impeach a bill of sale as a fraudulent transfer of property under the Fraudulent Conveyances Act, 1571. This statute was in force in England in 1902 and repealed and re-enacted in the Law of Property Act, 1925, which is not a statute of general application. Mr. Patel argued that the Act of 1571 had no application here as it was part of the English law of property.

The object of the Act of 1571 being to render voidable dispositions in fraud of creditors, and this included bills of sale, I find that the Act does apply here.

It is settled that a case is not brought within the Act of 1571 merely because a bill of sale was given to prefer a creditor, or some creditors to others, or because in the result it defeats an execution expected but not actually issued. See *Alton v. Harrison* (1) (1869), 4 Ch. App. 622, and *Wood v. Dixie* (2) (1845), 7 Q.B. 892.

However, if a bill of sale is voluntary, the grantor's intent to defeat or delay creditors will be sufficient to avoid it against creditors defeated or delayed, but if for valuable consideration, there must be proof of the like intent by both grantor and grantee. *Freeman v. Pope* (3) (1870), 5 Ch. App. 538; and *Re Reis, Ex parte Clough* (4), [1904] 2 K.B. 769. But it is not, it seems, sufficient proof of intent merely to show that the necessary result of the transfer is to defeat or delay creditors. *Re Wise, Ex parte Mercer* (5) (1886), 17 Q.B.D. 290. Again, an assignment nominally in consideration of a pretended debt, but really colourable and collusive and with intent to defeat execution-creditors is fraudulent and void under the Act of 1571 as against judgment-creditors. *Michael v. Gay* (6), 175 E.R. 78.

Finally, a bill of sale by way of mortgage of personal chattels, if executed as a security for money actually lent, is not fraudulent and void under the Act, though its object is to defeat the expected execution of a judgment-creditor. *Darvill v. Terry* (7), 158 E.R. 333.

The question is whether the bill of sale is a real transaction, and in this connection want of possession is a “notorious badge of fraud”.

It is scarcely necessary to say that you must prove fraud at the date of the deed.

I must now examine the position of the parties on August 24, 1956, and their relation to one another. According to the evidence in the objection proceedings, the second defendant had worked for Bugerere Saw Mills as a clerk since 1951. The first defendant took over the said mill “after June, 1956”, but the business was sold to him in May. The second defendant said that he found the Shs. 15,000/- by saving Shs. 3,000/-. As his salary was only Shs. 600/- monthly this sounded most unlikely. It is clear from the record that the second defendant could not really show that Shs. 15,000/-, or any other sum, was ever lent to the first defendant; it is also clear that the consideration in the bill was not truly set forth and consequently it is void in respect of the chattels comprised in it under the Bills of Sale Acts, 1878 and 1882.

It will be remembered that on June 18, 1956, the auctioneer returned the warrant of attachment before judgment and security endorsed that the parties had settled the matter. It will also be remembered that on June 8, 1956, the chattels in the bill of sale of August 24, lorry UFK. 600 excepted, were also the security for the bill of sale in favour of Bugerere Saw Mills, and that lorry UFK. 600 was also security for a bill of sale in favour of Daud Jiva.

Now the evidence in the lower court shows that Bugerere Saw Mills, Ltd., took possession of their security under the bill as the first defendant defaulted. Why then another bill for Shs. 15,000/- in favour of a servant, giving as security six chattels of which the first defendant was not the owner, and the seventh chattel given as security under an earlier bill? Why all these bills? I decline utterly to believe that any of them were genuine. My twenty years experience of the Indian trading community is that actual money is the last thing that changes hands. Promissory notes, hundis, bills of sale, post-dated cheques, overdrafts and the like, yes, but cash, no!

I am satisfied that the bill of August 24 was given for the purpose of protecting lorry UFK. 600 and defrauding execution-creditors generally. If this was not its purpose, I cannot see why it should have ever been executed.

I have come to the conclusion that the plaintiff has established that the bill of sale in favour of the second defendant is void.

The plaintiff is then entitled to the consequential reliefs asked for, his taxed costs of this suit and interest at six per cent.

Order of the district registrar set aside.

For the plaintiff:
A James
Baerlein & James, Jinja

The first defendant did not appear and was not represented.

For the second defendant:
MM Patel

Carasco & Mistry, Kampala

Adi Jamal v R
[1958] 1 EA 748 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	20 October 1958
Case Number:	43/1958
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Street traffic – Private hire licence – Conviction of taxi driver for carrying excess passengers – Magistrate's discretion to cancel private hire licence for vehicle – Order of cancellation made without hearing owner of vehicle – Whether magistrate should hear owner of vehicle before ordering cancellation of licence – Traffic Ordinance, 1951, *s.* 83, *s.* 84 (*U.*).

Editor's Summary

An African driver employed by the petitioner was convicted on his plea of guilty of carrying an excess number of passengers under s. 84 (2) of the Traffic Ordinance, 1951 (U.). The magistrate made an order under s. 84 (4) of the Ordinance cancelling the private hire motor vehicle licence for the vehicle concerned and further directed that no private hire licence be issued in respect of the vehicle for six months. Section 84 (4) states–

> "where any person is convicted of an offence under this section, the court may, in addition to any fine which it may impose, order the cancellation of the taxicab or private hire motor vehicle licence, as the case may be, issued in respect of the vehicle in respect of which such offence was committed."

The order of cancellation was made by the magistrate in the absence of the petitioner, who submitted in his petition for revision that since the penalisation might be permanent, the order made adversely affected him.

Held –

(i) the use of the word "may" instead of the word "shall" in s. 84 (4) of the Ordinance gives the court a discretion which must be exercised judicially and on the facts of each particular case.

(ii) the petitioner should be given an opportunity of being heard on the question of revocation of the order of the magistrate cancelling his licence.

Case remitted to magistrate to hear petitioner accordingly.

Case referred to in judgment:

(1) *Ali Kiseru s/o Avasi v. R.*, Uganda High Court Criminal Revision Case No. 22 of 1958 (unreported).

(2) *R. v. Yakobo Mbugeramula* (1951), 18 E.A.C.A. 207.

(3) *Sajjabi v. R.*, [1958] E.A. 134 (U.).

(4) *R. v. Kamya* (1950), 6 U.L.R. 249.

(5) *Nyanza Motor Spares v. R.* (1954), 21 E.A.C.A. 345.

Judgment

Sir Audley McKisack CJ: read the following judgment of **Sheridan J:** This petition for revision arises out of a conviction of the petitioner's African driver on a plea of guilty to a charge of carrying two excess passengers contra s. 84 (2) of the Traffic Ordinance, 1951. The learned magistrate made an order under s. 84 (4) of the Ordinance cancelling the private hire motor vehicle licence for motor vehicle No. UEE. 815, which was the subject matter of the charge, and he further directed that no private hire motor vehicle licence be issued to the accused or in respect of the vehicle for six months. Section 84 (4) is in the following terms:

> "(4) Where any person is convicted of an offence under this section, the court may, in addition to any fine which it may impose, order the cancellation of the taxicab or private hire motor vehicle licence, as the case may be, issued in respect of the vehicle in respect of which such offence was committed."

It is not disputed that the above order was made in the absence of the petitioner. In his petition he alleges that he was unaware of the proceedings against his driver. The petitioner further states (1) that he owns nine motor vehicles which, under the provisions of the Ordinance and Regulations made thereunder, have been duly licensed as private hire motor vehicles for the year 1958; (2) that he is obliged to employ African drivers to operate them and he can only exercise a reasonable amount of control in their user; (3) that the act of the accused was wholly unauthorised and the offence was committed without his knowledge; (4) that by virtue of Regulations made under s. 81 of the Ordinance as contained in Legal Notice No. 194 of 1957 the maximum number of private hire motor vehicles which may be licensed in respect of the Busoga licensing area is forty and the effect of the cancellation may be that he will be unable to procure an additional licence in respect of an additional vehicle as in the meantime the maximum number of licences may have been allocated. In other words the penalisation may be permanent.

Mr. McMullin, for the respondent, submits that the learned magistrate properly decided to penalise the vehicle as it was used to commit the offence. He refers to the risks of this trade which obliges owners to control their drivers. He says that s. 83 and s. 84 of the Ordinance, as amended by the Traffic (Amendment) Ordinance, 1958, which increased the penalties are aimed at curbing the activities of "pirate taxis" and that the intention of the legislature was to impose an absolute liability on the owners of private motor hire vehicles for the offences of their employees with the consequent risk of their licences being cancelled even if those offences are committed without their knowledge, consent or acquiescence.

It is clear that the court is given a wide power as appears from the order of Sir Audley McKisack, C.J., in *Ali Kiseru s/o Avasi v. R.* (1), Uganda High Court Criminal Revision Case No. 22 of 1958 (unreported). In that case the petitioner, who was the driver of a private hire motor vehicle, pleaded guilty to a charge under s. 83 (1) of the Ordinance. He was fined and the licence was cancelled. As he was the driver and not the owner the charge should have cited s. 84 (2) as well as s. 83 (1). It was held that he had not been misled as the particulars of the charge referred to him correctly as the driver. The conviction was upheld. It was argued that the licence should not have been cancelled as the petitioner was not the owner of the vehicle. In answer to this submission the learned Chief Justice pointed out that there was no such limitation in s. 84 (4). He went on to say:

> "There is certainly nothing in the section to support the contention that cancellation should only be ordered where the offence was that of causing or permitting the vehicle to be used in contravention of the Ordinance (i.e. an offence by the owner). The owner is specially catered for in s. 83, but s. 84 provides a general power to cancel the licence where the offence is by any person using or driving the vehicle in question. No doubt the legislature had good reason for thus in effect penalising the licensee, as well as the driver, for the misdeeds of the latter. I accordingly decline to interfere with the magistrate's order."

The effect of this revisional order was that the licence was cancelled in the absence of the owner but does it go as far as to lay down that an owner who is adversely affected by an order shall not be given an opportunity of addressing the court if he so applies? It must be borne in mind that in *Kiseru's* case (1)

there was no question of the learned magistrate giving the owner an opportunity of being heard as the petitioner was charged under s. 83 which refers to offences committed by owners. He pleaded guilty to that charge. On the face of it the use of the word "may" instead of the word "shall" in s. 84 (4) of the Ordinance gives the court a discretion which must be exercised judicially. In *R. v. Yakobo Mbugeramula* (2) (1951), 18 E.A.C.A. 207, the Crown appealed against a revisional order of this court which set aside a peremptory confiscation order under s. 29 (4) of the Arms and Ammunition Ordinance without giving the owner of the gun any opportunity to show cause. The appeal was dismissed. Under the section the court had a permissive power to make an order of confiscation. The effect of the revisional order was to constitute a direction to magistrates that they should not make a peremptory order of confiscation where the owner of the gun is known, and is a person other than the accused, without giving the owner of the gun a chance of being heard. I quote the following passage from the judgment of the Court of Appeal:

> "It may, therefore, be the case that the order made by the learned judges in Criminal Revision Case No. 28 of 1950 and followed by the learned judge in the instant case is still material if it is to be regarded as a directive that in no circumstances should a court make a final order regarding disposition of property when the owner is known and is not the person convicted of the offence . . . We consider, perhaps, that they stated the general principles a little too broadly but they carefully guarded themselves by stating that they were well aware that there would be cases where the owner of the gun was unknown, could not be brought to court or ownership was very uncertain. We would go a little further than that and say that even if the owner is known and could be brought to court, there might be such clear evidence before the court establishing either his gross neglect or complicity in the offence that a final order of forfeiture or confiscation might be justified. In short the exercise of discretion remains a matter dependent on the facts of each particular case which must be exercised judicially in the light of such facts."

By s. 33 (1) of the Firearms Ordinance, 1955, s. 29 (4) of the Arms and Ammunition Ordinance was replaced by a provision which made it mandatory for the court to order the forfeiture of firearms and cancellation of firearm certificates in the event of a conviction whether the owner was before the court or not. In *Sajjabi v. R.* (3), [1958] E.A. 134 (U.), I held that *R. v. Kamya* (4) (1950), 6 U.L.R. 249, which was Criminal Revision Case No. 28 of 1950, and which had been followed in *Mbugeramula's* case (2), was no longer applicable and that the owner's only remedy was to petition the Governor for remission of forfeiture under Art. 17 of the Uganda Order-in-Council. The Traffic Ordinance has not been amended by substituting mandatory for permissive orders in respect of the cancellation of licences.

In *Nyanza Motor Spares v. R.* (5) (1954), 21 E.A.C.A. 345, the facts of which are immaterial, the Court of Appeal followed *Mbugeramula's* case (2) and held that the discretion conferred by s. 303 of the Criminal Procedure Code as to orders for the disposal of property regarding which offences have been committed must be exercised judicially in the light of the facts of each case. The court observed that this was clearly a case where the trial court should have given to all the parties interested an opportunity to be heard before disposing of the property into which the stolen money had been converted.

On the authority of these two decisions on analogous provisions of the law and because I do not think the matter was decided by the learned Chief Justice in *Kiseru's* case (1) I consider that the petitioner should be given an opportunity of being heard on the question of the revocation of the order of the learned

magistrate cancelling his licence. I remit the case to him for that purpose. Nothing in this order must be taken as deciding the nature of the petitioner's liability, whether absolute or not, for his driver's offence or as prejudicing the learned magistrate's right to determine on the facts whether or not the petitioner discharged the legal duty of exercising control over him.

Case remitted to the magistrate to hear petitioner accordingly.

For the petitioner:
J Verjee
Verjee & Verjee, Kampala

For the respondent:
AM McMullin (Crown Counsel, Uganda)

For the Crown:
The Attorney-General, Uganda

Yosia Musoke v R
[1958] 1 EA 751 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	29 December 1958
Case Number:	320/1958
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Forests – Licence to occupy forest reserve – Licensee cultivating portion of forest without licence – Licensee charged with clearing and breaking up land in forest reserve – No evidence of clearing and breaking on date alleged – Meaning of "to clear and break up land for cultivation" – Forests Ordinance (*Cap.* 133), *s.* 14 (2) (*b*) (*U.*).

Editor's Summary

The appellant was convicted of clearing and breaking up land in a forest reserve without a valid licence or permit contrary to s. 14 (2) (*b*) of the Forests Ordinance. There was evidence that the appellant was maintaining a cultivated area in the forest reserve but no evidence that the appellant was seen doing anything in relation to this land on the date of the alleged offence. The appellant's evidence was that he did not go near the land on the date alleged but the magistrate found that the appellant had been cultivating the land for a long time, and that cultivation is a continuous process and accordingly even if

the appellant had not worked on the land on the material date he was nevertheless cultivating. On appeal it was argued that certain temporary occupation licences issued to the appellant under the Crown Lands Ordinance were sufficient licence or permit for the purposes of s. 14 (2) (*b*) of the Forest Ordinance and there was no evidence to prove that the appellant did "clear or break up land for cultivation" as alleged.

Held –

(i) a licence granted under one Ordinance to occupy Crown land is not equivalent to a licence to perform certain specified acts for which authority is required by another Ordinance, unless there is some statutory provision, express or implied, to that effect;

(ii) the expression "to clear or break up land for cultivation" means more than "to grow crops" or "to maintain land in a cultivated condition"; accordingly there was no proof that the offence alleged had been committed.

Appeal allowed. Conviction set aside.

Judgment

Sir Audley McKisack CJ: The appellant was convicted of contravening s. 14 (2) (*b*) of the Forests Ordinance (Cap. 133), and was sentenced to a fine of Shs. 200/- or one month's imprisonment in default.

The relevant part of s. 14 (2) is as follows:

> "Save as provided in s. 15 of this Ordinance, no person without a valid licence or permit shall in a forest reserve–
>
>
>
> (*b*) clear or break up any land for cultivation or any other purpose;"

It is not contended that the exceptions provided for in s. 15 have any relevance to the present case. The charge on which the appellant was tried is missing from the file and has presumably been lost, but Mr. Few, who appeared for the Crown, has been able to produce a copy. As originally drawn, the statement of offence was

> "that the accused did cultivate in Nabugulu Central Forest Reserve on June 6, 1958, without a valid licence or permit, contrary to s. 14 (2) (*b*) of the Forests Ordinance."

At the beginning of the trial, however, the learned magistrate amended the statement of offence by deleting the word "cultivate" and substituting the words "clear and break up land for cultivation", and he noted on the record that this amendment had been made in order "to follow the wording of s. 14 (2) (*b*)".

The appeal was argued on two grounds. In the first place it was said that temporary occupation licences issued to the appellant under the Crown Lands Ordinance (Cap. 117) were a sufficient licence or permit for the purpose of s. 14 (2) of the Forests Ordinance. I am unable to follow this argument. A licence to occupy Crown land required by one Ordinance cannot be said to be equivalent to a licence to perform certain specified acts in a forest reserve required under another Ordinance, unless there is some statutory provision, express or implied, to that effect. I can find no such provision, and it was therefore necessary for the appellant to have had a valid licence or permit under the Forests Ordinance if he was in fact doing any of the acts for which such a licence or permit is required. That ground of appeal therefore fails.

The second ground of appeal turned on the meaning of the words in para. (*b*) of s. 14 (2), and the sufficiency of the evidence led by the prosecution as to the appellant's acts. There was evidence that the appellant was maintaining what the principal witness described as a "cultivated area" within the forest reserve and that, according to the appellant's own evidence, he had been doing so since 1928. There was no evidence that the appellant was seen doing anything in relation to this cultivated area on June 6, 1958 (the date of the offence alleged in the charge), and the appellant's evidence was that he did not go near that area on that date.

The point was taken at the trial, and again argued on the appeal, that there was no evidence to prove that the appellant did "clear or break up land for cultivation" on the day in question. The trial magistrate took the following view:

> "It is thus apparent that he has been cultivating over a long period and that this period includes the day of the charge. I agree with Mr. Lyon (the prosecutor) when he says that cultivation is a continuous process. If a man is cultivating a garden he does not cease to cultivate it on any particular day he does not work there."

This reasoning, however, appears to rest on the assumption that the act charged

against the appellant was that of "cultivating", in the sense of raising or growing crops or, perhaps, of maintaining the land in a cultivated condition. But that is not the wording of para. (*b*) of s. 14 (2). In my view it would be straining the language of the Ordinance to put that construction on the words "clear or break up any land for cultivation". The trial magistrate further dealt with this point as follows:

> "Finally, as regards the actual offence of 'clearing or breaking up the land for cultivation', this is not a process which has to be performed once only. Vegetation grows extremely quickly in this country, and if cultivated land is not frequently hoed and weeded, it very soon reverts to bush. The process of clearing it and breaking it up can never stop."

Here it seems to me that the magistrate was construing the words "clear or break up" as meaning hoeing and weeding. But that does not seem to me consistent with his previous remarks about "cultivating". And there was certainly no evidence that the appellant was doing any hoeing or weeding on June 6, 1958.

The position then is this. Unless the expression "to clear or break up land for cultivation" means no more than "to grow crops" or "to maintain land in a cultivated condition", there is no proof that the offence was committed. As I have already said, the expression does mean more than that. And, if the meaning is "to hoe and weed land", there is no proof that the appellant did hoe or weed on the date specified in the charge, or indeed that he performed any other operation on the land on that or any other specific date. Consequently the conviction cannot be sustained.

It is unnecessary, therefore, for me to consider whether the expression used in s. 14 (2) (*b*) does not mean some more radical treatment of land in a forest than mere hoeing and weeding. My attention was drawn to certain rules made under the Ordinance, at p. 2146 of Vol. 8 of The Laws of Uganda, where there are references to the issue of "permits to cultivate" in a forest reserve–see r. 15 and forms H and H.1 in the second schedule. My only comment is that there appears to be an inconsistency between that language and the language of s. 14 (2) (*b*).

The appeal is allowed and the appellant is acquitted. The fine paid must be refunded to him.

Appeal allowed. Conviction set aside.

For the appellant:
BKM Kiwanuka
BKM Kiwanuka, Kampala

For the respondent:
HSS Few (Crown Counsel, Uganda)
The Attorney-General, Uganda

Mohamed Haji Abdulla and another v Ghela Manek Shah and others
[1958] 1 EA 754 (PC)

Division: Privy Council

Date of judgment: 1 December 1958

Case Number: 10/1957

Before:	Lord Reid, Lord Cohen and Lord Somervell
Sourced by:	LawAfrica
Appeal from:	E.A.C.A. Civil Appeal No. 34 of 1954 on appeal from H.M. Supreme Court of Kenya–Bourke, J

[1] Vendor and purchaser – Contract – Portion of premises sold becoming vacant before completion – Premises relet by vendor without consulting purchaser – Duty of vendor to purchaser between contract and completion – Indian Transfer of Property Act, 1882, *s.* 55 (1) (*e*) *– Indian Trusts Act,* 1882, *s.* 15.

Editor's Summary

The appellants as owners of certain land and buildings entered into a written agreement for the sale of the premises to the respondents. After signing the contract but before the execution of conveyance one of the tenants at the premises surrendered his tenancy of one shop and the appellants without consultation with the respondents relet the vacated shop to a new tenant at the same rent which was the maximum permitted under rent restriction legislation. Owing to the shortage of accommodation the premises with the shop vacant were worth Shs. 18,000/- more than with the shop let. The respondents sued the appellants claiming specific performance of the agreement subject to an abatement of the purchase price by the sum of Shs. 18,000/- or this sum as damages for breach of duty for reletting the shop without consulting them. The respondents succeeded in the Supreme Court and the appeal against that decision was dismissed by the Court of Appeal. The appellants appealed again and it was submitted *inter alia* that the words "take as much care of the property" in s. 55 (1) (*e*) of the Indian Transfer of Property Act should be limited to protecting the property from physical deterioration and that since they remained owners they were entitled to relet. The respondents contended that the appellants as vendors were in a position analogous to that of a trustee and had no right without consultation to diminish the value of the property by reletting.

Held –

(i) the words "care of the property" in s. 55 (1) (*e*) of the Indian Transfer of Property Act, 1882, are not restricted to the preservation of the property from physical deterioration but include care in its management having regard to the interests of the purchaser.

(ii) the appellants had no right without consultation with the respondents to diminish the value of the property as it was after the surrender by reletting.

Appeal dismissed. Order of the Court of Appeal confirmed.

Case referred to:

(1) *Egmont v. Smith* (1877), 6 Ch. D. 469.

Judgment

Lord Somervell: This is an appeal from the order of the Court of Appeal for Eastern Africa dismissing an appeal by the appellants and allowing a cross appeal by the respondents from a judgment of the

Supreme Court of Kenya.

The plaintiffs, the present respondents, claimed specific performance of an agreement in writing dated December 6, 1951. The agreement was for the sale by the defendants, the present appellants, to the plaintiffs of certain land and buildings at River Road, Nairobi. The plaintiffs' claim for specific performance was made subject to an abatement of the purchase price by reason of an alleged breach of duty or contract by the defendants.

The only question in the appeal is whether the respondents, hereinafter called the purchasers, are entitled on completion to compensation by way of an abatement of the sum to be paid to the appellants, hereinafter called the vendors to complete the purchase.

The material provisions of the agreement are as follows:

"MEMORANDUM OF AGREEMENT OF SALE OF THE UNDERMENTIONED PROPERTY BETWEEN THE PARTIES HEREUNDER MENTIONED UPON TERMS SPECIFIED BELOW.

1. *Name of the Vendors:*

 Mohamed Haji Abdulla and (2) Ahmed Haji Abdulla.

2. *Name of the Purchaser:*

 Khetshi Ghelabhai.

3. *Description of Property:*

 Plot known as L.R. No. 209/502 situate at River Road, Nairobi, together with the building standing thereon which is rented by (1) Hiragar Motigar (2) Velji Ravji, barber (3) Deva Naran, shoemaker, free from encumbrances.

4. *Purchase Price:*

 Shs. 125,000/- (Shillings One hundred and twenty-five thousand only).

5. *Deposit against Purchase Price made on the signing hereof:*

 Shs. 25,000/- (Shillings Twenty-five thousand only).

6. *Balance of Purchase Price:*

 Shs. 100,000/- (Shillings One hundred thousand only) to be paid on or before the 31st of March, 1952, against execution of a proper conveyance by the vendors in favour of the purchaser, his nominee or nominees.

7. *Conveyance*:

 To be prepared by an advocate named by the purchaser, their nominee or nominees. Cost of such advocate, stamping and registering the conveyance to be borne by the purchaser.

10. *Rent and Rates:*

 The purchaser is entitled to one-fifth of the net rent from the date hereof to the date of execution of a proper conveyance. The vendors are liable to pay municipal rates and ground rent only up to the date of execution of proper conveyance.

 Dated at Mombasa this 6th day of December, 1951."

On February 16, 1952, prior to the execution of any conveyance one of the tenants, Velji Ravji, surrendered his tenancy of the part of the building let to him. On the same day without consultation with the purchasers the vendors

relet the vacated part of the building to a new tenant at the same rent. Under the rent restriction legislation in force at the time the rent under the new lease was the maximum rent. Owing to the shortage of accommodation the premises with Velji Ravji's part vacant were worth Shs. 18,000/- more than with that part let. The purchasers claimed that this sum should be deducted from the purchase price or awarded as damages.

Before the learned judge the purchasers succeeded. Owing to a misunderstanding as to an agreement between counsel judgment was entered for Shs. 18,000/- as damages and not for specific performance with an abatement of the purchase price. This led to a notice of motion for a review of the judgment. This was dismissed and the purchasers by a cross appeal asked for a variation of the judge's order by substitution of an order for specific performance on payment of the agreement price less the deposit, less the Shs. 18,000/- and less taxed costs.

The vendors' appeal was dismissed and the cross appeal in substance allowed.

The purchasers submit that the vendors committed a breach of duty owed to the purchasers by reletting without consulting them. The purchasers admit that the vendors were interested in four-fifths of the rent until completion and that the purchasers would be bound to indemnify them for this loss arising from the premises being kept vacant. It was accepted in the courts below that if the purchasers had been consulted they would have wished the premises to remain vacant and would have been willing to pay the loss of rent or allow it to be deducted from their one-fifth share. It would not have amounted to more than £10 or £15.

The case depends on the duty owed by a vendor to a purchaser after contract but before completion.

By art. 11 (*b*) of the East Africa Order-in-Council, 1897, the provisions of the Indian Transfer of Property Act, 1882, as amended, prior to November 27, 1907, were made part of the law of Kenya. It is provided by s. 54 that a contract for the sale of immoveable property does not, of itself, create any interest in or charge on such property. This negatives the English principle under which a contract for sale confers an equitable title on the purchaser. That principle being negatived the vendor's obligations, if any, must be sought elsewhere. They are dealt with in s. 55 of the Act. The first argument arises on s. 55 (1) (*e*).

> "55. In the absence of a contract to the contrary, the buyer and the seller, of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:
>
> (1) The seller is bound
>
>
>
> (*e*) between the date of the contract of sale and the delivery of the property to take as much care of the property and all documents of title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents."
>
>

The vendors submit that the words "take . . . care of" should be limited to protecting the property from physical deterioration; that they remained owners and were entitled to relet; that the subject matter of the contract was a property fully let and that the vendors have always been ready and willing to convey the property fully let; that if the purchaser had desired some right of control or consultation if the whole or part of the premises became vacant then he should have so stipulated in the contract; that therefore no duty of consultation in the circumstances arose under s. 55 (1) (*e*) nor can any such duty be implied.

The purchasers submitted in the first place that the words "take . . . care of the property" should be given a wide meaning.

Their Lordships reject the submission that the words "care of the property" are restricted to the preservation of the property from physical deterioration. They include care in its management having regard to the interests of the purchaser. On this view the obligations imposed by s. 55 (1) (*e*) are substantially those imposed on a vendor under English law.

The Court of Appeal cited with approval the opinion of Mulla and Gour in their text-books on the Indian Act that the vendor's duties to a purchaser under para. (*e*), although he is not a trustee, are the same as they would be if s. 15 of the Indian Trusts Act, 1882, were applicable. That section reads as follows:

> "15. A trustee is bound to deal with the trust property as carefully as a man of ordinary prudence would deal with such property if it were his own; and in the absence of a contract to the contrary a trustee so dealing is not responsible for the loss, destruction, or deterioration of the trust property."

This is substantially the position of a trustee in relation to property under English law. Their Lordships therefore agree with the courts below that English principles and authorities are relevant and of assistance.

On this basis it seems plain that the vendors had no right without consultation with the purchaser to diminish the value of the property as it was after the surrender by reletting.

Reliance was placed by the Court of Appeal on a passage in *Egmont v. Smith* (1) (1877), 6 Ch. D. 469. In that case Sir George Jessel, M.R., considered the position if after contract and before completion a tenancy came to an end. The land was agricultural land. The Master of the Rolls (at p. 476) said this:

> "I have no doubt whatever that, on the general law, the duty of a trustee is to let the farms from year to year in order to obtain sufficient rent, and to keep the farms in a good state of cultivation. That, I have no doubt, is the general law. Whether the vacancy happen in the ordinary course of determining the tenancy either by the landlord or the tenant, or whether the vacancy happen because the landlord gave the notice at the request of the purchaser, appears to me as regards the subsequent liability wholly immaterial.
>
> "I think it is the proper course that the vendor should give notice of the impending vacancy to the purchaser, and ask him what he wishes to be done; because if the purchaser says I am willing to run the risk of the farms being unlet, and I will guarantee you against any loss that will arise to you in case the purchase goes off, it might be a proper thing to allow them to remain unlet."

In the circumstances that prevailed in Nairobi the reletting had the same effect in relation to value as the leaving vacant of agricultural land. Their Lordships are therefore of opinion that the decision of the Court of Appeal was right.

The vendors sought to rely on other provisions in s. 55. In their Lordships' opinion these do not assist or affect the conclusion to which they have come as to the construction and application of s. 55 (1) (*e*).

The purchasers sought alternatively to support the decision of the Court of Appeal on the terms of the contract and on a general proposition that a purchaser ought always to be consulted with regard to a new letting. It is

unnecessary to consider circumstances other than the present, which are in their Lordships' opinion covered by s. 55 (1) (*e*).

Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed and the order of the Court of Appeal confirmed. The appellants must pay the costs of the appeal.

Appeal dismissed. Order of Court of Appeal confirmed.

For the appellants:
HE Francis (of the English Bar)
Herbert Oppenheimer, Nathan & Vandyk, London

For the respondents:
Raymond H Walton (of the English Bar) and *LGE Harris*
Linklaters & Paines, London

Muljibhai Madhvani & Co Ltd v IH Lakhani & Co (EA) Ltd
[1958] 1 EA 758 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	18 December 1958
Case Number:	94/1958
Before:	Sir Kenneth O'Connor P, Forbes V-P and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda–Sheridan, J

[1] Sale of goods – Arbitration – Goods within limits of quality required by contract – Award requiring acceptance of goods by purchaser – Refusal by purchaser to accept – Sale of goods by vendor who claims damages for balance of price – Objection by vendor that action incompetent since award not filed in court – Whether action was for "enforcement of award" – Arbitration Ordinance (*Cap.* 21), *s.* 9 (2), *s.* 13 (1) (*U.*).

Editor's Summary

The respondent had by an agreement in writing purchased ground-nuts from the appellant, as to the quality of which a dispute arose, which was referred to arbitration. By reason of the award the respondent was obliged to accept delivery of the ground-nuts, which it refused to do when tendered. The appellant did not file the award in court but disposed of the ground-nuts at the best price available, and then filed a suit against the respondent claiming as damages for breach of contract the difference amounting to Shs.

10,250/- between the contract price and the price obtained on re-sale. The respondent took a preliminary objection that the plaint disclosed no cause of action, which the trial judge upheld on the ground that the appellant was seeking to enforce an arbitration award without going through the procedure laid down by the Arbitration Ordinance, and that the contract merged in the award when the matter was referred to arbitration.

Held –

(i) the suit was a suit for damages for breach of contract and not a suit to enforce an arbitration award.

(ii) the award had dealt with only the question of quality and perhaps with the obligation of the respondent to accept the ground-nuts, but not with damages for its refusal to do so, and in any event the appellant had a cause of action based on the contract.

Appeal allowed. Case remitted to the High Court to hear the suit as a suit for breach of contract.

Case referred to in judgment:

(1) *Leicester Waterworks Co. v. Overseers of Cropstone* (1875), 44 L.J. Q.B. 126.

(2) *Bremer Oeltransport G. m.b. H. v. Drewry*, [1933] All E.R. Rep. 851; [1933] 1 K.B. 753.

Judgment

Sir Kenneth O'Connor P: read the following judgment of the court: This is an appeal, by leave, from a decree of the High Court of Uganda dated September 29, 1958, dismissing the appellant's suit with costs. On December 15 we allowed the appeal with the costs of the appeal and the costs of and occasioned by the preliminary point in the court below. We set aside the decree of the High Court dated September 29, 1958, and ordered that the case be remitted to that court to hear the suit as a suit for breach of contract: the costs in the court below, other than the costs of and occasioned by the preliminary point, to be costs in the cause. We now give our reasons.

In its plaint dated September 29, 1958, the appellant company (the plaintiff in the court below) in effect pleaded:

(*a*) that the respondent company (defendant in the court below) had by an agreement in writing (a copy of which was attached to the plaint) purchased ground-nuts from the appellant at the price and subject to the conditions mentioned in the agreement;

(*b*) that a dispute had arisen as to the quality of the ground-nuts tendered in pursuance of the contract which dispute had been referred to arbitration;

(*c*) that by reason of the award made on this reference (a copy of which was attached to the plaint and which had not been appealed against) the respondent was obliged to accept delivery of the ground-nuts the subject matter of the contract;

(*d*) that, notwithstanding the award, the respondent had refused or failed to accept delivery, though tender had been made immediately after the award;

(*e*) that this refusal to take delivery constituted a breach of the contract, and that the appellant company, as it was entitled to do, had disposed of the ground-nuts at the best price obtainable at the time of the refusal by the respondent to take delivery;

and the appellant claimed as damages for breach of contract the difference amounting to Shs. 10,250/-, between the contract price and the price obtained by it on the re-sale, together with interest and costs.

By its defence dated December 10, 1957, the respondent company:

(i) pleaded that the plaint disclosed no cause of action against it;

(ii) in the alternative, denied the allegations set out in para. (*b*) to para. (*e*) above, and pleaded that the ground-nuts tendered were not of the quality required by the contract and that it, the respondent, became entitled to, and did, reject them;

(iii) in the further alternative, averred that the appellant ought not to be admitted to state that the award was binding, because (1) it had never been filed in court as required by the Arbitration Ordinance;

> and (2) the appellant had obtained a further arbitration award awarding damages to the appellant, which award had been set aside as being bad on the face of it. (We were told from the bar that this second award had been set aside because sufficient time had not been given).

The learned judge upheld the respondent's preliminary objection and he ruled that the plaint disclosed no cause of action. He held that the appellant was seeking to enforce an arbitration award without going through the procedure laid down by the Arbitration Ordinance (Cap. 21). We took it that the learned judge was referring to s. 9 (2) of that Ordinance (which provides procedure for having an award filed in court), and s. 13 (1) (which provides that an award when filed, shall be enforceable as a decree). The learned judge also held that the contract merged in the award when the matter was referred to arbitration, and he supposed that if the appellant could still sue on the contract he, the judge, might have to determine the quality of the goods–a matter which had already been determined by persons better qualified than he to determine it.

With respect, we thought that that decision was not correct. The suit was not a suit to enforce an arbitration award. It was, as stated in para. 9 of the plaint, a suit for damages for breach of contract. The dispute between the parties which had been referred to arbitration was whether the ground-nuts tendered were up to the standard of quality required by the contract which allowed a certain percentage to be defective. The award decided that the ground-nuts tendered were defective to an extent within the permitted percentage and that, as no F.A.Q. standard had been laid down by the Kampala Produce Exchange as called for in the contract, the buyers must accept on the basis of F.A.Q. 1955 season as established during the marketing season. It is true that that award could not be enforced as a decree unless it was filed pursuant to the Arbitration Ordinance. But the appellant did not ask for it to be enforced as a decree. If he had, it was doubtful whether the court would have enforced an award which would entail making a decree in the nature of a decree for specific performance when an alternative and adequate remedy in damages was readily available. Moreover, as learned counsel for the appellant explained, during the considerable period which would be required to bring the award before the court and have it enforced as a decree, the appellant company would be holding perishable goods and ignoring its obligation to mitigate damages by selling them before they deteriorated further. Accordingly, the appellant company took the course, which it was perfectly entitled (if not, indeed, obliged) to take, of selling the ground-nuts for the best price obtainable and bringing an action for the damages occasioned by refusal to accept the goods, using the award as evidence of the quality of the ground-nuts tendered. (See Russell on Arbitration (15th Edn.) p. 244 and p. 247). In *Leicester Waterworks Co. v. Overseers of Cropstone* (1) (1875), 44 L.J. Q.B. 126, apparently the award was not made a judgment of the court under 12 and 13 Vict. c. 45. It was, nevertheless, acted upon.

> "The publication of an award . . . extinguishes any right of action in respect of the former matters in difference, but gives rise to a new cause of action based on the agreement between the parties to perform the award which is implied in every arbitration agreement."

Halsbury's Laws of England, (3rd Edn.) Vol. 2 p. 45; *Bremer Oeltransport G. m.b. H. v. Drewry* (2), [1933] 1 K.B. 753 at p. 764. We think that the only matter in difference and referred to arbitration was the quality of the ground-nuts. But even if not, and if the obligation to accept the ground-nuts was also referred, a new cause of action for damages arose, based not on the award, but on breach of the implied agreement to perform the award: *Bremer Oeltransport v. Drewry* (2).

We refrain from expressing an opinion whether or not the award creates an estoppel or is conclusive as between the parties on the question of the quality of the ground-nuts tendered, as that will be one of the questions to be decided in the suit. It would appear that if it is desired to set up an estoppel, some amendment of the plaint would be necessary to aver this specifically.

Mr. Hunt, for the respondent, in addition to arguing that the suit was a suit to enforce an award (a point with which we have already dealt) contended, in the alternative, that if the award was merely to be used as evidence, it was wrong to plead it; and if it was mentioned in anticipation of a possible defence, this also would be against the rules of pleading. We think, however, that if the plaintiff intended to set up the award as creating an estoppel on the question of quality, it was essential to mention it (and indeed it should have been expressly pleaded as creating an estoppel): if it was only put forward as evidence of quality, it was part of the narrative of relevant events: even if mention of it was otiose, that could, at the most, affect the costs and could not destroy the cause of action.

As already stated, we thought that the suit was a suit for damages for breach of contract and not a suit to enforce an arbitration award, that the award had dealt only with the question of quality and perhaps the obligation of the buyers to accept the ground-nuts, but not with damages for their refusal to do so, and that in any event the plaintiff/appellant had a cause of action based on the contract. Accordingly, we set aside the decree of the learned judge and made the order mentioned in para. 1 above.

Appeal allowed. Case remitted to the High Court to hear the suit as a suit for breach of contract.

For the appellant:
AA Baerlein
Baerlein & James, Jinja

For the respondent:
RE Hunt
PJ Wilkinson, Kampala

Sunderji Nanji Limited v Mohamedali Kassam Bhaloo
[1958] 1 EA 762 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	30 October 1958
Case Number:	12/1958
Before:	Law J
Sourced by:	LawAfrica

[1] Evidence – Document – Unstamped document tendered as evidence – No ruling by magistrate whether document liable to duty until judgment – Party tendering document thereby denied opportunity

to pay duty and penalty and make document admissible – Whether party tendering document prejudiced – Stamp Ordinance (*Cap.* 189), *s.* 41 (*T.*).

Editor's Summary

During a trial before a magistrate the appellant sought to put in evidence an unstamped letter of guarantee and to rely on it. The respondent objected that, being unstamped, it could not be received in evidence at all. The magistrate did not rule on the objection at the time and only dealt with this issue in his judgment, holding quite correctly that as the letter of guarantee was unstamped, it was inadmissible in evidence. In a subsequent application for review the learned magistrate refused to vary his judgment, holding that it was for the appellant to make the document admissible by paying the penalty prescribed by s. 41 of the Stamp Ordinance, and that it was for the appellant to ask for the court to assess the penalty and to pay it "there and then". On appeal it was contended that the appellant could not pay the penalty nor could he ask the court to assess the penalty before ruling a was obtained whether or not the document was liable to stamp duty at all; and since this ruling was only delivered as part of the judgment, the appellant was deprived of the opportunity of paying the penalty and duty, and thus making the document admissible in evidence.

Held: – the issue as to whether or not a document is inadmissible for want of stamping must be decided when the document is sought to be put in evidence or at some stage before final judgment, so as to give the party producing it an opportunity of paying the requisite duty and penalty and thus making it admissible.

Appeal allowed.

Case referred to in judgment:

(1) *Thakar Das Rup Chand v. Sher Ahmad Iqbal Ahmad* (1934), A.I.R. Lah. 730.

(2) *Bagahat Ram v. Rattan Chand* (1930), A.I.R. Lah. 854.

Judgment

Law J: This is an appeal from the decision of the learned resident magistrate, Dar-es-Salaam, in Civil Case No. 775 of 1957. The appellant was the plaintiff in that case, and the respondent was the second defendant. The claim against the respondent was based on the allegation that he had guaranteed payment to the appellant of the amount found to be due from the first defendant in respect of goods sold and delivered. In the course of his evidence, the appellant produced a document which is admittedly a letter of guarantee and as such liable to payment of one shilling stamp duty under items 36 and 5 of the First Schedule to the Stamp Ordinance (Cap. 189). The

exact nature of this document was not appreciated when it was produced, as it was written in Gujerati. The record reads as follows (typescript, p. 3):

> "I produce a letter of guarantee written by defendant 2 (exhibit 10) (Rejected–unstamped–on objection)."

The words "rejected–unstamped–on objection" are clearly an addition made to the record by the learned magistrate after judgment, because it is obvious from the record of the advocates' addresses, as well as from the judgment and from a subsequent ruling delivered after an application for review, that the learned magistrate only ruled that the letter of guarantee was inadmissible as unstamped in the course of his judgment. He did not rule as to its admissibility when it was tendered in evidence, as he should have done. The appellant's contention was that the document was merely evidence of a collateral matter, i.e. a prior verbal contract of guarantee, and thus not liable to duty; the respondent claimed that it was itself a contract of guarantee and therefore inadmissible because it was unstamped. This issue should have been decided before judgment, so as to give the appellant the opportunity of paying the prescribed penalty and duty, and thus making the document admissible in evidence. In *Thakar Das Rup Chand v. Sher Ahmad Iqbal Ahmad* (1) ((1934), A.I.R. Lah. 730) the court held as follows in a similar case:

> "The (lower) court at no time previous to its final judgment decided that it (i.e. the document) required any stamp duty or was inadmissible in evidence for want of requisite stamp duty. It was in the final judgment that the learned trial judge held that the document was an agreement. That being so there was no occasion for the appellants to tender the requisite stamp duty and the penalty before the trial judge. It does not appear, and it is not contended, that the learned trial judge gave an opportunity to the appellants to pay the stamp duty and penalty. Under these circumstances, in my opinion, the proper course for the trial court was, after it held the document was an agreement, to give the plaintiffs an opportunity to pay the stamp duty and the penalty."

The instant case is very similar. The appellant put in evidence an unstamped letter of guarantee and sought to rely on it. The respondent objected that, being unstamped, it could not be received in evidence at all. The learned magistrate dealt with this issue only in his judgment, holding quite correctly that as the letter of guarantee was unstamped, it was inadmissible in evidence. In a subsequent application for review the learned magistrate refused to vary his judgment, holding that it was for the appellant to make the document admissible by paying the penalty prescribed by s. 41 of the Stamp Ordinance, and that it was for the appellant to ask for the court to assess the penalty and to pay it "there and then". But how could the appellant have paid the penalty, or asked the court to assess the penalty, before a ruling was obtained as to whether or not the document was liable to stamp duty at all? This ruling was only delivered as part of the judgment, so that the appellant was deprived of all opportunity of paying the penalty and duty, and of thus making the document admissible in evidence.

As was held in *Bagahat Ram v. Rattan Chand* (2) ((1930), A.I.R. Lah. 854), before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the court ought to give an opportunity to the party producing it to pay the stamp duty and penalty. The position in this case is exactly the same. The appellant has never been given the opportunity of paying the requisite stamp duty and the prescribed penalty on the unstamped letter of guarantee on which he sought to rely in support of his claim against the second defendant/respondent, and he must be given that opportunity.

The appeal accordingly succeeds. On the authority of the *Thakar Das Rup Chand* case (1) I am satisfied that this court, sitting in appeal, is competent to levy the requisite stamp duty and the prescribed penalty, and I accordingly impound exhibit 10 and order that the appellants do, within seven days, pay to the registrar of the High Court the sum of Shs. 21/-, being as to Sh. 1/- the unpaid stamp duty and as to Shs. 20/- the penalty prescribed under para. (*a*) of the proviso to s. 41 of the Stamp Ordinance. Upon such payment, the letter of guarantee referred to in the lower court as exhibit 10 will become admissible in evidence, and the suit will thereupon go back to the district court, Dar-es-Salaam, for the appellant's claim against the respondent to be disposed of on the basis that exhibit 10 is and always has been in evidence. The parties will be at liberty to adduce any fresh evidence they may consider desirable as a consequence of exhibit 10 now being part of the evidence in the suit.

Mr. Master has very fairly conceded that the appellant's advocate in the lower court was partly to blame in not pressing for a ruling at a stage which would have enabled him to pay the duty and penalty, and he does not accordingly ask for costs. The appeal is allowed, but I make no order as to the costs of the appeal; each party will bear his own.

The orders for costs made by the lower court in favour of the respondent are set aside, and the costs of the whole of the civil suit appealed from, as between the appellant and the respondent, will be in the discretion of the learned magistrate, in the light of the eventual decision in the suit as between these parties.

Appeal allowed.

For the appellant:
KA Master QC, and Tahir Ali
Tahir Ali, Dar-es-Salaam

For the respondent:
RC Kesaria
RC Kesaria, Dar-es-Salaam

Katikiro of Buganda v The Attorney-General of Uganda
[1958] 1 EA 765 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	25 November 1958
Case Number:	446/1958
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Practice – Crown – Action against Minister claiming declaration – Questions of constitutional law

and practice raised by pleading – Application by defendant to reject plaint before defence filed because action alleged to be misconceived or incompetent – Suits by or against the Government Ordinance (*Cap.* 7), *s.* 3 *and s.* 4 (*U.*) – *Civil Procedure Rules, O.* 7, *r.* 11 (*a*) *and* (*d*), (*U.*).

Editor's Summary

The plaintiff filed an action claiming certain declarations on constitutional matters. The defendant moved under O. 7, r. 11 (*a*) and (*d*) of the Civil Procedure Rules for the rejection of the plaint on the grounds that it did not disclose a cause of action and that the suit was barred by s. 4 of the Suits by or against the Government Ordinance, which provides that "No suit shall be instituted against the Government, or against a public officer in respect of any act done . . . until the expiration of two months next after notice in writing has been, in the case of the Government, delivered to or left at the office of the Chief Secretary . . .". It was contended for the plaintiff, *inter alia*, that the words "any act done" refer only to suits brought against a public officer or to an act done by the Government of Uganda, and for the defendant that the Ordinance is a comprehensive Code, and that unless a suit conforms to its provisions it is not maintainable.

Held –

(i) the motion raised points of law which required serious discussion, which should not be decided in a summary way, but should be taken on the pleadings.

(ii) O. 7, r. 11 ought not to be applied to an action involving serious investigations of law and questions of general importance. *Dyson v. Attorney-General*, [1911] 1 K.B. 410, applied.

Application dismissed.

Case referred to in judgment:

(1) *Mukwaba and Others v. Mukubira and Others*, Uganda High Court Civil Case No. 50 of 1954 (unreported).

(2) *Saint Benoist Plantation Ltd. v. Jean Emile Adrien Felix* (1954), 21 E.A.C.A. 105.

(3) *Ngilisho Gadi Msue v. Council of Chagga Chiefs and Others* (1938), 5 E.A.C.A. 63.

(4) *Dyson v. Attorney-General*, [1911] 1 K.B. 410; [1912] Ch. 158.

(5) *Thomas v. Attorney-General*, [1936] 2 All E.R. 1325; [1937] Ch. 72.

(6) *Vacher & Sons v. London Society of Compositors*, [1913] A.C. 107.

(7) *Bhagchand Dagadusa and Others v. Secretary of State for India in Council and Others* (1927), 54 I.A. 338.

Judgment

Sheridan J: This is an application under the Civil Procedure Rules, O. 7, r. 11 (*a*) and (*d*), for the rejection of a plaint on the grounds (1) that it does not disclose a cause of action and (2) that the suit

appears from the plaint to be barred by s. 4 of the Suits by or against the Government Ordinance (Cap. 7).

On this application all that it is necessary or desirable for me to say on the facts is that the respondent, who is the Katikiro of Buganda, by the plaint, asks for declarations (1) that the Legislative Council of the Uganda Protectorate as at present constituted is not the Legislative Council referred to in the Second Schedule to the Buganda Agreement, 1955, (2) that he is not bound or entitled to take the steps laid down in the said Schedule for the purpose of electing representative members to represent Buganda in the Legislative Council as at present constituted and (3) that until the Legislative Council is reconstituted so as to be the same as the Legislative Council referred to in the Buganda Agreement, 1955, there is no procedure for electing representative members thereto. By s. 2 (2) of the Buganda Agreement, 1955, Order-in-Council, 1955, the Governor was empowered by Proclamation to provide that any part of the Agreement should have the force of law. By a Proclamation dated October 18, 1955, the Governor declared that the First and Second Schedule to the Agreement should have the force of law. The First Schedule sets out the Constitution of Buganda and it contains a special provision in para. 2 (7) for referring any question relating to the interpretation of the Constitution to the High Court for determination. I am informed that one of the reasons for the insertion of this provision was to overcome the difficulty that arose in the case of *Mukwaba and Others v. Mukubira and Others* (1) (Uganda High Court Civil Case No. 50 of 1954 (unreported) which concerned constitutional matters. There the suit was dismissed on the ground that the Buganda Agreement then in existence had not been made part of the municipal law and so the court has no jurisdiction to inquire into Acts of State. This special procedure does not apply to the Second Schedule which regulates the election of persons for recommendation to the Governor for appointment as representative members from Buganda of the Legislative Council of the Uganda Protectorate. Mr. Quass, for the respondent, argues that the provision in the First Schedule is an additional safeguard which was inserted because of the 1954 case.

The first submission on behalf of the applicant is that Cap. 7 is a comprehensive Code and that unless a suit conforms to its provisions it is not maintainable. Section 3 of the Ordinance provides:

> "3. Any claim against the Government which would if such claim had arisen against a subject be the ground of an action in any competent court shall be cognizable by the said court whether such claim shall arise or shall have arisen out of any contract lawfully entered into on behalf of the Government or out of any wrong committed by any servant of the Government acting in his capacity and within the scope of his authority as such servant:
>
> "Provided that nothing herein contained shall be construed as affecting the provisions of any law which limits the liability of the Government or any department thereof in respect of any act or omission of its servants or which prescribes specified periods within which a claim shall be made in respect of any such liability or imposes conditions on the institution of any action."

Prior to the enactment of Cap. 7 in 1912 the Indian Code of Civil Procedure, Act XIV of 1882, applied to Uganda by virtue of s. 15 (2) of the Uganda Order-in-Council, 1902. Chapter XXVII of that Act set out the procedure for bringing suits by or against the Government or public officers. These provisions were reproduced in Cap. 7 with the important addition of s. 3 which deals with positive jurisdiction and confines liability to contract or tort. Clearly the present suit does not fall within the ambit of this section but does that mean that it cannot be brought apart from the Ordinance? Mr. Starforth, for the

applicant, relies on the wording of the Ordinance itself which in s. 2, s.4, s.5, s.6 and s.10, refers to "suit" without any limitation, as indicating that the Ordinance was comprehensive. He concedes, so I understand, that it would be competent for the court to grant a declaration under the Ordinance in matters relating to contact or tort. The Civil Procedure Code contains no general provision for the grant of declarations but they are frequently and increasingly asked for and granted and no objection is taken. That relief can be granted in East Africa by claiming a declaration is acknowledged in *Saint Benoist Plantations Ltd. v. Jean Emile Adrien Felix* (2) (1954), 21 E.A.C.A. 105 at p. 109.

Some support for the view that a declaratory order might be obtained apart from Cap. 7 is lent by the decision of the East African Court of Appeal in *Ngilisho Gadi Msue v. Council of Chagga Chiefs* (3) (1938), 5 E.A.C.A. 63. The facts are not material save that in the court of first instance a suit was dismissed on the ground that the suit being against the Government could not be instituted without the written consent of the Governor which could not be waived. On appeal the acting Solicitor-General stated that he was unable to support the judgment on the ground that a declaratory order did not fall within the scope of the Government Suits Ordinance which substantially enacted the Petition of Rights Act and that a suit in such a case came within the provisions of Art. 17 of the Order-in-Council and consequently no fiat was necessary. Article 17 is on similar lines to s. 15 (2) of the Uganda Order-in-Council. The appeal was allowed and judgment was entered in terms of these submissions. This decision can be distinguished on the ground that it was based on the construction of a different Ordinance which referred to petitions of right. Also it is argued that the submissions were recited and not adopted in the judgment of the court. This is a very fine distinction which I am not sure that I appreciate. The court did not express any disapproval of the submissions and although it did not give reasons of its own it embodied those submissions in a judgment which I cannot ignore. The appeal was not allowed by default. Nor do I know of any adverse comment on that judgment since it was pronounced in 1938. That case does at least show that the submission that Cap. 7 is all embracing is not too plain for argument and that is an important factor at this stage of the proceedings. I observe that the Tanganyika Ordinance refers to "suit" in the same wide terms as does Cap. 7. The point has also been made that the attorney-general of Uganda appeared to share this view when he applied to be joined as a party in the 1954 action. It was conceded on behalf of the applicant that it was arguable that but for Cap. 7 the suit might be maintainable under s. 15 (2) of the Order-in-Council.

Reference was made to *Dyson v. Attorney-General* (4), [1911] 1 K.B. 410; [1912] 1 Ch. 158, where it was held that a declaratory judgment could be made against the attorney-general, as defendant representing the Crown, and the plaintiff was not bound in such a case to proceed by petition of right. It is distinguished on the ground that there the plaintiff had laid himself open to a penalty but that in the instant suit the plaint does not allege any disagreeable consequences for the plaintiff if the declaration asked for is not made. It is conceded that there is the possibility of an order of mandamus being made against him. But this case is relevant for the statement that O. XXV, r. 4 of the Rules of the Supreme Court, which corresponds to the Uganda O. 7, r. 11, was never intended to apply to any pleading which raises a question of general importance, or serious question of law. On appeal at p. 167 of the Chancery Report the court approved of the refusal of the lower court to dismiss the action in a summary way. Fletcher Moulton, L.J., said:

> "It is not in accordance with the practice of the court, not is it desirable, to refuse to allow cases raising points which involve serious argument to

> go to trial so that the parties may have them decided in the ordinary way at the trial and may enjoy the rights of appeal following from their being so decided."

In *Thomas v. Attorney-General* (5), [1937] Ch. 72, the court referred to the limits it would observe in granting declarations. I regard that case as more suitable for quotation at the hearing of the action than on this application.

Finally, on his first submission, Mr. Starforth relies on the decision of the House of Lords in *Vacher & Sons v. London Society of Compositors* (6), [1913] A.C. 107. In that case it was held that the defendant trades union had been rightly struck out as being improperly joined on the ground that the language of the Trade Disputes Act, 1906, which conferred an immunity in tort on trades unions, was so precise and unambiguous that the contention that in certain circumstances they could be made liable was unarguable. I am unable to go as far as that in regard to Cap. 7.

The question of notice under s. 4 of the Ordinance is closely linked with the question of jurisdiction under s. 3 because if I am not satisfied at this stage that there is virtually no doubt about the correctness of the first submission, it becomes unnecessary to consider the second submission in any detail or to make a positive finding on it.

Section 4 reads:

> "4. No suit shall be instituted against the Government, or against a public officer in respect of any act done in pursuance, or execution, or intended execution of any Ordinance or other law, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Ordinance, duty or authority, until the expiration of two months next after notice in writing has been, in the case of the Government, delivered to or left at the office of the Chief Secretary, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left."

Mr. Quass referred me to English cases on analogous Acts which establish that notice is not always necessary, the main purpose of those Acts being to avoid litigation and give the defendant an opportunity of putting right the matter complained of. He will pardon me if I come straight to the consideration of the Privy Council case of *Bhagchand Dagadusa and Others v. Secretary of State for India in Council and Others* (7) (1927), 54 I.A. 338, which is more in point. Section 424 of Cap. XXVII of the Indian Code of Civil Procedure has been replaced by s. 80 of the 1908 Code which reads:

> "no suit shall be instituted against the Secretary of State for India in Council, or against a public officer, for any act purporting to be done by such officer in his official capacity, until the expiration of two months next after notice in writing."

In that case it was held that the language of the section was mandatory and admitted of no implications or exceptions, that the section was applicable to all forms of action and all kinds of relief. "But", says Chitaley and Rao's Code of Civil Procedure (4th Edn.), Vol. 1, at p. 764,

> "the decision of the Privy Council cannot be taken to mean that notice is necessary in every suit for injunction against the Secretary of State or a public officer, without regard to the fact whether the other conditions necessary to the applicability of the section are satisfied. Thus, the section will only apply when the suit is in respect of *an act done* by the public officer."

Mr. Starforth has argued that the presence of a comma after the word Government in s. 4 means that the words must be read disjunctively until you reach the words “until the expiration of two months”. My present view is that he is probably correct and that the words “such officer” in line 3 of s. 80 of the Indian Code make this clearer but this is difficult to reconcile with the passage I have quoted from Chitaley and Rao. Does “the act done” only refer to a suit brought against a public officer or does it also qualify a suit brought against the Secretary of State–or Government in Uganda, or, in any event, must there be an act done by the Secretary of State–or Government of Uganda–as Mr. Quass appears to contend?

I hope I have said enough to indicate that I do not consider this to be a plain and obvious case which ought to be disposed of in a summary way without requiring the applicant to plead in the manner provided for by O. 6, r. 5 of the Civil Procedure Rules. The scope of the English rule corresponding to O. 7, r. 11 and the cases on it are set out at p. 574 of the Annual Practice, 1958. Having listened to the exhaustive and interesting arguments of counsel on both sides, I am of the opinion that there is a point of law which requires serious discussion and to which objection should be taken on the pleadings. As at present advised I cannot say that the case is beyond doubt. This Rule

> “ought not to be applied to an action involving serious investigations of ancient law and questions of general importance”.

Dyson v. Attorney-General (4), [1911] 1 K.B. at p. 414.

In conclusion and in order to avoid any misunderstanding, I would like to state that I was prepared to give my decision on the correctness of the applicant’s submissions but in view of the respondent’s submissions and on the authorities, I feel I must refrain from doing so at this stage, because the question whether or not Cap. 7 is a comprehensive Code raises a serious and important point of law which is not suitable for determination on this application. I am not concerned with the possibility of further delay or the possible repetition on a future occasion of at least some of the weighty arguments which have already been addressed to me. The application is dismissed with costs.

Application dismissed.

For the plaintiff/respondent:
P Quass, QC (of the English Bar), and *GL Binaisa*
GL Binaisa, Kampala

For the defendant/applicant:
MJ Starforth (Crown Counsel, Uganda)
The Attorney-General, Uganda

Yozefu Matovu v Ndikola Iga and another

[1958] 1 EA 770 (HCU)

Division: HM High Court for Uganda at Kampala

Date of judgment: 3 November 1958

Case Number: 30/1957

Before: Sir Audley McKisack CJ

Sourced by: LawAfrica

*[1] Native law and custom – Mailo land – Appellant cultivating land outside his kibanja – Kibanja subsequently cut off – Whether appellant has any claim – Busulu and Envujo Law, s.*2, *s.*4, *s.*5, *s.*6, *s.*15 (*U.*).

Editor's Summary

The appellant sued the first respondent, who was the owner of certain mailo land, and the second respondent, the mailo owner's land agent, for "cutting off his kibanja and causing him loss of crops worth Shs. 6,750/-." The principal court came to the conclusion that the appellant had had no permission from the mailo owner and had wrongfully cultivated land of the mailo owner and that he had no claim to that land. On appeal it was conceded for the appellant that he did cultivate on land outside his kibanja, but that by virtue of the provisions of s. 4 and s. 5 of the Busulu and Envujo Law, he was entitled to do so, subject only to paying the charges ("envujo") specified in that Law.

Held –

(i) the argument for the appellant founded on the words "the right to cultivate as he wished" in s. 4 of the Busulu and Envujo Law involved construing the word "as he wishes" to mean "wherever he wishes".

(ii) the principal court was quite justified in holding that no permission had in fact been obtained from the previous owner; consequently the appellant had acquired no right and the previous owner's successor was thus entitled to stop the appellant continuing to encroach outside the kibanja.

Appeal dismissed.

Judgment

Sir Audley McKisack CJ: In the principal court of Buganda Yozefu Matovu, who is now the appellant, sued the owner of the mailo land on which Matovu had a kibanja, and, as second defendant, the mailo owner's land agent, for "cutting off the plaintiff's kibanja and causing him a loss of crops worth Shs. 6,750/-." After hearing the evidence, and inspecting the land in question, the principal court came to the conclusion that Matovu had wrongfully cultivated land of the mailo owner, and that he had no claim to that land. The court ordered him to leave it.

The appeal was argued on a question of law. Mr. Kiwanuka for the appellant concedes that Matovu did cultivate on land outside his kibanja, but says that, by virtue of certain provisions in a Buganda Law entitled the Busulu and Envujo Law (Laws of Uganda (Revised Edn., 1951), Vol. 7, p. 1238), he was entitled to do so, subject only to paying the charges ("envujo") specified in that Law. The principal court failed, he says, to consider the effect of that Law in relation to the plaintiff's claim. Mr. Binaisa for the respondents says that that Law does not govern the case.

The Busulu and Envujo Law provides, in s. 2, that every person (referred to as a musenze) who pays

poll tax and resides on the land of a mailo owner, whether or not as the holder of a kibanja, must make a payment ("busulu") to the mailo owner of Shs. 10/- a year. Section 4 says the payment of this busulu gives the musenze

> "the right to cultivate as he wished for himself and his family all food and all other kinds of produce save only those specified in the First Schedule to this Law".

The produce specified in that Schedule is cotton and coffee (if more than ten trees in full bearing). Section 5, until it was amended in 1954, provided that, for the growing of crops specified in the afore-mentioned First Schedule

> "whether grown within the limits of the kibanja or elsewhere on the land of the mailo owner",

the musenze shall pay a charge (envujo) specified in the Second Schedule for any area not exceeding one acre. Section 6 provides for a further charge in respect of an area exceeding one acre and not exceeding three acres, and goes on to say that

> "the planting of any area with cotton, coffee or other such economic crops in excess of three acres shall be a matter of mutual agreement between the cultivator and the mailo owner, and shall not come under the provisions of this Law".

That was how the Law stood at the time Matovu cultivated the land in question, since he did so before 1954.

Mr. Kiwanuka argues that this Law gave Matovu the right to cultivate outside his kibanja anywhere on the owner's land, subject only to the payment of envujo, and that it was not necessary for him to obtain permission to do so if the area cultivated did not exceed three acres. He points to the words "the right to cultivate as he wishes" in s. 4, and to the words

> "whether grown within the limits of the kibanja or elsewhere on the land of the mailo owner".

in s. 5. In the absence of any express provision to that effect, it would need much to convince me that the Law could be interpreted as meaning that, although a musenze holds a kibanja of fixed limits, he can nevertheless make use of any other part of the mailo owner's land without so much as a "by your leave". To adopt Mr. Kiwanuka's contention would involve, for one thing, construing the words "as he wishes" in s. 4 to mean "wherever he wishes". In any event those words do not apply in the case of cotton and coffee, and the appellant's claim was in respect of various crops which include 375 coffee trees.

In further support of his argument Mr. Kiwanuka relies on the fact that in 1954 s. 5 of the Busulu and Envujo Law was replaced by a new section which, in altering the rate of envujo for areas up to three acres, spoke of crops

> "whether grown within the limits of the kibanja or elsewhere on the land of the mailo owner, by permission".

The same phrase had been in the original s. 5, but without the words "by permission". For this reason Mr. Kiwanuka says that it is to be implied that, while the original s.5 was in force, the musenze could cultivate cotton, etc., outside his kibanja without the necessity of obtaining permission. I am unable to agree that the insertion of those words in the new s. 5 is sufficient ground for a construction leading to such a strange and, I venture to think, chaotic a result. The insertion of those words may well have been merely for the removal of doubts or the clarification of the original provisions.

It is further contended for the appellant that, as the mailo owner who granted him the kibanja died in 1951 without having effectively stopped appellant from cultivating outside his kibanja, the successor to that mailo owner (who is respondent No. 1) must accept the position that appellant had in fact obtained

the necessary permission from the previous owner. Mr. Kiwanuka refers me to s. 15 of the Busulu and Envujo Law, which says that change of ownership shall not affect the musenze's rights and duties under that Law. The principal court, however, was, in my view, quite justified in holding that no permission had in fact been obtained from the previous owner; consequently the appellant had acquired no rights and the previous owner's successor was thus entitled to stop the appellant continuing to encroach outside the kibanja.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

For the appellant:
BKM Kiwanuka
BKM Kiwanuka, Kampala

For the respondents:
GL Binaisa
GL Binaisa, Kampala

Purshotam Naranji Kotak v Gangabai Jadav
[1958] 1 EA 772 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	3 October 1958
Case Number:	4/958
Before:	Law J
Sourced by:	LawAfrica

[1] Rent restriction – Application for possession by landlord – Tenant not in personal occupation of premises – Powers of Rent Restriction Board – Rent Restriction Ordinance, s. 7(1)(*h*) *and s.* 19 (1)(*T.*).

Editor's Summary

The tenant of certain residential premises became the tenant of other residential premises in which he established his home. He continued to pay rent for the original premises which he used as a store for surplus furniture, and which he occasionally, without the landlord's permission, lent to friends and relations. The landlord of the original premises obtained an order for possession from the Rent Restriction Board on the grounds that the tenant had wrongfully handed over possession to his son without the landlord's consent. On appeal

Held –

(i) the general rule is that a board cannot make an order for possession against a statutory tenant except on one of the specific grounds mentioned in s. 19 (1) of the Rent Restriction Ordinance;

(ii) an exception to the rule above is the case of a tenant who ceases to remain in physical possession of premises, and who cannot satisfy the court that he has a genuine intention to return (*Skinner v. Geary*, [1931] All E.R. Rep. 302; [1931] 2 K.B.546), in which case a board may order possession under its general powers conferred by s. 7 (1)(*h*) of the Ordinance;

(iii) the case of *Skinner v. Geary* (supra) applies in Tanganyika, just as it is applicable in Kenya. (*Tara Singh v. Jiwala Singh* (1944), 11 E.A.C.A. 24);

(iv) a board's findings of fact as to whether a tenant has a genuine intention to return to premises must stand unless shown to rest on no evidence.

Appeal dismissed.

Case referred to in judgment:

(1) *Wadiwalla v. Madhani*, Tanganyika High Court Miscellaneous Civil Appeal No. 5 of 1958 (unreported).

(2) *Skinner v. Geary*, [1931] All E.R. Rep. 302; [1931] 2 K.B. 546.

(3) *Dando* (*S. L.*) *Ltd. v. Hitchcock*, [1954] 2 All E.R. 335.

(4) *Alimohamed Daniji v. Punja Hirji Gudka* (1953), 20 E.A.C.A. 78.

(5) *Brown v. Brash*, [1948] 1 All E.R. 922.

(6) *Tara Singh v. Jiwala Singh* (1944), 11 E.A.C.A. 24.

(7) *Hallwood Estates Ltd. v. Flack* (1950), 66 T.L.R. (Pt. 2) 368.

Judgment

Law J: This is an appeal by a tenant, Purshotam Naranji Kotak, against an order of the Dar-es-Salaam Rent Restriction Board, in Application No. 46 of 1958, giving possession of a flat in a house at Steere Street to the landlord, the respondent Gangabai Jadav. The written application filed before the board did not specifically refer to the section of the Rent Restriction Ordinance under which possession was sought, but the reason for claiming possession was stated as follows:

> "The first respondent (i.e. the present appellant) wrongfully handed over possession of the premises to the second respondent who is his son during the statutory tenancy on a date unknown to the applicant and therefore the second respondent is unlawfully in occupation. No consent of the landlord was or has been obtained."

The board has also omitted, in its written decision, to specify under what provision of the Ordinance possession was given. It is clear however from perusal of that decision that the board gave possession because it found that the appellant had ceased to occupy the suit premises since 1955 and had failed to satisfy the board that he had a firm intention of resuming his occupation. I have held before that a board cannot make an order for possession against a statutory tenant in relation to protected premises except on one of the specific grounds mentioned in s. 19 (1) of the Rent Restriction Ordinance (*Wadiwalla v. Madhani* (1), Tanganyika High Court Miscellaneous Civil Appeal No. 5 of 1958 (unreported)). As Greer, L.J., said in his judgment in *Skinner v. Geary* (2), [1931] 2 K.B. 546 at p. 565:

> "In every case which comes before this court under these Acts, we have to consider only the words used by the legislature, and in my judgment we are restrained from making an order or judgment for recovery of possession except in the cases mentioned in s. 4."

Megarry on Rent Restriction begins Chapter 7 of his 7th edn. (p. 222) with the words:

> "The Acts provide that the court may make an order for possession against a tenant of controlled premises only on certain specified grounds."

There appears however to be one exception to the general rule enunciated above, one which has been recognized both by the courts in England and in East Africa. This is the present case, that of a tenant who ceases to remain in physical possession of premises, and who cannot satisfy the court that he has a genuine intention to return. The English cases begin with *Skinner v. Geary* (1) and end with *S. L. Dando Ltd. v. Hitchcock* (3), [1954] 2 All E.R. 335, and the reasoning appears to be that in such cases the landlord is entitled to possession because the tenant, by abandoning possession, ceases to be a statutory tenant and thus entitled to the protection of the Rent Restriction laws, unless he can show that he has an intention to return.

As Denning, L.J., observed in his judgment in the latter case at p. 336:

> ". . . the only person protected under the Rent Restriction Acts is the tenant, and he is only protected so long as it is his home."

In the case now under appeal, the suit premises were not the tenant's home. He had established a home elsewhere. In these circumstances the landlord's right to possession was not restricted by the specific provisions of s. 19 (1) of the Rent Restriction Ordinance, and the board had jurisdiction to make an

order for possession by virtue of its general powers conferred by s. 7 (1) (R.) of the Ordinance. The position is the same in Kenya, as will be seen from the judgment of Nihill, P., in *Alimohamed Damji v. Punja Hirji Gudka* (4) (1953), 20 E.A.C.A. 78. The Supreme Court judge who dealt with the first appeal in that case decided that the landlord could not succeed unless he brought the case within s. 16(1)(i) of the Kenya Ordinance, which corresponds with s. 19(1)(*g*) of the Tanganyika Ordinance; in other words, the learned judge held that the landlord must prove that the tenant had assigned, sub-let or otherwise "parted" with possession. The main part of Mr. Master's argument in this case was directed to this point; he submitted that the tenant had never "parted with", or "transferred", possession, "transfer" being the expression used in the corresponding section of the Tanganyika Ordinance, s. 19(1)(*g*), as he was still legally the tenant and had continued paying rent, although living elsewhere, so that he retained legal possession. But this argument is fallacious, as will be seen from the judgment of the learned president (20 E.A.C.A. at p. 79):

> "The learned judge who heard the appeal seems to have accepted this view, and that, with respect, is where I think his judgment has gone wrong. The real issue before the board was whether the respondent, as a statutory tenant, had abandoned possession; that is to say, whether he had gone to live elsewhere without an intention to return. That was a question of fact and of degree, and was answered by the board in the landlord's favour. On that finding the respondent forfeited his status as a statutory tenant and the landlord was entitled to an order for possession which the board, under the Ordinance, had jurisdiction to give (s. 5(1)(*f*))."

Section 5(1)(*f*) of the Kenya Ordinance corresponds with s.7(1)(*h*) of the Tanganyika Ordinance, in that it confers on boards a general power to make orders for possession. The learned president also quoted with approval an extract from the head-note in *Brown v. Brash* (5), [1948] 1 All E.R.922, and I quote the first sentence as being material to the point now under consideration:

> "A 'non-occupying' tenant *prima facie* forfeits his status as a statutory tenant under the Rent Restriction Acts", . . .

Mr. Master also submitted that *Skinner v. Geary* (1) should not be applied in Tanganyika, but there is direct authority that it is applicable in Kenya, see the judgment of Whitley, C.J., in *Tara Singh v. Jiwala Singh* (6) (1944), 11 E.A.C.A.24 at p. 26, and having regard to the similarity between the Rent Restriction legislation in Kenya and Tanganyika that decision is binding on this court. It is thus abundantly clear that the board had jurisdiction, under s.7(1)(*h*) of the Rent Restriction Ordinance, Cap. 301, to make the order now appealed against; and the first ground of appeal, which is that the board erred in making an order for possession, accordingly fails.

The second ground of appeal, which is described as alternative, is that the board erred in finding that the appellant did not manifest "animus revertendi". The onus of satisfying the board that the appellant had an intention to return to the premises which he had ceased to occupy personally lies on the tenant, see *Damji v. Gudka* (4) where it was held, following the terminology used in *Brown v. Brash* (5), that

> "the onus is on the non-occupying statutory tenant to prove an animus revertendi by some outward and visible signs of an inward intention to return."

As evidence of his intention to return, the appellant relied *inter alia* on the fact that he had left two beds, some chairs and some domestic articles in the suit premises. In cross-examination he said

> "They were spare things; whenever the necessity arose I could take them. I left them as they were spare."

The board's finding on this point was as follows:

> "The board takes the view . . . that this form of occupation by furniture was not calculated to preserve the premises as a home but rather to use them as a store."

It is in my opinion clear that there was some evidence to support this finding.

Again, the appellant said in cross-examination

> "We kept the premises so that either myself or Gopal (the appellant's son) should go back there,"

and later on

> "If my wife does not get better I will not go back to Steere Street."

In his examination-in-chief he had said

> "I did not intend to abandon Steere Street. I was going to come back to it if and when my wife got better."

In this respect the board's finding was as follows:

> ". . . it accepts that the respondent wished to return in the event of his wife's recovery but . . . as the illness has now lasted over three years it would appear that complete recovery is more a matter of hope than certainty and they are accordingly of the opinion that no more than a hope of returning has been manifested."

The evidence in my opinion clearly supports this finding.

The appellant also deposed that during this three years' absence from the suit premises, he had continued to pay the rent and the flat had been intermittently occupied by his son Gopal and his wife, and was occasionally lent to friends. The board considered this aspect of the case, and found that it was merely another instance of the tenant making use of the property for purposes other than its preservation as his home. This again is an inference of fact which is supported by the evidence. In such circumstances, as was said by Asquith, L.J., in *Hallwood Estate Ltd. v. Flack* (7) (1950), 66 T.L.R. (Pt. 2) 368 at p. 376, the lower court's findings of fact must stand, unless shown to rest on no evidence. In the present case, the board's findings of fact are all based on evidence, so that this court should not interfere, even though it might have come to a different conclusion had it tried the case at first instance. The board was accordingly justified, in my view, in finding that the appellant had failed to discharge the onus of proving his intention to return to the suit premises, and the second ground of appeal also fails.

This appeal is accordingly dismissed with costs to the respondent.

Appeal dismissed.

For the appellant:
KA Master, QC and *RC Kesaria*
RC Kesaria, Dar-es-Salaam

For the respondent:
MN Rattansey
Mahmud N Rattansey & Co, Dar-es-Salaam

Sukusamakindo s/o Mwamakosi v R

[1958] 1 EA 776 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	27 November 1958
Case Number:	175/1958
Before:	Sir Kenneth O'Connor P, Forbes V-P and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika–Spry, Ag. J

[1] Criminal law – Provocation – Grounds for reducing a charge of murder t. manslaughter – Legal provocation not negative – Penal Code, s. 202 (3)(*T.*)

Editor's Summary

The appellant had killed the deceased by stabbing him with a knife and was convicted of murder. About four months before the deceased met his death, his wife had been asked by the appellant to have intercourse with him and upon her refusal had been assaulted by him. She had informed the deceased. On the date of the death of the deceased the appellant, after following the deceased's wife to her house, was sitting outside the house when the deceased appeared. The appellant was at the time carrying an axe and wearing a sheath knife. The deceased asked the appellant what he was doing there and getting no answer proceeded to strike him two hard blows on the head and seized him by the throat. After a struggle for possession of the axe the appellant drew his knife and stabbed the deceased once in the abdomen and killed him. The learned judge did not specifically direct himself upon the question whether in the circumstances of the case the means of retaliation adopted by the appellant could be said to be disproportionate to the degree of provocation which was offered.

Held –

(i) on the evidence for the prosecution the deceased had been guilty of provocation of no low degree; the appellant had been suddenly and violently assaulted and had been seized by the throat, an act which in itself might constitute a threat to life; the fact that the deceased, unarmed, was prepared to grapple with a man armed with an axe was an indication of the seriousness of his intention. Whether the appellant intended to use the axe himself, he had every reason to believe that the deceased would have done so had he obtained possession of it;

(ii) there was no question of any time for passion to cool and only one blow was struck by the appellant with a weapon ready to his hand and not procured for the purposes of the struggle; in the circumstances the court were unable to take the view that the mode of resentment had been shown to be unreasonable in relation to the provocation;

(iii) there was nothing in the history of the case to render the sudden attack by the deceased upon the appellant a "lawful act" under s. 202(3) of the Penal Code.

Appeal allowed. Conviction and sentence quashed and conviction for manslaughter and sentence of twelve years imprisonment substituted.

Case referred to:

(1) *Mancini v. Director of Public Prosecutions*, [1941] 3 All E.R. 272; 28 Cr. App. R. 65.

November 27. The following judgment was read by direction of the court:

Judgment

This appeal was brought against the conviction of the appellant on an information for the murder of one Gulamwenda s/o Deda on May 26, 1958.

The appellant was not represented before this court but after hearing counsel for the Crown we quashed the conviction for murder and set aside the death sentence, substituting therefor a conviction for manslaughter and a sentence of twelve years' imprisonment respectively. The court indicated that it would give brief reasons in writing for its decision and this we now proceed to do.

It is not in dispute that the appellant killed the deceased on May 26, 1958, by stabbing him in the abdomen with a knife. There was some conflict between the evidence for the Crown and the unsworn statement made by the appellant before a magistrate after his arrest and repeated in substance by him at the trial, but the learned trial judge and the assessors accepted the evidence for the Crown and rejected the statement of the accused. It is therefore necessary only to relate briefly the facts as disclosed by the Crown case.

About four months prior to the date in question, Mwajuma, the wife of the deceased, had been asked by the appellant to have sexual intercourse with him and upon her refusal had been assaulted by him. She had informed her husband and the matter had been reported to the village headman. The appellant was called to appear before the latter but failed to do so.

Coming now to the events of May 26, 1958, Mwajuma said that when she was returning home carrying water she met the appellant who called her. She refused to go near him but the appellant followed her to her house talking and asking why she refused when he had called her. She replied that she did not like him. He then sat outside the house near a wall. Her husband, who had been hunting, returned while the accused was still there. He said

> "What do you want here at my house? The other time you hit my wife and I told you not to come to my house."

To this the appellant made no reply. The deceased then struck the appellant two hard blows on the head and seized his throat. The appellant was at the time carrying an axe and wearing a sheath knife. After a struggle he drew the knife and stabbed the deceased in the abdomen; from the effects of this blow the deceased later died. The details of the struggle were given by the witness to the court in the following terms:

> "Both were holding the axe. The accused raised the axe with one arm and with the other tried to free himself from deceased throttling him. Then I saw accused being stabbed. The accused had the axe in his right hand. He had the knife in his right hand. Deceased let go of accused's throat and seized the axe with both hands. Accused did not use his left hand to get hold of the axe. I am not certain. He may have used the left hand to seize the axe."

It is clear from these facts that the deceased was the original assailant and that after a struggle for the possession of the axe the appellant drew his knife and struck the deceased with it. It is not certain whether he still retained his grip on the axe when he used the knife or whether the deceased, who was the taller man, had wrested it from him.

Both the assessors were in favour of conviction but were influenced by the general conduct of the appellant towards the wife of the deceased. The first assessor said:

> "The deceased was killed without any sufficient reason . . . I think accused went to deceased's house, he still wanted deceased's wife and I think if deceased's wife had refused on that day, she would have been assaulted again or even killed . . . Accused should have run away seeing the deceased come."

The other assessor said:

> "I disbelieve the accused's evidence. Accused followed Mwajuma. He was probably thinking he could assault

her as he did the first time . . .

> I think by taking the two weapons he wanted to help himself in case Mwajuma refused again. I think if deceased would not have come the accused would have punished Mwajuma. By accused taking a knife after being slapped only twice, accused was not justified and it will be too bad for this country lest others do the same. Other people might follow accused's behaviour chasing people's wives."

The learned trial judge agreed with the assessors and placed great reliance upon their opinions. In dealing with the question of provocation, he said in his judgment:

> "Finally, there is the question of provocation. To establish this defence, there must be not only a wrongful act or insult but an act or insult so gravely wrong as to deprive the person wronged of all self-control. Admittedly, the assault by the deceased was wrong, as is every assault, but considering the fact that the deceased was unarmed and bearing in mind, as I think one may and must, the background to these events, I cannot regard the wrong as so excessive as to constitute provocation."

The learned judge did not specifically direct himself upon the question whether in the circumstances of the case the means of retaliation adopted by the appellant could be said to be disproportionate to the degree of provocation which was offered. This appeared to us to be the only substantial question, which, if resolved against the appellant, might have justified the finding of murder instead of manslaughter, for it is obvious that the deceased was, on the Crown's own case, guilty of provocation of no low degree. The appellant had been assaulted suddenly and violently and had been seized by the throat, an act which in itself might well constitute a threat to his life. The very fact that the deceased, unarmed, was prepared to grapple with a man armed with an axe is an indication of the seriousness of his intentions. There followed a struggle for the axe and, whether or not the appellant had intended to use it himself, he had every reason to believe that the deceased would have done so had he obtained possession of it. There was no question of any time for passion to cool and only one blow was struck by the appellant with the knife, which was weapon ready to his hand and not one which he had procured for the purposes of the struggle. In all these circumstances we are unable to take the view that (to adapt the phraseology used in *Mancini v. Director of Public Prosecutions* (1), 28 Cr. App. R. 65 at p. 74) the mode of resentment has been shown to be unreasonable in relationship to the provocation.

Counsel for the Crown at the hearing of the appeal stated that he could not argue that in some circumstances the actions of the deceased would not have constituted provocation; he submitted however that some weight should be attached to what the learned trial judge referred to as "the background". While we agree that all circumstances bearing upon the relationship between the parties are relevant matters for consideration, we do not find that anything in the history of the case was sufficient to render the sudden attack by the deceased upon the appellant a lawful act, so as to bring it within the third paragraph of s. 202 of the Tanganyika Penal Code which reads:

> "A lawful act is not provocation to any person for an assault."

No doubt the events of four months earlier provided the motive for the attack but they did not render it lawful. Neither can it be said that by his presence the appellant incited the deceased to attack him in order to furnish an excuse for retaliation. Such a situation might have arisen had the deceased requested the appellant to leave and the latter had thereupon adopted a challenging or provocative attitude, but that was not the case and the deceased's reaction to the appellant's presence was immediate and violent. There was in our view no room for a finding of incitement.

We are of opinion therefore that nothing in the background circumstances operated so as to render inapplicable the general rules of law as to provocation and, for the reasons given earlier in this judgment, we considered that legal provocation had not been negatived and accordingly made the order already specified.

Appeal allowed. Conviction and sentence quashed and conviction for manslaughter and sentence of twelve years imprisonment substituted.

The appellant did not appear and was not represented.

For the respondent:
GC Thornton (Crown Counsel, Tanganyika)
The Attorney-General, Tanganyika

Abdulla and others v The Collector for the City Council of Nairobi Coronation Hotel v The Collector for the City Council of Nairobi
[1958] 1 EA 779 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	14 November 1958
Case Number:	35A/1958, 36/1958
Before:	Rudd J
Sourced by:	LawAfrica

[1] Compulsory purchase – Compensation – Land acquired by Government for Nairobi City Council – Business premises on land subject to Rent Restriction Ordinance – Claim by "protected" tenants for compensation – Indian Land Acquisition Act, 1894, *s.* 6, *s.* 18, *s.* 23 *and s.* 24 *– Increase of Rent* (*Restriction*) *Ordinance,* 1949 (*K.*) *– Landlord and Tenants* (*Shops*) *Ordinance,* 1956 (*K.*).

Editor's Summary

These two cases were almost identical and as they concerned the same plot, they were heard at the same time. The facts in each case were that a certain plot of land and the buildings thereon had been acquired for the Nairobi City Council in connection with a project to improve and extend Victoria Street in Nairobi. The notification under s. 6 of the Indian Land Acquisition Act, 1894, that the land was required for a public purpose was published on March 1, 1955, and the collector assumed possession as from January 1, 1958. The present applicants, who were tenants of business premises on the site, were in occupation of the premises, and the collector was authorised by the town clerk to give an undertaking that the City Council would not require any of the applicants to leave their premises before December 31,

1960, at the earliest, provided that they paid to the City Council the equivalent of the rent that was payable to the landlord immediately before the collector assumed possession; the City Council further empowered the collector to give an undertaking that the amount of such rent would not be increased so long as the tenants were allowed to remain in possession. All the applicants claimed compensation from the collector under s. 23 of the Act, but the collector refused to award any compensation on the ground that he considered the undertakings given by the City Council gave the applicants as much as they were entitled to under their existing

tenancies as at March 1, 1955, or as a January 1, 1958. The applicants thereupon applied for the matter to be referred to the Supreme Court for determination. The tenancies of the applicants up to December 24, 1954, were monthly tenancies protected under the Increase of Rent (Restriction) Ordinance, 1949, which Ordinance was later superseded, as far as business premises were concerned, by the Landlord and Tenant (Shops and Hotels) (Temporary Provisions) Ordinance, 1954, which in turn was replaced in 1956. The claims of the applicants were based on the first, fourth, fifth and sixth clauses of s. 23 (1) of the Indian Land Acquisition Act, 1894. In addition, all the applicants claimed fifteen per cent. of the market value of their interest in the land on March 1, 1955, under sub-s. (2) of s. 23 of the Act.

Held –

(i) the compulsory acquisition did not affect the tenancies as they stood on March 1, 1955, since formal possession was not taken until 1958; even on the basis of the applicants' rights as at January 1, 1958, if there had been no compulsory acquisition, the applicants were now offered, in effect, terms of occupation which were not less than what the applicants could have insisted upon against a landlord who wished to demolish the premises, and the collector was justified in his refusal to award the full market value of the interest as at March 1, 1955, as compensation under the first clause of s. 23 (1).

(ii) the court was not satisfied that any of the applicants would have embarked upon substantial improvements but for the acquisition, and found that there had in no case been any diminution of the profits of the land between the time of the publication of the declaration and the time of the collector taking possession; therefore, all the claims under the sixth clause would be disallowed.

(iii) as regards the claims under the first, fourth and fifth clauses the collector was, in the circumstances of the case, entitled to find that no compensation was payable.

(iv) the applicants were entitled to compensation under sub-s. (2) of s. 23 for the prejudice which had been occasioned to them by reason of the compulsory nature of the acquisition and they were each entitled to fifteen per cent. of the value as at March 1, 1955, of their interest which was in each case a tenancy, with nearly two years to run.

Order accordingly.

Case referred to:

(1) *R. v. Liverpool and Manchester Railway Co*. (1836), 4 Ad. & El. 650.

Judgment

Rudd J: The matter before the court arises from the compulsory acquisition under the Land Acquisition Act, 1894, of a plot of land and the buildings thereon situated in River Road opposite the junction of Victoria Street with River Road.

The land was acquired for the Nairobi City Council in connection with a project to improve and extend Victoria Street. According to this scheme the buildings will eventually be demolished and the site turned into a street but, according to the town clerk no funds have, as yet, been set aside for the completion of the project and it appears likely that the site will not be cleared until after the end of 1961.

The buildings on the site comprise both business premises and other buildings which have been used for residential purposes. The court is at present not concerned with the buildings which have been used for residential purposes. The fourteen applicants were all tenants of business premises on the site. The

notification under s. 6 of the Act that the land was required for a public purpose was published on March 1, 1955, and the collector assumed possession as from January 1, 1958. None of the applicants have, as yet, been disturbed in their occupation of the premises. The collector was authorised by the town clerk to give an undertaking that the City Council would not require any of the applicants to leave their premises before December 31, 1960, at the earliest, provided that they paid to the City Council the equivalent of the rent that was payable to the landlord immediately before the collector assumed possession and the City Council further empowered the collector to give an undertaking that the amount of such rent would not be increased so long as the tenants were allowed to remain in possession. These undertakings have actually been confirmed by the resolution of the City Council.

It now appears that in all probability, as far as can be foreseen, at present, the tenants will be allowed to remain in possession until at least the end of 1961 but the actual undertaking does not extend beyond the end of 1960.

The applicants all claimed compensation from the collector under s. 23 of the Act but the collector refused to award any compensation to any of the applicants on the ground that he considered that the undertakings given by the City Council gave the applicants as much as they were entitled to under their existing tenancies at March 1, 1955, or, indeed, at January 1, 1958.

The tenancies of the applicants up to December 24, 1954, were monthly tenancies protected under the Increase of Rent (Restriction) Ordinance, 1949. As from December 24, 1954, the tenancies, in the absence of leases made on agreed terms, would have been subject to the Landlord and Tenant (Shops and Hotels) (Temporary Provisions) Ordinance, 1954, which I shall refer to as the Ordinance of 1954, that is to say, any tenant could apply to the court under that Ordinance for a lease on terms to be fixed by the court for the duration of the Ordinance, that is to say, up to December 24, 1956.

In January, 1955, all the applicants except the Coronation Hotel Ltd. entered into agreements with their landlord for a lease for two years as from January 1, 1955. No lease was ever actually executed but these tenants were in possession by virtue of their agreements for a lease and that was the position as regards them on March 1, 1955. The Coronation Hotel Ltd. applied to the court under the Ordinance of 1954 and were granted a lease for the duration of that Ordinance, that is to say, up to December 24, 1956; the application was pending on March 1, 1955.

According to the law as it stood on March 1, 1955, none of the applicants were entitled to insist upon a tenancy which would extend beyond the year 1956 into the year 1957. There was nothing to indicate that any further protection would be granted to their tenancies by law after the expiration of the Ordinance of 1954. There was the possibility that if no further legal protection was provided by Ordinance the tenants might have been able to induce the owner to give them an extension of their tenancies into 1957 and onwards, or that they might have been able to effect new contractual tenancies in 1957, but, on March 1, 1955, they had no indefeasible right to either an extension of their existing tenancies or the grant of new tenancies.

However, towards the end of 1956 when the Ordinance of 1954 was drawing near its expiration, the Landlord and Tenants (Shops) Ordinance, 1956, which I shall refer to as the Ordinance of 1956, was passed and this Ordinance would have applied to all these tenancies on and from January 1, 1957, if there had been no compulsory acquisition under the Act.

The broad effect of the Ordinance of 1956 was that subject to the tenant’s right to determine the existing tenancy by notice, the existing tenancies to which the Ordinance applied would continue until

determined by six months' notice given by the landlord and upon such termination the parties were free to contract for a new lease or tenancy, upon agreed terms, but if terms could

not be decided by agreement a tenant could apply to the court for the grant of a lease for not less than two years and not more than four years on terms to be fixed by the court. The landlord was required to state whether or not he would oppose the grant of a new lease. The landlord was entitled to oppose the grant of a new lease upon one or more of a limited number of grounds set out in s. 9(1) of the Ordinance. One of these grounds was that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises. Under s. 10, the Ordinance of 1956 enacted that if the landlord opposes an application for a new tenancy on grounds on which he is entitled to oppose it, and establishes any of those grounds to the satisfaction of the court, the court shall not make an order for the grant of a new tenancy.

In the case of the Coronation Hotel Ltd. the landlord served a notice to quit under the Ordinance of 1956 and stated that he would not oppose a new lease for four years and the Coronation Hotel Ltd. made an application to the court for a new lease in accordance with the Ordinance, but, owing to the acquisition, the matter went no further than that.

In the case of some of the other applicants similar notices were served by the landlord but no further action was taken, doubtless because of the compulsory acquisition.

The claim of the Coronation Hotel Ltd. for compensation was made under the clauses respectively headed, Firstly, Fourthly and Fifthly of s. 23 (1) of the Act. These clauses are as follows:

> "Firstly, the market-value of the land at the date of publication of the declaration relating thereto under s. 6, . . .
>
> "Fourthly, the damage (if any) sustained by the person interested, at the time of the collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, moveable or immoveable, in any other manner, or his earnings;
>
> "Fifthly, if, in consequence of the acquisition of the land by the collector, the person interested is compelled to change his residence or place of business, the reasonable expenses (if any) incidental to such change; . . ."

The other applicants claimed under each of these three clauses and under the clause headed Sixthly as well. This clause reads as follows:

> "Sixthly, the damage (if any) bona fide resulting from diminution of the profits of the land between the time of the publication of the declaration under s. 6 and the time of the collector's taking possession of the land."

In addition all the applicants claimed fifteen per cent. of the market value of their interest in the land on March 1, 1955, under sub-s. (2) of s. 23 of the Act which reads as follows:

> "(2) In addition to the market-value of the land as above provided the court shall in every case award a sum of fifteen per centum on such market-value, in consideration of the compulsory nature of the acquisition."

The only other provision of the Act to which I feel I should refer is the clause headed Seventhly, of s. 24 as follows:

> "24. But the court shall not take into consideration . . .
>
> Seventhly, any outlay or improvements on or disposal of, the land acquired, commenced, made or effected without the sanction of the collector after the date of publication of the declaration under s. 6."

Theoretically, the market value of the interest of each of the persons interested in the land acquired should not be valued separately. The proper

method is ordinarily to value the full freehold as at the date of the notification and then to apportion that amount amongst the claimants in proportion to their interest. This assumes that every person interested has submitted a claim. In the present matter the parties potentially interested were in the first place the Crown, in the second place the Crown lessee and in the third place the sub-tenants of that Crown lessee who were the applicants now before the court. No claim was made by the Crown. The collector considered that the sub-lessees were not entitled to compensation and therefore only assessed the value of the interest of the Crown lessee as at March 1, 1955. The collector considered that the fact that the City Council was willing to allow all the present applicants to remain in possession up to at least December 31, 1960, and possibly longer, without increasing the rent, was at least as much as any of the applicants were entitled to under their existing tenancies.

On March 1, 1955, none of the applicants had an indefeasible right to demand and obtain either an extension of his existing tenancy beyond the end of 1956 nor any such right to demand and obtain a new tenancy which would endure beyond that date. By the time the collector assumed possession, that is to say January 1, 1958, the applicants were in a position which could be considered more favourable to them than the position as at March 1, 1955, inasmuch as their tenancies existing in 1956 were extended indefinitely subject to six months' notice to quit.

On service of such a notice by the landlord the applicant concerned had a right to demand a new tenancy but the terms of such a new tenancy were uncertain. Further, the right to demand a new tenancy was not an indefeasible right to a new tenancy. The fact that their landlord appears to have been willing to negotiate for a new tenancy for four years, subject to settlement of terms, did not create a new tenancy and in view of clause "Seventhly" of s. 24 of the Act it would not have bound either the collector or the City Council if, in fact, the parties had agreed on the terms of a new tenancy.

If the City Council had acquired by ordinary purchase the interest of the applicants' landlord without acquiring the interest of the present applicants as well, then the interest of each one of the applicants could have been determined on six months' notice and a claim for a new lease could have been defeated by establishing an intention to demolish the building. The City Council could, of course, have chosen its own time to serve the six months' notice. In my opinion this goes very far to show that the collector was justified in considering that the acquisition did not, or would not, interfere with the applicants' established rights to any significant degree. The applicants now have an undertaking which, in my opinion, is at least enforceable as an estoppel under which as long as they pay the amount of the rent they are secure in their occupation of their premises and businesses until at least December 31, 1960, and there is a possibility that they may be allowed to remain in the premises even longer. It is, in fact, more assurance of being allowed to continue in occupation than they had on March 1, 1955, or, indeed, on January 1, 1958. In the 4th Edn. of Ghosh on the Indian Land Acquisition Act at pp. 270 and 278 the following rule is stated:

> "The ordinary rule that has been adopted in England in the case of compulsory acquisition of land occupied by tenants whose tenancies are determined by notice or efflux of time, is that the tenants are not to be awarded compensation for loss of profits even though they have reasonable expectation of continuing in possession or having the lease renewed. The leading case is *R. v. Liverpool and Manchester Railway*, 4 Ad. & E. 650."

Aggarawala in his Compulsory Acquisition of Land (3rd Edn.) says as follows:

> "In the case of an occupier being a tenant the question would be what

> was the probability of the business being continued at the place if the land were not acquired and the length of the unexpired period of the lease would be a relevant matter for consideration. In the case of a monthly lease terminable at any time by notice at the lessor's will the compensation would be very small or even nil whether as injurious affection, loss of earnings or removal. The practice usually is to allow, nevertheless, two or three months' income to cover all these items, and if the collector allows the tenant two or three months to vacate the property the compensation may very well be nil.
>
> "It may, however, be observed that in this country (India) long leases for shops, etc., are not the usual practice and generally a tenant on monthly terms is allowed to continue as such as long as he pays the rent, though the rent is sometimes increased at intervals. Too much stress, therefore, should not be laid on the circumstance of a lease being only a monthly lease but all the circumstances including the period for which the business has actually been carried on at the place, though on such precarious occupation, and the probabilities judged from the local conditions and practice, ought to be taken into account."

In my opinion the passage from Aggarawala is, with all respect to the learned author, somewhat ambiguous and I am not sure whether he is dealing only with compensation under the fourth, fifth and, possibly the sixth clauses of the sub-section or whether he includes compensation under the first clause as well.

However, if the acquiring authority does not more to deprive the occupier of his occupation than the previous owner could have done, had he been so minded, without becoming bound to pay compensation, then it appears to me that there should be no liability to pay compensation under any of these clauses.

Section 23 (1) is not exclusive and therefore I think the court is entitled to have regard to other matters as well as the matters set out in that sub-section. I think it would be wrong to allow the applicants the full market value of their interest as at March 1, 1955, in view of the fact that the acquiring authority is prepared to allow them a longer period of occupation, with liberty to carry on their businesses as before, than they were actually entitled to under their previous landlord on March 1, 1955. It is a fact that the rights of the applicants on that day were more substantial than those of a mere common law monthly tenant, or a tenant at sufferance, but nevertheless their tenancies were then due to determine at the end of 1956 and there was no right on March 1, 1955, to a new tenancy.

The compulsory acquisition did not affect the tenancies as they stood on March 1, 1955, since formal possession was not taken until 1958. Even on the basis of the applicants' rights as at January 1, 1958, if there had been no compulsory acquisition, the applicants are now offered, in effect, terms of occupation which are not less than what the applicants could have insisted upon against a landlord who wished to demolish the premises. In my opinion, these are facts which must be taken into consideration and I think that when they are taken into consideration they justify the collector's refusal to award the full market value of the interest as at March 1, 1955, as compensation under the first clause of s. 23 (1).

In *R. v. Liverpool and Manchester Railway Co.* (1)(1836), 4 Ad. & El. 650, a tenant under a lease for seven years had it renewed several times for a period of a further seven years. At the time of the last renewal the landlord refused to grant a lease for fourteen years and he granted a renewal for seven years only, at the same time assuring the tenant that at the expiration of that term he would not be turned out. On the strength of this assurance the tenant incurred expenditure on improvements but the railway company, having bought the landlord's reversion, served notice to quit at the expiration of the term and

it was held that the tenant had no interest for which the company was bound to make compensation under the English Act which covered the right to compensation in that matter.

In the instant case, if the City Council had acquired or bought merely the rights of the applicants' landlord, the Council could have taken steps requiring the applicants to vacate before December 31, 1960, without having to pay any compensation either for the value of the land or for damage or loss of income to the tenants by reason of the legal determination of their tenancies.

Aggarawala states, quite clearly, that in the case of ordinary monthly tenants the usual practice is to allow two or three months' income and that if the collector allows the tenant two or three months to vacate the property compensation may very well be nil. As regards the claims under the sixth clause of s. 23 (1), I find that none of them have been proved.

I am by no means satisfied that any of the applicants would have embarked upon substantial improvements but for the acquisition and I find that, in fact, there has in no case been any diminution of the profits of the land between the time of the publication of the declaration and the time of the collector taking possession.

I therefore disallow all the claims under the sixth clause of the sub-section.

As regards the claims under the first, fourth and fifth clauses of the subsection, I find that in the circumstances of the case the collector was entitled to find that no compensation was payable under these clauses.

There remains the question of compensation under sub-s. (2) of s. 23 which requires that fifteen per cent. of the market value determined according to sub-s. (1) shall be paid as compensation in consideration of the compulsory nature of the acquisition.

At one time I was inclined to the view that if compensation was not payable under the first clause of sub-s. (1) then no compensation would be payable under sub-s. (2) but, upon reconsideration of the matter, I am not satisfied that that is correct in this case.

I think it cannot be denied but that the City Council has in law acquired the tenancies of the applicants as at either March 1, 1955, or probably more correctly January 1, 1958. In either case, the Council has acquired interests which were in being and which belonged to the applicants. I have held that the Council is not bound to pay the market value of those interests as at March 1, 1955, under the first clause of sub-s. (1) but that was because the Council offered the applicants virtually as much as they were entitled to, as of right, under their actual established and ascertained rights. Nevertheless, it is a fact that technically the rights of the applicants are not precisely the same under the City Council as they would have been under their previous landlord.

For example, although the City Council is prepared to allow them to remain until the end of 1960, and possibly even longer, the Council is not prepared to grant them an actual lease for any term.

Further, if the land had not been compulsorily acquired under the Act, the tenants would have been in a position to bargain for either the continuation of their existing tenancies or for new tenancies of the premises which they were occupying. They would have been in a position to bid in competition with the City Council, or any other prospective tenant or purchaser.

This last fact would not entitle them to compensation if they had not had a tenancy existing at the time of the acquisition but, in view of the fact that they had existing tenancies at that time, which existed at

January 1, 1958, by virtue of the operation of law rather than by act of the parties after March 1, 1955, I consider that they are entitled to compensation under sub-s. (2) for the prejudice which has been occasioned to them by reason of the compulsory nature of the acquisition.

For this reason, I think that sub-s. (2) definitely applies and the measure of compensation is specified in the sub-s. as fifteen per cent. of the market value of the interest held as at March 1, 1955.

It follows from what I have said, that the applicants are each entitled to fifteen per cent. of the value as at March 1, 1955, of their interest which was in each case a tenancy, with nearly two years to run, in the premises which they occupied for the purposes of businesses which they had carried on there, profitably, for a considerable period.

There was a prospect, which I think was quite a good prospect, so long as their landlord did not dispose of, or lose his title, that they would be able to effect either a continuation of their existing tenancies or new tenancies on the expiration of their lease or agreements for lease.

I think that this prospect is a matter that would have an effect, to some extent, upon the market value of the applicants' interest since, I think, it is a matter which a prospective purchaser would seriously consider. I think that a prospective purchaser not knowing of the intention that the lands were to be compulsorily acquired, would be prepared to pay more for those interests than he would for similar interests in respect of which he knew there would be no possibility of their continuance after the end of 1956.

I consider that where permanent fixtures had been put in by the applicants, or their predecessors, these would have an effect upon the market value, and naturally the trading position of the site, and the success of businesses on and adjoining that site, would also have an effect.

I have not found any of the matters for decision in this judgment, except the dismissal of the claims under the sixth clause of sub-s. (1), easy of decision, and the most difficult of all to decide is the market value of the applicants' interests as at March 1, 1955.

I am not satisfied that any of the evidence before me provides a satisfactory criterion for the assessment of that value.

In the case of the Coronation Hotel, I think the rent paid was less than the full rack rent. This may well have been because the improvements effected by the Coronation Hotel were taken into account by the court which fixed that rent.

Even in the case of the other applicants my present view is that the rents which they were paying were less than what they would have had to pay in an open market for similar premises, if such were obtainable, but I do not feel competent, upon the evidence, to say how much less. The very fact that the legislature ultimately considered it desirable to extend a measure of protection to such tenants, so provided by the Ordinance of 1956, shows that there was a sufficient scarcity, or an excessive demand, for such premises as to justify, in the opinion of the legislature, a measure of protection for existing tenants.

I have had evidence of the profits which have been made in the various businesses, but I do not think that they are a proper criterion inasmuch as those are the profits of the whole business and not merely the profits of the tenancy. In some cases, I have had evidence of offers made to the applicants but I am not prepared to accept those offers as really good evidence. No actual transfer of the premises in question, or of similar premises on analogous terms, has been adduced.

I have had no expert valuer on behalf of the applicants and while I accept Mr. Spur as a competent and honest expert on valuation, I am not satisfied that he has taken into account everything that might

have been properly taken into account on behalf of the applicants. I do not think that he would deny that his evidence was very largely the case for the City Council and that it was not for him to stress any matter which was more in the favour of the applicants than of the Council.

As regards the offers, I think that they would be a most uncertain guide. In the first place, even if the applicant in question showed himself to be to some extent prepared to do business, the actual terms upon which agreement could eventually have been reached, might be quite different from what was in the mind of the offeror when he made his offer. Thus, in one case, there was evidence that the offeror would have insisted upon a long lease, or upon being able to obtain a long lease; secondly, I think that most of these offers were intended to include an offer for the business as well, or that at least the business goodwill, was to some extent implicated; thirdly, I think that most of the offers were more in the nature of feelers than of firm offers.

I think it would be quite wrong for me to refuse to assess the market value merely because I found it difficult to do so upon the evidence before me, particularly in view of the fact that I am satisfied that each of the applicants had a marketable interest in the property acquired on March 1, 1955.

In this connection, I have found nothing in the Ordinance of 1954 which would make it illegal for a tenant to receive consideration for giving up his tenancy or for transferring. If I have to put a market value on these interests on the basis of the evidence before me, the result would be virtually mere guessing on the part of one who was not qualified as a valuer. I think that this would be undesirable in the interests of everyone.

I therefore decide not to go further in giving judgment today and what I have said so far will therefore be rulings or a preliminary judgment.

I have a suggestion to make. It is only a suggestion and if the parties do not agree to it, then, if no better basis can be arrived at, I suppose I will have to assess the market values myself on the basis of the unsatisfactory material before me.

The suggestion is that, without prejudice to the rights of the parties in the matter of appeal and the like, from the other parts of this judgment or ruling, the parties should agree that the market value as at March 1, 1955, should be assessed ad hoc, by me in consultation with Mr. Spur and another valuer. I would suggest that if arrangements can be made to that end Mr. Anrels might be a very suitable choice for the second valuer since he knows the premises and has had to consider them when preparing the valuation which was placed before the collector on behalf of the landlord, which valuation has been accepted. I am prepared to hear the parties on the question of the ascertainment of the market value.

Order accordingly.

For the applicants in the first case:
GR Mandavia
GR Mandavia, Nairobi

For the applicant in the second case:
RN Khanna
DN & RN Khanna, Nairobi

For the respondents in both the cases:
K Bechgaard
K Bechgaard, Nairobi

Said Bin Sultan Bin Break v Ahmed Kermali

[1958] 1 EA 788 (HCZ)

Division:	HM High Court for Zanzibar at Zanzibar
Date of judgment:	27 October 1958
Case Number:	6/1958
Before:	Windham CJ
Sourced by:	LawAfrica

[1] Rent restriction – Possession – Premises required by landlord for his own occupation as a residence or business premises – Landlord beneficiary as well as trustee under wakf – Beneficiary entitled to eighty per cent. of the income from property under wakf – Estoppel – Rent Restriction Decree, 1953, *s.* 19 (1) (*e*) (*Z.*).

Editor's Summary

The respondent applied to the Rent Restriction Board as landlord of a house for an order for recovery of possession thereof under s. 19 (1) (*e*) of the Rent Restriction Decree, 1953, which provides that an order for recovery of possession may be made where "the premises are reasonably required by the landlord for himself or as a residence for his wife or children or for some person in his whole-time employment or for the occupation of the person who is entitled to the enjoyment of such premises under a will or settlement. . ." The board made the order for possession after applying in the respondent's favour proviso (iii) of s. 19 (1)(*e*) which provides that notwithstanding the lack of alternative accommodation for the tenant an order for possession may be made in the landlord's favour if he would suffer greater hardship by its refusal. It later transpired that the premises were wakf property and that the respondent held them not in his personal capacity as owner but in his capacity as a mutawalli (trustee) who was at the same time entitled as beneficiary under the wakf deed to be paid about eighty per cent. of the income from the property during his lifetime. On the first appeal the court remitted the matter to the board to give them the opportunity to reconsider their decision in the light of this factor which had not been brought to their notice previously. The board held that this newly divulged status of the respondent did not preclude him in law from obtaining an order for possession under s. 19 (1)(*e*) and would not affect their decision regarding the balance of hardship; accordingly they adhered to their decision and again made the order for possession, but they also held that the respondent could not avail himself of the first part of s. 19 (1)(*e*) which provides that an order for possession may be made "where the premises are reasonably required by the landlord for occupation as a residence or business premises for himself . . .". From that order the appellant again appealed and the main ground of appeal was that the respondent, in view of the existence of the wakf, and his position under it, could not bring himself within s. 19 (1)(*e*) at all, for the purpose of obtaining thereunder the relief which he had sought. It was contended for the respondent that the board erred in holding that he could not avail himself of the first part of s. 19 (1)(*e*) and that since he originally leased the premises to the appellant in his personal capacity (the existence of the wakf having not been disclosed) and since for eighteen years the appellant paid him rent on that footing, the appellant

was estopped from arguing that the respondent leased the premises to him in the capacity of a mutawalli.

Held –

(i) a landlord of the premises can avail himself of s. 19 (1) (*e*) only if he is, whether in the same or in different capacities, both the landlord of the premises and the person not merely entitled to receive the income from them but to occupy them.

Sharpe v. Nicholls, [1945] 2 All E.R. 55; [1945] K.B. 382, and *Parker v. Rosenberg*, [1947] 1 All E.R. 87; [1947] K.B. 371, applied.

(ii) the board was correct in holding that the respondent could not avail himself of the first part of s. 19 (1) (*e*) of the Rent Restriction Decree, 1953.

(iii) the respondent could not avail himself of the second part of s. 19 (1) (*e*) because the words "entitled to the enjoyment of such premises" did not cover a landlord who was only entitled to eighty per cent. of the income from the premises.

(iv) there was no question of the appellant having denied the respondent's title or right to lease the premises to him but it was the respondent's status which was challenged and a tenant is free to question the landlord's status.

Appeal allowed. Order of the board set aside.

Case referred to in judgment:

(1) *Sharpe v. Nicholls*, [1945] 2 All E.R. 55; [1945] K.B. 382.

(2) *Parker v. Rosenberg*, [1947] 1 All E.R. 87; [1947] K.B. 371.

(3) *Kulsom Bibee v. Golam Hossein Cassim Ariff* (1905), 10 Cal. W.N. 449.

(4) *Smith v. Penny*, [1946] 2 All E.R. 672.

(5) *Stratford v. Syrett*, [1957] 3 W.L.R. 733.

(6) *Lokoram v. Bidya Ram* (1919), 53 I.C. 43.

Judgment

Windham CJ: The facts and the previous history of this case are fully set out in the decision of the Rent Restriction Board dated July 3, 1958, from which this appeal lies, and (as touching the question of hardship) also in their earlier decision dated June 8, 1957, to which they adhered in the decision now appealed from. The respondent had applied as landlord of a house at Malindi for an order for recovery of possession thereof against the tenant, the present appellant, under s. 19 (1) (*e*) of the Rent Restriction Decree, 1953, on the ground that the premises were reasonably required by him

> "for occupation as a residence or business premises for himself or as a residence for his wife or children".

The board, after applying in the respondent's favour proviso (iii) of s. 19 (1) (*e*) which provides that notwithstanding the lack of alternative accommodation for the tenant an order for possession may be made in the landlord's favour if he would suffer the greater hardship by its refusal, proceeded to make the order for possession as prayed. It later transpired that the premises were wakf property and that the respondent held them not in his personal capacity as owner but in his capacity as a mutawalli who was at the same time entitled as beneficiary under the wakf deed to be paid about eighty per cent. of the income from the property during his lifetime. On first appeal this court remitted the matter to the board to give them the opportunity to reconsider their decision in the light of this factor, which had not been brought to their notice. The board in a reasoned decision held that this newly divulged status of the respondent did not preclude him in law from obtaining an order for possession under s. 19 (1) (*e*) and would not affect their previous decision regarding the balance of hardship; accordingly they adhered to that decision and again made the order for possession as prayed. From that order the appellant now appeals again.

It will be convenient to deal first with what has proved to be the main ground of appeal, namely, whether the respondent, in view of the existence of the wakf and his position under it, can bring himself within s. 19 (1) (*e*) of the Rent Restriction Decree, 1953, at all, for the purpose of obtaining thereunder the relief which he has sought. For this purpose I will set out the relevant portion

of s. 19 (1) (*e*) and the relevant portion of clause 1 of the wakf deed. Section 19 (1) (*e*) permits an order for recovery of possession to be made where–

> "the premises are reasonably required by the landlord for occupation as a residence or business premises for himself or as a residence for his wife or children or for some person in his whole-time employment or for the occupation of the person who is entitled to the enjoyment of such premises under a will or settlement, . . ."

The relevant portion of clause 1 of the wakf deed, in which the expression "the donee" refers to the respondent, reads as follows:–

> "The mutawalli shall manage the said immoveable property in such manner as he shall deem fit and after providing for tax or taxes now subsisting or which may hereafter be levied and after deducting ten per cent. of the income in every year for the maintenance of the said property shall pay ten per cent. of the balance to the poor and orphans of Khoja Shia Ithnasheri Jamat or Jamats in Zanzibar such as the mutawalli may deem fit and the remainder to the donee during his lifetime and thereafter to his children . . ., etc."

The respondent, who was the son of the creator of the wakf, was not the original mutawalli, but on the latter's death he became mutawalli in accordance with the terms of the wakf.

Now the respondent seeks, and sought before the board, to bring his claim within either one or another, if not within both, of two passages in s. 19 (1) (*e*). He seeks to show that the premises are reasonably required by the landlord either (*a*)

> "for occupation as a residence or business premises for himself or as a residence for his wife or children",

or (*b*)

> "for the occupation of the person who is entitled to the enjoyment of such premises under a will or settlement".

I will consider these contentions in turn.

The first of these two contentions, namely, that the premises were

> "reasonably required by the landlord for occupation as a residence or business premises for himself or as a residence for his wife and children",

was rejected by the board itself in its decision, and it is the respondent and not the appellant who now seeks to show that the board erred in rejecting it. In successfully persuading the board to reject it, learned counsel for the appellant relied, as he has relied before this court, on two English judgments in which the same relief was sought as now, and in which the meaning of the almost identical words in Sch. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, was considered. These cases were *Sharpe v. Nicholls* (1), [1945] K.B. 382, and *Parker v. Rosenberg* (2), [1947] K.B. 371. In the former case the three plaintiffs were the personal representatives of the deceased owner of the house in question, and one of them (the widow, in whose favour the order for possession was sought) was also a beneficiary in his estate. The Court of Appeal refused the order for possession on the ground that there was nothing to show that the widow was beneficially entitled to the house. It is to be inferred from the judgments in *Sharpe v. Nicholls* (1) that if the widow had been shown to be beneficially entitled to occupy the house, the order for possession would have been made, and that the mere fact that she sued in two capacities, first as a legal owner (as one of the personal representatives) and secondly as a beneficiary, would not have disentitled her to the

relief sought, if only she could have shown that she was beneficially entitled to the house. The second case, *Parker v. Rosenberg* (2), brings out more clearly the distinction, vital in the present case, between being entitled to occupy a house and being entitled merely to be paid the income deriving from it. In that case two of the plaintiffs were trustees of the will of a deceased lady whose estate comprised the dwelling-house concerned, they having no beneficial interest of any kind, and the third plaintiff, a Miss Marsh, in whose favour the order for possession was sought, was the deceased's sister. Under the will the trustees held the house upon trust for sale with power to postpone, and upon trust to permit the third plaintiff:

> "during her life until sale of the said property to have the use and enjoyment thereof or to receive the net rents and profits thereof . . ."

In short, the trustees could in their discretion either let her live in the house or pay her the income from it, and she had no right to insist on their adopting the former course. Tucker, L.J., in refusing the order for possession, said in his judgment (at p. 376),

> "It follows that the trustees in the present case could not have obtained an order for possession if they were the only plaintiffs. Can they remedy this by joining Miss Marsh as plaintiff and was she properly joined? Under the will of the testatrix Miss Marsh had no right to compel the trustees to give her possession of the house. The trustees held the property under a trust . . . to permit Miss Marsh in their discretion during her life either to receive the net rents and profits or to have the use and enjoyment thereof . . ."

Such, it seems to me, is the position under the wakf in the instant case, save for the factor, whose relevance I will consider presently, that here the trustee (mutawalli) and the beneficiary happen to be the same person. As I see it, the proposition which emerges from the decisions in *Sharpe v. Nicholls* (1) and *Parker v. Rosenberg* (2) upon the meaning of the words in the rent restriction legislation which we are now considering, is that a "landlord" of the premises concerned (which term in order to enable the legislation to have any application at all to a wakf must in the case of a wakf mean the mutawalli, who is the person charged with managing and letting out the premises) can avail himself of this provision of the legislation only if he is, whether in the same or in different capacities, both the landlord of the premises and the person entitled not merely to receive the income from them but to occupy them.

Applying this proposition to the wakf under consideration, it is clear from its terms that all that the respondent, in his capacity as a beneficiary, is entitled to is to receive some eighty per cent. of the income from the premises, and that the wakf gives him no right to insist on living there. There are wakfs in which the right of residence is expressly conferred upon beneficiaries; one such was the subject matter of an Indian case, *Kulsom Bibee v. Golam Hossein Cassim Ariff* (3) (1905), 10 Cal.W.N. 449. But this is not one of them. Nor do I consider that the position is altered by the fact that the respondent happens to be the mutawalli, and that in that capacity he is empowered to allow himself, in the capacity of a beneficiary, to occupy the premises. The test, as established by the English decisions which I have cited, is whether the landlord, in his capacity as beneficiary, has a right to occupy the premises in dispute, a right which is not dependent upon the exercise of any discretion in his favour on the part of a trustee or (as here) a mutawalli, even if he himself happens to be such trustee or mutawalli. In *Sharpe v. Nicholls* (1), as we have seen, all three personal representatives of the deceased's estate, who included the widow herself, were desirous of letting the widow occupy the house in dispute, yet the order for possession was refused because she, in her capacity as beneficiary, was not

shown to have any right to occupy it. On these grounds I hold that the board were correct in holding that the respondent cannot avail himself of the first part of s. 19 (1) (*e*) of the Rent Restriction Decree, 1953.

I turn now to the second part of s. 19 (1) (*e*), whereunder the respondent must show that the premises were

> "reasonably required by the landlord . . . for the occupation of the person who is entitled to the enjoyment of such premises under a will or settlement".

The person said to be so entitled is, of course, again himself in his capacity as beneficiary under the wakf. But under this limb of s. 19 (1) (*e*) the respondent must in my view fail on two distinct grounds. The first ground is largely covered by my findings with regard to the first part of s. 19 (1) (*e*); for I am unable to see how he can be held to be entitled to the "enjoyment of such premises" when all that the wakf entitles him to, as beneficiary, is to be paid some eighty per cent. of the income derived from the premises. Indeed, if he were entitled to live in the premises it is difficult to see how the remaining twenty per cent. of the income, to be devoted to maintenance and charity, would be raised, or how the income would be computed, unless in his capacity as beneficiary he paid to himself as mutawalli twenty per cent. of a notional rent for that purpose. But what is more important, an examination of the whole of the Rent Restriction Decree, 1953, shows that it is concerned with balancing the scales as evenly as possible between two categories of persons, tenants and statutory tenants on the one side and landlords who, but for them, would be entitled personally to occupy the premises, on the other side. With these considerations in mind, I am unable to construe the words "entitled to the enjoyment of such premises" to cover one who is only entitled to receive some eighty per cent. of the income from the premises. The three English decisions relied on by the board in reaching the contrary conclusion on this point are in my view irrelevant, none of them being concerned with rent restriction legislation.

But there is another ground on which the respondent could not succeed in obtaining his order for possession under this second limb of s. 19 (1) (*e*), and it turns on the persons whom he desires to put into occupation. The premises in dispute consist of two floors. The respondent does not desire to occupy either of them personally, since he lives in Chwaka and proposes to continue living there. But he desires to turn the ground floor into business premises in which his son is to run his (the respondent's) business on his behalf, while he desires the first floor as a residence for his son and the latter's wife and children. Now it may be that occupation of the ground floor by his son, to run his business for him, might be held to be occupation by himself for that purpose. But occupation of the first floor as a residence by his son and the latter's family cannot, at least *prima facie*, be held to be occupation by himself. And this second part of s. 19 (1) (*e*) does not, after the words

> "the person who is entitled to the enjoyment of such premises under a will or settlement"

contain the additional words "or the wife or children of such person". In this, it differs from the first part of s. 19 (1) (*e*), about three lines further up, where, after the words "as a residence or business premises for himself" there follow the words "or as a residence for his wife or children". This pointed difference between the two parts of s. 19 (1) (*e*), which is peculiar to the Zanzibar Decree, must, according to the ordinary canons of construction, be presumed to be intentional, and the omission of any mention of wife and children in the second part, being presumably intentional because of their express mention in the first part, cannot therefore be remedied by reading the omitted words into the

section as being presumably intended by the legislature, as they were read into the corresponding provision in the English Act (which makes no mention of wife and children anywhere) in *Smith v. Penny* (4), [1946] 2 All E.R. 672. Accordingly, even if the respondent could be held to be a "person entitled to the enjoyment of such premises", which I have held he cannot, the most he could be put into possession of would be the ground-floor of the premises. And the board, at p. 7 of their decision of July 3, 1958, have made it clear that if there was a question of the order for possession being confined to the ground floor, they would not make it at all, because in such a case they would consider that greater hardship would result to the present appellant (the respondent below). That being so, this court would not make such an order either.

That disposes of this appeal save for a point of estoppel which has been raised by the respondent. Since this court, in its remitting judgment, admitted the wakf in evidence and ordered the board to reconsider their decision in the light of its admission, it cannot properly be argued that the wakf ought not to be looked at by the board. But it is contended that since the respondent originally leased the disputed premises to the appellant in his personal capacity (the existence of the wakf having not been disclosed) and since for eighteen years the appellant paid him rent on that footing, the appellant cannot now turn round and argue that the respondent leased the premises to him in the capacity of a mutawalli. In support of this contention he relies, as did the board, on *Stratford v. Syrett* (5), [1957] 3 W.L.R. 733. But that case, in so far as it touched on the point at all, did no more than to lay down that the well-known doctrine of estoppel, whereby a tenant is estopped from denying his landlord's title, is applicable to statutory tenancies. In the present case, however, there is no question of the appellant having denied the respondent's title, that is to say the respondent's right to let the premises to him; for such a right the respondent admittedly had whether he let as a private individual or as a mutawalli, nor was this ever challenged. What was in issue was the respondent's status, a very different thing; and a tenant is free to question his landlord's status: *Lokoram v. Bidya Ram* (6) (1919), 53 I.C. 43. This status was and is relevant to determine, not whether he is the landlord of the premises or entitled to let them, but whether, as such landlord, he is entitled to avail himself of the provisions of s. 19 (1) (*e*) of the Rent Restriction Decree, 1953.

For these reasons the appeal is allowed, with costs here and below, and the order of the Rent Restriction Board dated July 3, 1958, is set aside.

Appeal allowed. Order of the Rent Restriction Board set aside.

For the applicant:
KS Talati
Wiggins & Stephens, Zanzibar

For the respondent:
SM Chowdhary
SM Chowdhary, Zanzibar

City Council of Nairobi v Ata Ul Haq

[1958] 1 EA 794 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	10 December 1958
Case Number:	83/957
Before:	Sir Kenneth O'Connor P, Gould JA and Sir Owen Corrie Ag JA
Sourced by:	LawAfrica
Appeal from:	HM Supreme Court of Kenya–Forbes, J

[1] Building contract – Contract for building seventeen blocks of housing – Refusal by City Council to accept six blocks after accepting eleven – Buildings alleged to be below standard required by specification – No final certificate issued – Buildings already let by Council and occupied – Action by contractor for balance of price and extras – Whether claim premature or barred by limitation.

[2] Building contract – Contract for building seventeen blocks of housing – Refusal by City Council to accept six blocks after accepting eleven – Buildings alleged to be below standard required by specification – No final certificate issued – Buildings already let by Council and occupied – Action by Council claiming damages for breach of contract and other relief – Whether Council waived wholly or partially or is estopped from alleging breach by contractor – Indian Contract Act, 1872, *s.* 237.

Editor's Summary

By a contract made in 1954, the respondent agreed to build for the appellants seventeen blocks of African housing at Nairobi. The respondent completed the blocks, eleven of which were accepted by the appellants; upon these the respondent was paid ninety-five per cent. of the contract price. The appellants refused to take over the other six blocks, on the grounds that the respondent had broken the contract in respect of all seventeen blocks and that the buildings were far short of the standard required by the specification. When this decision was made, the respondent had already been paid ninety per cent. of the price for the blocks not accepted. The respondent denied the alleged breach of contract, and in 1956 he commenced proceedings, claiming Shs. 140,018/- as the balance of the contract price, including retention monies, Shs. 50,000/- deposited by him as security, an inquiry into the value of extra work done and payment of the amount due. The appellants' defence was that the work was not in accordance with the contract, that they were entitled to deductions for defects and that since no final certificate had been issued, the claim was premature. Several months later the appellants sued the respondent, alleging that the respondent's work was not in accordance with the contract and claiming Shs. 826,849/- special damages for the estimated cost of remedying the defects of the work, and loss of rent in the meantime. They also claimed Shs. 46,220/- for unusual maintenance costs. The respondent's defence to this action averred due completion, acceptance of all the blocks by the appellants, which they had let and for which they were collecting rents and that, if there were defects, the work had been inspected, repairs had been required and made, and thereby and by payments made to the respondent, the appellants had waived any claim. Both suits were consolidated and tried together. The trial judge gave judgment for the contractor for the balance of the contract price, the deposit and Shs. 70,850/- for extras, and for the appellants Shs. 22,502/- damages for defective work. On appeal

Held –

(i) the respondent's claim was not premature.

(ii) the absence of a final certificate would not preclude the respondent from claiming any sum due to him, since he could either ask for arbitration, or bring a suit to establish his right to a certificate and payment.

(iii) whilst the finding of the trial judge that the work had been substantially completed, with some defects, was correct, substantial completion of the particular contracts between the parties was not enough to justify payment of retention monies; to justify such a payment the work must be entirely performed.

(iv) the appellants were not estopped from alleging breaches of the contract, but their failure to take mitigating action in respect of *inter alia* patent defects should be reflected in the amount of damages awarded.

(v) the trial judge had correctly assessed the value of extras.

(vi) the appellants were, on the evidence, entitled to Shs. 312,955/- for the cost of remedying defects in all seventeen blocks, plus a further Shs. 10,000/- if the remedial work was actually done.

Appeal allowed.

Case referred to in judgment:

(1) *Powell v. Streatham Manor Nursing Home*, [1935] A.C. 243; [1935] All E.R. Rep. 58.

(2) *Ellis v. Hamlen* (1810), 3 Taunt. 52; 128 E.R. 21.

(3) *Whitaker v. Dunn* (1887), 3 T.L.R. 602.

(4) *Dakin* (*H.*) *& Co. Ltd. v. Lee*, [1916] 1 K.B. 566.

(5) *Hoeing v. Isaacs*, [1952] 2 All E.R. 176.

(6) *Adcock's Trustee v. Bridge R.D.C.* (1911), 75 J.P. 241.

(7) *Bombay Furniture Works v. Gross*, E.A.C.A. Civil Appeal No. 94 of 1955 (unreported).

(8) *Petrofina S.A. of Brussels v. Compagna Italiana Transporto Olii Minerali of Genoa* (1937), 53 T.L.R. 223; (1937), 53 T.L.R. 650.

(9) *Newton Abbot Development Co. v. Stockman Bros.* (1931), 47 T.L.R. 616.

(10) *Bird v. Smith* (1848), 12 Q.B. 786; 116 E.R. 1065.

(11) *Bateman* (*Lord*) *v. Thompson* (1875), 2 Hudson on Building Contracts (4th Edn.) 36.

(12) *Dunaberg and Witepsk Railway Co. v. Hopkins, Gilkes & Co. Ltd*. (1877), 36 L.T. 733.

(13) *Harvey v. Lawrence* (1867), 15 L.T. 571.

(14) *Robins v. Goddard*, [1905] 1 K.B. 294.

(15) *Marsden U.D.C. v. Sharp* (1931), 47 T.L.R. 549.

(16) *Hughes v. Metropolitan Railway Co*. (1877), 2 App. Cas. 439.

(17) *Birmingham and District Land Co. v. London and North Western Railway* (1889), 40 Ch.D. 268.

(18) *Re Trent and Humber Co., Ex parte Cambrian Steam Packet Co*. (1868), L.R. 6 Eq. 396.

(19) *Wilson v. Hicks* (1857), 26 L.J. Ex. 242.

(20) *Smailes & Son v. Hans Dessen & Co*. (1906), 94 L.T. 492.

(21) *Chaplin v. Hicks*, [1911] 2 K.B. 786.

(22) *Cinema Press Ltd. v. Pictures and Pleasures Ltd*., [1945] K.B. 356; [1945] 1 All E.R. 440.

December. The following judgments were read by direction of the court:

Judgment

Sir Kenneth O'Connor P: This is an appeal from a decision of the Supreme Court of Kenya in two consolidated suits arising out of a contract to build seventeen blocks of African housing in the Ofafa Estate, Nairobi. The contract, which is dated June 29, 1954, was made between Ata Ul Haq (therein and hereinafter called the contractor) of the one part and the City Council of Nairobi (therein and hereinafter called the Council) of the other part.

Eleven out of the seventeen blocks were accepted and taken over by the Council, the contractor being paid ninety-five per cent. of the contract price. The Council refused to take over the remaining six blocks on the ground that the contractor had been guilty of breaches of contract in respect of all seventeen blocks and that the building was far short of the standard required by the specification which formed part of the building contract. When this decision was made by the Council, the contractor had been paid ninety per cent. of the contract sum in respect of the six blocks not taken over. The contractor denied the breaches of contract alleged and took no steps to remedy them.

On February 18, 1956, he issued a plaint against the Council in Civil Case No. 170 of 1956 in which he claimed that he had duly completed the work in accordance with the contract and had supplied extras and done additional work and claimed:

(i) Shs. 140,018/- in respect of balance of contract price including retention monies;

(ii) Shs. 50,000/- in respect of a deposit which he had made by way of security;

(iii) Inquiries into the value of the extra work carried out by him and payment of the amount shown to be due.

He also claimed costs, interest and other relief.

On May 28, 1956, the Council filed a defence to this suit in which they denied liability and said that the works had not been completed in accordance with the contract and that they were justified in not taking over the six blocks; and they claimed to be entitled to make deductions for defects. They further pleaded that the contractor's suit was premature as a final certificate had not been issued and, alternatively, that it was barred by limitation under s. 129 of the Municipalities Ordinance (Cap. 136).

On November 14, 1956, the Council filed a plaint in Civil Case No. 1314 of 1956 in which they alleged, *inter alia*, that the contractor had failed to execute the works in accordance with the contract in various respects of which they gave particulars. They said that these were latent defects of which they had not known when the payment certificates had been issued to the contractor, and they claimed special damages amounting to Shs. 826,849/-, being the estimated cost of remedying the defects and for loss of rent of the buildings and supervision charges while the work was being done. The Council also claimed Shs. 9,881/- in respect of the fee paid to a Mr. Wevill, a quantity surveyor, for a detailed survey and report on the works, and damages amounting to Shs. 46,220/- in respect of the unusual maintenance costs which would be necessitated by the poor quality of the buildings; together with interest, costs and further or other relief.

On January 31, 1957, the contractor filed a defence in suit 1314/56 in which he averred, *inter alia*, that he had duly completed the contract, that the Council had accepted all the works (including the six blocks), had gone into possession and let them and had continued to collect rents for them. He denied that there were any latent or other defects and pleaded, in the alternative, that if there were any such defects, the Council, with full knowledge of them, had waived any claim in respect thereof. He said that the Council by its servants or agents had inspected the works from time to time, had required the contractor to carry out repairs or alterations as the Council considered necessary and that he (the contractor) had duly completed such repairs and alterations, that the Council by its servants or agents had approved all the works and taken possession, and that the Council by its city engineer had issued interim payment certificates amounting to Shs. 1,612,540/-. The contractor also pleaded that the Council was estopped from denying that the works had been carried out in

accordance with the contract, having induced the contractor to think that the works were approved and having failed to object during the progress of the work when any alterations or repairs could more easily have been remedied. The contractor alleged that the Council by refusing to pay the balance due were in breach of their contract. He denied any breaches by him and prayed that the Council's suit be dismissed.

These two suits were consolidated and tried together.

Before the hearing the ten issues which arose on the pleadings (apart from an issue as to costs) were agreed by counsel, as follows:

1. Is the contractor's claim premature?
2. In the alternative is it barred by limitation wholly or partially?
3. Have the works been completed by the contractor in accordance with the contract?
4. If so is the contractor entitled to the sum claimed, or any part thereof in the absence of the final certificate?
5. If the answer to No. 3 is in the negative in what respects has the contractor failed to perform the contract?
6. Has the Council waived any breach of contract by the contractor wholly or partially?
7. Is the Council estopped from alleging such breaches or any of them?
8. If the Council is entitled to any damages in respect of such breaches–how much?
9. Has the contractor carried out the extra work as alleged in the plaint?
10. If so to what sum is the contractor entitled in respect thereof?

A considerable amount of evidence was called on each side and the trial lasted for about seventeen days.

On September 6, 1957, the learned trial judge delivered judgment. He negatived a plea (which had been introduced by an amendment) that the contractor had been guilty of fraudulent misrepresentation of the quality of the work. He found that the contractor had established his claim to the extent of:

(*a*) Shs. 140,018/- in respect of the balance of the contract price.

(*b*) Shs. 50,000/- in respect of the deposit for security.

(*c*) Shs. 70,850/- in respect of extras.

Against this he found that the Council was entitled to Shs. 22,502/- for damages in respect of defective work. He accordingly gave judgment for the contractor in suit No. 170 of 1956 in the sum of Shs. 260,868/- and costs. In suit No. 1314 of 1956 he gave judgment for the Council in the sum of Shs. 22,502/- with costs to be assessed as if the claim had been for the amount of the sum awarded; and he directed that one-eighth of the costs of the hearing should be deemed to be attributable to suit No. 1314/56. A decree was signed on September 6, 1957. It is against this judgment and decree that the present appeal is brought.

It will be necessary now to set out the facts a little more fully. The facts as found by the learned judge are not seriously questioned on the appeal, though the inferences which he drew from them are challenged.

I take the following extracts from the judgment of the learned judge:

> "In or about the year 1954 the Council undertook the development of an African Housing Estate at Ofafa. The projected estate was divided into sections for construction purposes, the particular section with which this

case is concerned being known as ‘Part B’. Part B comprised

seventeen blocks of dwellings and ablution units with minor ancillary works. Tenders were invited for the construction of Part B, that submitted by the contractor was accepted, and a contract for the carrying out of the work was duly entered into between the contractor and the Council on June 29, 1954. The contract itself is a fairly brief document of four clauses, but it incorporates in the contract the general conditions of contract of the Council, the tender of the contractor, the specification prepared by the Council's engineer, a schedule of rates, and the contract drawings."

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"In practice, day to day supervision of the execution of the contract works was carried out by an African Housing architect and a clerk of works, both of whom were employed by the Council. Initially, the architect was a Mr. Tanner and the clerk of works was a Mr. Stone. Mr. Tanner was succeeded as architect by a Mr. Mould who took over in June, 1955. Mr. Mould had been associated with the work since March, 1955, under Mr. Tanner, and it appeared that the works were about eighty per cent. complete when Mr. Mould came on to the scene. Mr. Stone was succeeded as clerk of works by a Mr. Goodwin in about May, 1955.

"In pursuance of the contract the contractor entered upon the site and commenced work in June, 1954. Work proceeded, and in due course, eleven of the seventeen blocks provided for in the contract were completed, accepted in writing, and taken over by the Council. Payments were made to the contractor on certificates issued by the city engineer under cl. 15 of the specification up to a total of Shs. 1,011,104/-, being ninety-five per cent. of the certified value of the work in respect of these blocks.

"Of the remaining six blocks, four were completed and ready for inspection and the other two were complete except for minor details, when differences arose between the contractor and the Council. Interim payments made to the contractor in respect of these six blocks amounted to Shs. 493,398/-, being ninety per cent. of the certified value of the work done. These blocks were never formally accepted, but were in fact occupied by the Council after the contractor had withdrawn from the site."

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"Taking the evidence of Mr. Stone and Mr. Mould together, a very clear general picture emerges. I do not think it is disputed that the Council were seeking to erect cheaply priced buildings in this housing estate, and that this contract did envisage a low, or shall I say, economical standard of work. This, of course, is no excuse for an even lower standard than is called for by the specification. There is, however, some latitude for interpretation of the specification, and it is perfectly clear that during his term of office as architect in charge of the contract, Mr. Tanner deliberately allowed a low standard of work within the specification, in a number of instances below specification, while Mr. Mould on arrival, no doubt performing the function of a new broom, did his best to insist on compliance with a far higher standard. The position is really summed up by Mr. Mould's admission in cross-examination when he agreed that a different standard is being applied now, when he wholeheartedly condemns all the blocks or buildings, from that applied when acceptance of certain of the blocks was recommended to the Council. I accept Mr. Mould's evidence that when he drafted letters of acceptance in respect of five of the blocks he was not fully aware of the general character of the buildings. He had, of course, not seen the major part of the work being carried out; and I have no doubt that he was sincerely shocked when he did discover

> the standard to which the building had been carried out and considered it was a scandalously low standard. I do not accept, however, that the Council, through its officers, had no knowledge of the standard to which the works were being built. It is clear from Mr. Stone's evidence that Mr. Tanner was in general fully aware of the standard of the work that was being done and accepted it, and there is some evidence that this knowledge and acceptance was shared by more senior officers of the Council. Mr. Mould stated that he did not recommend acceptance of the five blocks of buildings without protest but that he was overruled. He said that he indicated his objections to Mr. Roberts, then city engineer, and that later, when Mr. Saunders was acting city engineer, he explained his grounds of objection to Mr. Saunders in detail. Mr. Mould said that Mr. Saunders put it to him often that he (Saunders) would have to put it to the Council and Mr. Mould also said that there were many meetings between heads of departments. Mr. Mould was not present and was unable to say what was put to the Council or what was discussed at the meetings of heads of departments, and other evidence does indicate that Mr. Mould's superior officer, and possibly the Council itself, was at one time prepared to accept a lower standard of work than he was.
>
> "However this may be, I am satisfied that, with certain exceptions to which I will refer later, Mr. Tanner, and Mr. Stone on Mr. Tanner's authority, allowed a low standard of work; and that in many cases work was authorised or knowingly accepted which was not strictly in accordance with specification. I am also satisfied that on occasion Mr. Tanner directed work to be done which was additional to specification. It seems equally clear that notwithstanding the provisions of the contract documents, to which I will refer in detail presently, practically the whole of the dealings between Mr. Tanner (and later Mr. Mould) and the contractor were on a verbal basis and that the contractor accepted and gave effect to verbal directions given him by Mr. Tanner. Written variation orders for additional work in accordance with the contract appear to have been issued in only three cases, that is, exhibits 18, 19 and 20."

The answers to the questions raised in the appeal turn largely upon the construction to be put on certain provisions of the contract documents, a matter upon which an appellate court is in as good a position to pronounce as is the trial judge: *Powell v. Streatham Manor Nursing Home* (1), [1935] A.C. 243, 267. It will be desirable now to set out and to consider the relevant provisions of the contract documents. The contract documents are:

(i) the deed of contract (already mentioned) dated June 29, 1954, and made between the contractor of the one part and the Council of the other part (referred to hereinafter as "the deed"). This recites that the contractor has tendered and the Council has agreed with the contractor for the execution of the work in accordance with–

(ii) general conditions of contract of the Council (hereinafter called "the general conditions");

(iii) tender of the contractor;

(iv) specification prepared by the engineer;

(v) schedule of rates;

(vi) numbered contract drawings.

Documents (ii) to (vi) above are referred to in the deed and hereinafter as "the attached documents".

I do not think that it is necessary to set out the deed in full, but the following provisions of it must be particularly noted.

(*a*) By cl. 1, in consideration of the works thereinafter mentioned, the Council undertakes to pay to the contractor £85,476 subject to the provisions of cl. 2 at the times and by the instalments and subject to the provisions for retention monies mentioned in the attached documents. The contract price includes Shs. 50,000/- for contingencies. "The engineer" is interpreted for purposes of the deed as "the city engineer for the time being of the Council". His representative and the deputy of his representative are not included in this definition.

(*b*) By cl. 2, in case the city engineer thinks proper at any time during the progress of the works to make any alteration in or additions to or omissions from the works or any alteration in the kind or quality of the materials to be used therein, and shall give notice thereof in writing to the contractor, the contractor is to comply with the notice

"but the contractor shall not do any work extra to or make any alteration or addition to or omission from the works or any deviation from any of the provisions of this contract without the previous consent in writing of the engineer. . ."

(*c*) By cl. 3 the contractor is to observe and perform all the stipulations mentioned in the attached documents and all references to the works are also where the context permits it to include material or goods. It is not clear whether this interpretation of "works" is to apply to the attached documents only or also to the deed itself. There is a definition of "works" in general condition 1 (iv) which includes "materials" and is expressed to apply to "all contract documents".

(*d*) By cl. 4, the attached documents and conditions there set out are "except where the same are varied by or inconsistent with these presents" to form and be deemed to be part of the contract as if the same were repeated therein categorically and the contractor is to observe and perform the conditions set out in the attached documents.

The "provisions for retention monies" noted under (*a*) above are contained in para. 15 of part I of the specification set out below.

The provision noted in para. (*b*) above is important. The effect of it is two-fold, that is to say, it is (i) a provision for the benefit of the contractor to the extent that he cannot be required to do extras or vary the works contracted for, or to alter the kind or quality of the specified materials without a written notice from the city engineer; and (ii) a stipulation for the benefit of the Council that the contractor shall not do extras or make alterations or additions to or omissions from the works "or any deviation from any of the provisions of this contract" without the previous consent in writing of the city engineer. The object is clear. On the one hand, the contractor will have written variation orders upon which he can either claim additional payment or justify omissions. On the other hand, the Council will not be bound to accept alterations or additions to, or omissions from, the works or "any deviation from any of the provisions of the contract" unless the city engineer has consented to them in writing. The first part of the clause specifically refers to "alteration in kind or quality of the materials". The second part contains no express reference to alterations to materials. It may be that the interpretation of "works" in cl. 3 would cover materials. But if not, I am of opinion that, since extras, alterations and additions to, and omissions from the works are already expressly provided for in this sentence, the expression "or any deviation from the provisions of the contract" must have been intended to refer to alterations in the kind or quality of the materials to be used in the contract. This construction would give effect to all the words of the sentence, and would make the obligation of the contractor not to depart from the terms of the contract without the

written consent of the engineer commensurate with the power of the engineer to direct such departures. This seems to be the plain and sensible construction. Accordingly, though "deviation" in a building contract commonly means a divergence from the plan of drawings, I think that in this clause the expression "any deviation from any of the provisions of this contract" would include a divergence from the requirements of the contract documents relating to the materials to be used. For instance, general condition No. 2 (i) mentioned below is to the effect that the contractor shall execute and perform the works in a good and workmanlike manner and with the best materials and workmanship in accordance with the specification, and the specification provides, for example, for foundation concrete to be of a certain mix and for first quality local stone to be used. If concrete of a substantially weaker mix or inferior quality stone were used, that would, in my opinion, be a deviation from a provision of the contract within the prohibition in cl. 2 and would require the authorisation in writing of the city engineer himself. The word "deviation" can be used to denote a departure from the specified materials. For example, in *Ellis v. Hamlen* (2), 128 E.R. 21, failure to put into a building joists of specified materials and dimensions was described as a "deviation" from the contract; and the learned editor of Hudson on Building Contracts (7th Edn.) at p. 180 refers to *Whitaker v. Dunn* (3) (1887), 3 T.L.R. 602 (which was a case relating to the use of inferior concrete), as a case of a builder who "deviates" from a specification. I think that general condition No. 17 (noticed below) which mentions "deviations" from the specification as including "materials" ordered not to be used supports the construction which I have put upon the word "deviation" in this contract.

The effect of the provision of the deed noted under para. (*d*) above is that in case of inconsistency between any provision of the deed and of any of the attached documents, the provision of the deed is to prevail: in fact the provision of the attached documents is not deemed part of the contract to the extent of such inconsistency.

The following general conditions are relevant:

Condition No. 1 reads:

> "*Definition of Terms*:–1 (i) Engineer. The term 'engineer' wherever used hereinafter and in all contract documents shall be deemed to imply the city engineer or such person or persons as may be duly authorised to represent him on behalf of the City Council of Nairobi or the successors in office of such person or persons and also such person or persons as may be deputed by such representative to act on his behalf for the purpose of this particular contract. During the continuance of this contract, any person acting for the engineer, or exercising his authority, or any successor in office of such engineer, shall not disregard or overrule any decision, approval or direction given to the contractor, in writing, by his predecessor, unless he is satisfied that such action will cause no pecuniary loss to the contractor or unless such action be ordered as a variation to be adjusted as hereinafter provided.
>
> "(ii) Approved and Directed. The terms 'approved' and 'directed' wherever used hereinafter and in all contract documents shall mean the approval and direction in writing, of the engineer.
>
> "(iv) Works. The term 'works' wherever used hereinafter and in all contract documents shall mean all or any portion of the work, materials and articles . . . which are to be used in the execution of this contract . . ."

It will be observed that there is inconsistency between the interpretation of the expression "the engineer" in cl. 1 of the deed and this definition of "engineer", in that, while this definition would include in the term "engineer"

not only the city engineer for the time being, but such person or persons as may be duly authorised to represent him on behalf of the City Council of Nairobi and their successors in office and also such person or persons as may be deputed by such representative to act on his behalf for the purpose of this particular contract, the expression "the engineer" is in the deed confined to "the city engineer for the time being of the Council". The general conditions are, as their name implies, general, and apply only to any contract of the Council to or in which they are applied or incorporated by express provision in the contract deed. It would be open to the parties to apply the general conditions in whole or in part and with or without modification as expressed in the contract deed. It is also open to them to provide that the general conditions shall only apply to the extent that they are not inconsistent with the contract deed. That is what has been done here. The question now arises: to what extent is the definition of "engineer" contained in general condition 1 (i) inconsistent with the interpretation of "the engineer" in cl. 1 of the deed? The interpretation in the deed-"(herein referred to as 'the engineer')" *prima facie* refers only to the deed; but cl. 4 of the deed provides that the attached documents (which include general condition 1) shall except where the same are varied by or are inconsistent with these presents form and be deemed to be part of the contract "as if the same were repeated herein categorically". It is arguable that condition 1 (i) is thus imported into the deed and that that part of it which extends the meaning of the term "engineer" to include the representative of the engineer and the deputy of such representative must be discarded throughout the contract documents as being inconsistent with the meaning ascribed to "the engineer" by the deed. If possible, however, effect must be given to every part of a written contract and it must, therefore, be considered whether there is any way of reconciling these two interpretations. It may be that it would be possible to apply the extended definition of "engineer" contained in condition No. 1 (i) to matters not expressly provided for in the deed itself where its application would not produce inconsistency with the provisions of the deed; but, however that may be, it is clear that in any express provision of the deed itself, the expression "the engineer" must be given the meaning assigned to it by the deed, namely, "the city engineer for the time being of the Council" and not the extended meaning provided by condition 1 (i) of the general conditions. The matter is important because, as already noted, there is a provision in cl. 2 of the deed which expressly enjoins that the contractors shall not

> "make any deviation from any provisions of this contract without the previous consent in writing of the engineer".

That means, by the interpretation in the deed itself, the previous consent in writing of the city engineer for the time being of the Council, and does not include the consent, either oral or in writing, of his representative or his representative's deputy.

It will be noted that "approved" and "directed" are both interpreted to require writing by the engineer. If the general conditions stood alone, direction or approval in writing by the city engineer's representative or deputy would be enough in all cases, but (as already pointed out) that extension of meaning is negatived by the express provision of the deed in certain matters including deviations from the provisions of the contract.

Condition 2 (i) of the general conditions is as follows:

> "2 (i). The contractor shall at his own risk and cost execute and perform the works described in the contract agreement and detailed in the specification and drawings provided and supplied to the contractor for the purpose of the works and completely finish the said works in a

> good and workmanlike manner with the best materials and workmanship and with the utmost expedition, in accordance with the said contract agreement, specification and drawings, which shall have been signed by the contractor and the engineer, and in accordance with such further drawings, details, instructions, directions and explanations as may from time to time be given by the engineer."

It will be noted that there is here a specific requirement (incorporated in the contract by cl. 3 of the deed) that the contractor will execute and perform the works "in a good and workmanlike manner with the best materials and workmanship". There is also a provision for further drawings, instructions, etc., to be given by the engineer. Construing this latter provision with cl. 2 of the deed and general condition 1 (i), the result seems to be that the engineer or his representative or the deputy of his representative could give written or oral details, instructions and explanations, or written directions, or drawings, as to what was required under the contract, and, perhaps, as to matters upon which the contract is silent; but that if alterations in, or additions to, or omissions from the specified works or alterations in the kind or quality of the specified materials, or other deviations from any of the provisions of the contract were desired by either side, a written notice or written consent as the case might be, from the city engineer himself would be requisite. Put more shortly, I think the effect is that the city engineer's representative or representative's deputy could illustrate, explain, instruct or direct (writing being required for a "direction"), within the limits of the contract documents (and, no doubt, there is some room for flexibility here) and where the contract documents are silent; but that if alteration, variation or deviation from the contract were desired, the written direction or written consent of the city engineer himself would be necessary. There is nothing unreasonable in such a provision. The reasons for it are plain. The benefit for the contractor has already been pointed out. On the other hand, the Council thereby give notice that they do not bind themselves to accept departures from the contract requirements which may be orally consented to by some complacent representative of the city engineer or the deputy of such representative, or, indeed, by the city engineer himself otherwise than in writing. So far as the representatives of the engineer are concerned, this is a proper precaution on the part of a body charged with the disposal of public funds. As regards the city engineer himself, it is obvious that where the duration of contracts extends over months or years, if the city engineer is absent on leave or has been replaced, the question of whether he has or has not consented can be readily and cheaply established only if written consents are required. But it is unnecessary to speculate as to the object of the provisions and whether they are reasonable or unreasonable. My duty is to construe the contract and the material point is that the authority of the architect (and indeed, of the city engineer) is limited and does not include power to approve orally departures from the specification. A fortiori for the clerk of works.

Condition 3, so far as relevant, reads as follows:

> "The said works shall be executed under the direction and to the entire satisfaction in all respects of the engineer, who shall at all times have access to the works . . ."

The effect of this will be referred to later.

Condition 7 (iv) reads:

> "When the works have been completely executed according to the provisions of the contract and to the satisfaction of the engineer, the date of such completion shall be certified by him, and such date shall be the date

of commencement of such period of maintenance as may be provided by the contract."

Condition 9 (i) reads:

> "All materials and workmanship shall be the best of their respective kinds and shall be provided by the contractor, except as may be otherwise particularly provided by the specification or directed by the engineer, and the contractor shall, upon the request of the engineer, furnish him with proof that the materials are such as are specified. The engineer shall at all times have power to order the removal of any materials brought on the site which, in his opinion, are not in accordance with the specification or with his instructions, the substitution of proper materials and the removal and the proper re-execution of any work executed with materials or workmanship not in accordance with the specification and drawings or instructions, and the contractor shall forthwith carry out such order at his own cost."

Again there is a stipulation that the best materials and workmanship are required.

Paragraphs (ii), (iii) and (iv) of condition 9 read:

> "9. (ii) Any defect which may appear, either of material or of workmanship, during the period of maintenance provided by the contract, shall be made good by the contractor at his own expense, as and when directed.
>
> "(iii) If the contractor shall fail to carry out any such order, as by the preceding sub-clauses provided within such reasonable time as may be specified in the order, the materials or work so affected may, at the option of the engineer be made good by him in such manner as he may think fit, in which case the cost thereby incurred shall, upon the written certificate of the engineer, be recoverable by the City Council as a liquidated demand in money.
>
> "(iv) If any defect be such that, in the opinion of the engineer, it shall be impracticable or inconvenient to remedy the same, he shall ascertain the diminution in the value of the works due to the existence of such defect and deduct the amount of such diminution from the sum remaining to be paid to the contractor, or failing such remainder, it shall be recoverable as liquidated demand in money."

The last fourteen words of para. (iv) are interesting. Under para. 15 of the first part of the specification, which will presently be noticed, the contractor is only to receive ninety-five per cent. of the value of the work properly executed on completion and taking over by the Council and remaining five per cent. is to be retained during the six months' period of maintenance provided for in para. 14 on the same page of the specification and is, on the termination of that period, to be paid to the contractor. Therefore, under this contract, there would be a "sum remaining to be paid to the contractor" until the expiry of the period of maintenance. Yet condition 9 (iv) provides that "failing such remainder" the amount may be recoverable as a liquidated demand in money. It is possible that the five per cent. might have been exhausted in meeting claims for defects previously discovered; but this provision does seem to indicate that it was contemplated that sums might be recoverable for defects after the expiration of the period of maintenance.

General condition No. 16 reads:

> "16. Payment shall be made to the contractor by instalments in accordance with the provisions of the specification, under the certificates therein stipulated to be issued by the engineer to the contractor.

> "No certificate so issued by the engineer shall of itself be considered conclusive evidence as to the sufficiency of any work or materials to which it relates so as to relieve the contractor from his liability to execute the works in all respects in accordance with the terms and upon and subject to the conditions of this agreement or from his liability to make good all defects as provided thereby."

It should be noted that the second paragraph of this condition refers to a certificate "so issued", i.e. to payment certificates issued under para. 15 of the specification (which will presently be referred to) and not to certificates certifying the date of completion under condition 7 (iv), supra. Thus, there is express provision that no payment certificate shall be conclusive; but there is no such express provision regarding a certificate given under condition 7 (iv).

General condition No. 17 reads:

> "17. (i) The engineer may at any time during the progress of the works, by order in writing under his hand, make or cause to be made any variations from the original specification and drawings by way of addition or omission or otherwise deviating therefrom, and the said works shall be executed according to the said variations or deviations under his direction and to his satisfaction, as if the same had been included in the said original specification and drawings; and any work or materials which shall be ordered not to be done, or used, shall be omitted and shall not be used by the contractor."

Again, construing this with cl. 2 of the deed, a variation or deviation requires a written direction from the city engineer himself.

Condition No. 23, paras. (i) to (iv) read as follows:

> "23. (i) In case at any time during the progress of the works–
>
> (*a*) any unnecessary delay shall occur in the carrying out of the same through some default of the contractor; or
>
> (*b*) the contractor shall not carry out the said works to the satisfaction of the engineer; or
>
> (*c*) the contractor shall fail to comply with the directions given by the engineer; or
>
> (*d*) the contractor shall at any time neglect or omit to pull down or remove any work or materials which the engineer shall have certified in writing to be defective or not according to the contract
>
> then and in any such case, the engineer shall give written notice to the contractor to proceed with the said works or to remedy such default or defect to the satisfaction of the engineer.
>
> "(ii) If the contractor shall–
>
> (*a*) fail to comply with the instructions given in such written notice to the satisfaction of the engineer, within six days after such notice shall have been given
>
>
>
> then, and in any such case, the engineer shall be at liberty, without avoiding the contract, to take the said works wholly or partially out of the hands of the contractor and to enter upon and take possession of all materials, plant, tools, implements and things on or about the said works . . .
>
> "(iii) If the engineer shall exercise the powers above described, he may complete the works himself or may engage any other person to complete the works and exclude the contractor . . ."

It seems that the words in sub-para. (*d*) of para. (i) "then and in any such case" to the end of the sub-paragraph should apply to the whole of para. (i) and not only to sub-para. (*d*). Nothing, however, turns upon this.

Condition No. 26 (i) is an arbitration clause and reads:

> "26. (i) If any dispute shall arise between the engineer and the contractor as to anything contained in or incidental to the contract otherwise than such matters or things hereinbefore left to the decision or determination of the engineer, every such dispute shall at the instance of either party, be referred to arbitration and unless the engineer, and the contractor concur in the appointment of a single arbitrator, the reference shall be to two arbitrators and every such reference shall be deemed a submission within the meaning of the Arbitration Ordinance, 1913, and any Ordinance in amendment thereof or in substitution therefor, and shall be subject to the provision of such Ordinances."

It will be noted that this clause applies only

(*a*) to disputes between the engineer and the contractor; and

(*b*) to matters not left by the conditions to the decision or determination of the engineer.

Condition No. 27 reads:

> "27. If any clause, stipulation or provision contained in any contract document shall be wholly or partially repeated in the same document or contained in these conditions or in the contract agreement and also in the specification or on the drawings, the engineer may at his option, adopt either of such clauses, stipulations or provisions."

This would not, in my view, entitle the engineer to override the provisions of the deed. This condition would, under cl. 4 of the deed, only operate to the extent that it is not inconsistent with the deed.

The form of tender signed by the contractor begins with the following words:

> "I/We hereby undertake to supply all labour, plant, tools, materials, transport, etc., and to execute and perform in accordance with the attached drawings, specification, general conditions of contract and to the entire satisfaction of the city engineer, all works necessary to complete the buildings and erections enumerated below, together with all works pertaining thereto for the total sum stated below."

The heading of the specification is:

> "Specification of works required to be done and materials to be provided and used in the erection, completion and maintenance of the 161 dwelling units together with 18 ablution units and all works pertaining thereto, for the City Council of Nairobi, under the supervision of and to the entire satisfaction of the city engineer."

Paragraph 1 of part 1 of the specification reads:

> "1. Scope of Contract.–The contract is for the erection, completion and maintenance including the supply of all necessary labour and materials, of 'Doonholm Neighbourhood, Stage 1, Part C' [This should be 'Part B'] 'African Housing Scheme', as shown on and in accordance with the contract, drawings, this specification and the general conditions of contract and to the entire satisfaction of the city engineer."

Paragraph 2 reads:

> "2. Entirety of Contract.–Any details of construction which are fairly and obviously intended and which may not be definitely referred to

in the specification and/or drawings, but which are usual in sound building construction practice and essential to the works, are to be considered as included in the contract."

Paragraphs 14, 15 and 17 of part 1 of the specification read:

"14. Period of Maintenance.–The period of maintenance of any dwelling and/or ablution blocks shall be six months after the date of completion of the block as certified by the city engineer under cl. 7 of the general conditions.

"15. Terms of Payment.–Payments will be made on certificates issued by the city engineer at his discretion.

"Interim payments shall not exceed ninety per cent. of the value of the work properly executed. When the work has been satisfactorily completed and taken over by the council, the contractor shall be entitled to a certificate for ninety-five per cent. of the value of the work so executed. The remaining five per cent. shall be paid to the contractor at the termination of the period of maintenance as laid down in cl. 13 hereof.

"The value of any materials which it is intended to use in the work and which are unfixed will not be included in any interim payment certificate."

"17. Cash Deposit.–The contractor is required to deposit with the Council the sum of Shs. 50,000/- as surety for the due performance of the contract. This sum must be deposited when the contract is signed and will be refunded when the final certificate is issued by the city engineer."

Paragraphs 23 and 25 read as follows:

"23. Excavation.–The whole area covered by the buildings, plus the extra width and length necessitated by the excavation to foundations shall be excavated down to rock or murram suitable for foundations and the black cotton soil resulting from the excavation shall be entirely removed as specified below. The excavated area shall be entirely free of all black cotton soil before foundation works or filling proceeds.

"The contractor is to allow in his tender for the excavations and footings being carried down to a depth over any building to allow four courses of stonework between top of foundation concrete to underside of concrete floor slab. Any greater or less depths of foundation work found to be necessary shall form the subject of variation orders . . ."

"25. Bottoms of Trenches.–Trenches for foundations, etc., are to be excavated down to a solid hardrock or murram bottom as specified and levelled before laying concrete. All bottoms are to be approved by the city engineer before concrete is laid.'"

Paragraph 26 reads:

"26. Hardcore.–Fill in between walls under concrete ground floor slab with approved hard, dry, broken stone in layers not exceeding six inches up to underside of floor slab, and ram each layer."

Paragraph 6 of the part of the specification headed "Concretor" (p. 5) reads:

"6. Mixing.–All materials for concrete are to be well mixed by means of an approved mechanical mixer . . ."

Paragraphs 8 and 9, so far as material, read:

"8. Foundation Concrete.–Concrete in foundation is to be a 1: 3: 6 mix composed of cement, sand and aggregate mixed in the following proportions . . ."

> "9. Concrete in Floors, etc.–Concrete in floors, channels, drains, troughs, etc., to be a 1: 3: 6 mix as specified above and consolidated to the thickness shown on the drawings."

There are some provisions in the specification requiring approval of the city engineer during the course of the works. For instance, para. 25 of part 1 quoted above requires that bottoms of trenches are to be approved by the city engineer before concrete is laid; and para. 15 of the part entitled "Mason" on p. 6 provides that samples of stone and dressing are to be submitted to the city engineer for approval (see also paras. 46 and 52). It will be observed that the term is "city engineer" and not "engineer" as defined in general condition (i) of (1) and that "approval" under general condition 1 (ii) means approval in writing.

The above are, I think, all the relevant provisions of the contract documents and it will be convenient now to consider the learned judge's findings in respect of each of the issues set out above and the objections to such findings raised on the appeal.

As to issue No. 1, it was argued on behalf of the Council in the court below, as regards the eleven blocks taken over, that the contractor's claim was premature because no certificate for payment of the five per cent. remaining due to the contractor had been issued. I do not agree. Nothing in the contract requires the issue of a further certificate after the issue of the certificate entitling the contractor to ninety-five per cent. of the value of the work. Moreover, I agree with the learned judge that the letters of acceptance by the chief engineer operated as certificates of completion and caused the maintenance period to commence. Neither do I think that the contractor's claim was premature in relation to the six blocks not taken over. The Council had apparently required him to carry out further remedial work which he refused or neglected to do and left the site. The Council then proceeded to carry out the work and the engineer declined to certify for, and the Council declined to pay, the balance of ten per cent. which the contractor said was due to him on the contract. I am not convinced that the Council committed any breach of condition 23 as found by the learned judge; but once the dispute had broken out and the chief engineer had declined to issue further payment certificates in respect of the six blocks to which the contractor felt himself entitled, I think that the contractor was justified in bringing a suit. I would answer issue 1 in the negative.

As to issue No. 2 the learned judge found that the contractor's claim was not barred by limitation and there is no appeal against that finding.

As to issue No. 4, I do not think that if the contractor is otherwise entitled to the sum claimed or any part of it, the absence of a final certificate (assuming that by this is meant a certificate, under cl. 15 of the specification, for payment of ninety-five per cent. of the value of the work done) would preclude him from claiming. He could ask for arbitration or bring a suit to establish his right to a certificate and to payment. The learned judge answered this issue in the negative and I agree, though not for precisely the same reasons.

It will be convenient next to deal with issues Nos. 3, 5 and 6.

The learned judge, having reviewed the evidence, answered issue No. 3 as follows. He applied the principle stated in *Dakin* (*H.*) *& Co. Ltd. v. Lee* (4), [1916] 1 K.B. 566, and found:

> "Issue No. 3. I find that the works have been substantially completed in accordance with the contract, with some defects in respect of which the Council is entitled to a reduction in the amount recoverable on the contract."

Mr. Stewart Brown, for the appellant, submitted that while the principle of *Dakin v. Lee* (4) applies to lump-sum contracts where there is no provision for

retention monies, it has no application to a contract where payment is to be made by instalments and retention money is only payable on perfect completion. *Dakin v. Lee* (4) was a case of a lump sum contract; it was there argued that, as the contractor had not entirely completed the contract, he was not entitled to recover anything. It was held that he had substantially completed the contract and could recover for his services. But *Dakin v. Lee* (4) was not a case where provision was made in the contract for retention money. In *Hoenig v. Isaacs* (5), [1952] 2 All E.R. 176, Denning, L.J., said at p. 180:

> "This case raises a familiar question: Was entire performance a condition precedent to payment? That depends on the true construction of the contract . . .
>
> "In determining this issue the first question is whether, on the true construction of the contract, entire performance was a condition precedent to payment. It was a lump sum contract, but that does not mean that entire performance was a condition precedent to payment. When a contract provides for a specific sum to be paid on completion of specified work, the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions. The promise to complete the work is, therefore, construed as a term of the contract, but not as a condition. It is not every breach of that term which absolves the employer from his promise to pay the price, but only a breach which goes to the root of the contract, such as an abandonment of the work when it is only half done. Unless the breach does go to the root of the matter, the employer cannot resist payment of the price. He must pay it and bring a cross-claim for the defects and omissions, or, alternatively, set them up in diminution of the price. The measure is the amount which the work is worth less by reason of the defects and omissions, and is usually calculated by the cost of making them good: see *Mondel v. Steel; H. Dakin & Co. Ltd. v. Lee* and the notes to *Cutter v. Powell* in Smith's Leading Cases (13th Edn.), Vol. 2, pp. 19-21. It is, of course, always open to the parties by express words to make entire performance a condition precedent. A familiar instance is when the contract provides for progress payments to be made as the work proceeds, but for retention money to be held until completion. Then entire performance is usually a condition precedent to payment of the retention money, but not, of course, to the progress payments. The contractor is entitled to payment pro rata as the work proceeds, less a deduction for retention money. But he is not entitled to the retention money until the work is entirely finished without defects or omissions."

Keating in his work on Building Contracts at p. 34 summarises the position as follows:

> "Substantial Completion. In the ordinary lump sum contract the employer cannot refuse to pay the contractor merely because there are a few defects and omissions. If there is a substantial completion he must pay the contract price subject to a deduction by way of set-off or counterclaim for the defects.
>
> "Entire Completion. The parties may if they choose by clear language show that they intend that the contractor should be entitled to nothing until he has completed the contract in every detail, or that he should not be entitled to the retention money until he has so completed the contract.
>
> "Non-Completion. If the contractor fails to complete, either substantially in the ordinary case, or in every detail in the special case referred to in the last paragraph, he is not entitled to anything unless he can show either–

(i) A contractual right to unpaid instalments, or

(ii) Prevention of completion by employer, or

(iii) Implied promise to pay for the work done by way of waiver or acceptance, or

(iv) Impossibility or frustration."

Paragraph 15 of the specification in the present case provides that payments will be made on certificates issued by the chief engineer at his discretion: interim payments are not to exceed ninety per cent. and

> "When the work has been satisfactorily completed and taken over by the Council, the contractor shall be entitled to a certificate for ninety-five per cent. of the value of the work so executed",

and after the expiration of the maintenance period to the remaining five per cent. This seems to me to be clear language to the effect that payment of the retention money depends upon (*a*) satisfactory completion of the work and (*b*) its taking over by the Council. As regards the six blocks, the work has been held not to have been satisfactorily completed in all respects and the Council has not taken them over. Accordingly, the contractor is not entitled to payment of the retention money in respect of those blocks unless he has shown one of the matters mentioned under (i) to (iv) above, e.g. waiver, or that the refusal to take over the six blocks was unjustified. *Prima facie* he would be entitled to the retention money in respect of the eleven blocks which have been taken over subject to any right which the Council may have to show that the work was not, in fact, satisfactorily completed and to sue for defects notwithstanding acceptance of those blocks. This is discussed below.

As to issue 3, then, I accept the learned judge's finding of fact that the works have been substantially completed in accordance with the contract, with some defects; but, with respect, I do not think that the principle stated in *Dakin v. Lee* (4) applies to the retention money in this case. The retention money is only payable on satisfactory completion, on entire performance, and substantial completion is not enough.

As to issue 5, the learned judge found:

> "Issue 5. I find that the contractor has–
>
> (*a*) failed to maintain the specified mix for mortar and concrete in a proportion of the mortar and concrete used, or that the mix was not properly mixed or laid, the result in either case being defective mortar and concrete;
>
> (*b*) failed in certain other comparatively minor details to comply strictly with specification, e.g. hoop-iron reinforcement; bitumen damp course; fixing of door frames;
>
> (*c*) failed to comply strictly with a number of other specifications as detailed earlier in this judgment, but that in each of these cases the variations were either expressly directed by or else known to and accepted by the architect or clerk of works, acting for the engineer".

I accept these findings. They will be referred to later.

As to issue 6, the learned judge found:

> "Issue 6. I find that the acceptance of work by the engineer or architect on his behalf with express knowledge of variations from the terms of the specification and the issue of certificates in respect of such work amounts to a waiver by the engineer as agent of the Council of any breach of contract that might be constituted by such variations."

The question (involved in issue No. 6) of the extent to which the Council is bound by acceptance of the work by the city engineer or architect on his behalf, the architect having actual knowledge of deviations from the terms of the general conditions and the specification, is probably the most important question in the case and it will be desirable to consider it now. It involves two subsidiary questions: (i) whether the city engineer or the architect had authority actual or ostensible, by oral acceptance of inferior materials and work, to waive the due performance of the contract; and (ii) whether the issue by the city engineer of letters of acceptance and certificates for payment of ninety-five per cent. of the value of the work in respect of the eleven blocks, Mr. Tanner and perhaps the city engineer having notice of the defects, was conclusive against the Council and prevented them from subsequently alleging and claiming for defects.

The learned judge dealt with these matters as follows. After setting out the provisions of the contract documents which he considered relevant, he said:

> "It is, I think, clear from these provisions and from the contract documents as a whole that the general control of the contract on behalf of the Council was in the hands of the city engineer. The city engineer could order variation and extras. The work was to be performed to the satisfaction of the engineer. The engineer was to issue certificates for payments. From the general tenor of the contract documents I think there can be no doubt that the intention was that the city engineer should be the agent of the Council for the purposes of this contract, and, in fact, all dealings between the contractor and the Council were conducted on the Council's side by the city engineer or his subordinates."

I respectfully agree, except that the work was to be done to the specified standards with the specified materials and to the satisfaction of the engineer. This will be referred to later. It has also been noted that the authority of the engineer to demand or sanction departures from the contract which the Council had made was limited to written notices or to written consents.

The learned judge continues:

> "Subordinated to the city engineer were the architect and the clerk of works. It is not easy to define their precise authority, particularly that of the architect, under the contract documents. It was conceded that the architect was in fact duly authorised to represent the engineer under cl. 1 (i) of the general conditions, and the general conditions authorise the 'engineer' as therein defined to give directions in writing for extras and variations. On the other hand, cl. 2 of the contract requires the extras and variations to be authorised by the city engineer himself, and, by virtue of cl. 4 of the contract, this provision must prevail over the provisions set out in the general conditions. I conclude that under the contract documents authority to order extras or permit variations is limited to the city engineer personally. And in fact the only variation orders issued–exhibits 18, 19 and 20–were signed by the city engineer himself. On the other hand I am satisfied that the architect on behalf of the engineer had authority under the contract to approve work and give instructions and explanations within the scope of the specifications. The contract documents do not provide that 'instructions' or 'explanations' are to be in writing, though it is perhaps difficult to see what the difference is between an 'instruction' and a 'direction'."

The learned judge then reviewed the position of the clerk of works and said that any authority that he might have had on behalf of the engineer was very limited. He said:

> "In the case of Mr. Stone it would appear that Mr. Tanner deputed him to see that work done was done up to the standard set by Mr. Tanner, but in the circumstances of the case I do not think this is very material. The evidence which I have accepted is to the effect that Mr. Tanner saw and approved or directed certain standards of work, and that work seen by Mr. Stone though not by Mr. Tanner came up to those standards. It is therefore of little moment whether or not Mr. Stone was authorised to accept that work."

The learned judge proceeded to consider to what extent the interim payment certificates and letters of acceptance of certain blocks issued by the city engineer were conclusive. He said:

> "As I have stated, the contract documents expressly provide that the work is to be done to the satisfaction of the engineer. Considerable argument turned on whether and to what extent the certificates for interim payments and the acceptance of certain blocks were conclusive in this respect.
>
> "There is no provision in the contract documents that the certificates are to be conclusive. On the contrary cl. 16 of the general conditions provides that–
>
> > " 'No certificate so issued by the engineer shall of itself be considered conclusive evidence as to the sufficiency of any work materials to which it relates so as to relieve the contractor from his liability to execute the works in all respects in accordance with the terms and upon and subject to the conditions of this agreement or from his liability to make good all defects as provided thereby.'
>
> It is abundantly clear from this that no such certificate is conclusive as regards any latent defect–that is any defect of which the engineer was not aware. The position, however, appears to me to be vitally different where the engineer (or the architect acting on his behalf) was fully aware of the alleged defect and accepted it–in some cases directed it."

Counsel for the respondent did not seek to support the finding that condition 16 does not apply to patent defects and, with respect, I do not think it can be sustained. Condition 16 expressly applies to all defects. The distinction between latent and patent defects may be important in other contexts, but, with respect, not as regards condition 16.

The learned judge continued:

> "Clause 9 (i) enables the engineer during the course of the work to order the removal of materials and the re-execution of work not up to specification. Where the engineer has not made use of this clause but with full knowledge has accepted work as satisfactory and subsequently issues a certificate in respect of that work, I consider that the certificate must be held to be conclusive in so far as the engineer had knowledge of the quality of the work and materials; that the issue of the certificate operated as a waiver of strict compliance with the specification; and that the engineer cannot subsequently exercise the power conferred by the clause (Hudson on Building Contracts (7th Edn.), p. 239, citing Adcock's *Trustee v. Bridge R.D.C.* (1911), 75 J.P. 241."

The passage in Hudson to which the learned judge here refers merely says that where the architect has power to order the contractor to re-execute defective work or remove inferior materials during the progress of the works and has seen the works in the course of execution and the materials used, but has not ordered the re-execution of the work or the removal of the materials, he can

no longer exercise the power when the work is completed. This refers to the power of an architect to order re-execution of work during progress of the work and not, with respect, to the right of the building owner to sue for defective work. It seems that the learned judge did not have the report of *Adcock's* case (6) ((1911), 75 J.P. 241) before him (which, by courtesy of Mr. Stewart Brown, I have been able to borrow). If he had had this, it would, I think, have been clear to him that the fact that the architect does not act during progress of the work under a clause empowering him to order re-execution of bad work does not prejudice the other remedies of the building owner. The learned judge continued:

> "It was argued, relying on *Robins v. Goddard*, [1905] 1 K.B. 294, that by virtue of the arbitration clause the certificate could not be held to be conclusive. The arbitration clause does not expressly provide that the arbitrator shall have power to open up and review any certificate, as was the case of the contract considered in *Robins v. Goddard*. I would, however, accept the proposition that by virtue of the arbitration clause the certificates issued are not conclusive, but I do not think this adds anything to the express provisions of cl. 16 of the general conditions.
>
> "The basis of my finding is that under this contract the engineer was the agent of the Council for the purpose, *inter alia*, of passing the work as satisfactory. There is some reason to believe from the evidence that the city engineer, by reason of personal visits to the site, must have been aware from his own observation of the general standard of the work of the contractor; but in any case, as I have said, it has been conceded that the architect was duly authorised under cl. 1 (i) of the general conditions to represent the engineer and I consider that the knowledge of the architect must in the circumstances be regarded as the knowledge of the engineer; and acceptance of work by an owner (or his agent authorised in that behalf) with knowledge of defects does disentitle the owner from claiming for those defects. Halsbury (3rd Edn.), Vol. 3, p. 454, and *Bombay Furniture Works v. Gross*, E.A. Civil Appeal No. 94 of 1955 (unreported)."

With great respect, I do not think that the statement of the learned judge that

> "acceptance of work by an owner (or his agent authorised in that behalf) does disentitle the owner from claiming for those defects"

is a correct statement of the law or is supported by the authorities referred to by him. Acceptance with knowledge is not enough. There must be actual waiver as well. Paragraph 867, p. 454, of Halsbury's Laws of England (3rd Edn.), Vol. III, which I think is a correct statement of the law and borne out by the authorities there cited, reads:

> "**Effect of acceptance with knowledge of defects.**–Unless it can be shown that the employer has not only accepted the work with a knowledge of the defects, but also has actually waived the condition as to performance in accordance with the contract, the acceptance will not prevent the employer from showing that the work was incompletely performed or was not in accordance with the contract.
>
> "Knowledge of the defects at the time the work was done is not sufficient to imply acquiescence in them so as to preclude the employer from exercising any rights he may have in respect of the incomplete performance of the contract: *Whitaker v. Dunn* (1887), 3 T.L.R. 602.
>
> "Where the work, however, has been done to the approval of the employer if he has expressly or impliedly notified his approval he cannot go

> back on it and recover for patent defects–*Bateman* (*Lord*) *v. Thompson* (1875), 2 Hudson's B.C. (4th Edn.), 36–and it is submitted that in such a case payment by the employer might be held to imply approval so as to prevent him from bringing an action against the contractor for damages on account of the defective work.
>
> "Where the work is to be done to the approval of a third person such as an architect or engineer, and the expression of that person's opinion is conclusive, then, in the absence of fraud or collusion, such approval prevents the employer from having any right of action on account of defects, whether latent or patent. If the expression of the third person's opinion is not a condition precedent or is not final, for instance where it is subject to arbitration, the expression of that person's approval does not prevent the employer setting up a claim on account of defects."

In the present case there was no express requirement that the work had to be done to the approval of the employer: it had to be done to certain specified standards (general condition No. 2 (i)) and to the satisfaction of the engineer (general condition No. 3). I think that the city engineer was the agent of the Council to accept the work on behalf of the Council (though an agent with limited authority, in that acceptance of any work or materials which diverged from contract requirements must be in writing); but that in the matter of expressing satisfaction or dissatisfaction he was bound to act fairly between the parties. In exercising that function the city engineer had quasi-arbitral duties to perform and to that extent was a third party. There was no express provision in the contract that the city engineer's opinion was to be final. As to payment, there was express provision that no payment certificate issued by the engineer was of itself to be considered conclusive as to the sufficiency of work or materials.

Bombay Furniture Works v. Gross (7) (E.A.C.A. Civil Appeal No. 94 of 1955 (unreported)) cited by the learned judge is not, with respect, an authority for the proposition that mere acceptance of work by an agent authorised in that behalf with knowledge of defects disentitles the owner from claiming for those defects. In that case the agent had authority, or was held out by the building owner as having authority, to make the building contract and to pass the work as satisfactory. There was no provision, such as there is in the present case, requiring the work to be done to certain standards and limiting the authority of the agent to permit deviations from the provisions of the contract by requiring his consent to such deviation in writing or providing for a maintenance period and retention money. The grounds for the decision of this court in the *Bombay Furniture* case (7) were not merely that the agent had power to accept the work, but that he had power to waive complete performance of the contract and had done so.

> "Acceptance will not prevent the owner from showing that the work is incomplete or badly done . . ."

Hudson (7th Edn.), p. 236, citing *Dakin* (*H.*) *& Co. Ltd. v. Lee* (4).

As has been said above, this contract does not merely require that the work is to be done to the satisfaction of the city engineer (general condition 3). It also requires that the work shall be executed and performed in a good and workmanlike manner with the best materials and workmanship in accordance with the contract agreement, the specification, etc. (general condition No. 2 (i)). The appellant contends that on the face of the contract there is a dual obligation. It is important to consider whether there is a dual obligation imposed by independent covenants or whether the description of the standards is mere surplusage and the certificate of, or acceptance by, the engineer is conclusive as to the quality. On this point there is some conflict of authority. Counsel

for the appellant contends that the undertaking to execute the works in a good and workmanlike manner with the specified materials is the primary obligation and that the obligation to satisfy the engineer is something added to, and not in substitution for, the primary obligation, something super-added for the further protection of the Council. He relies on *Petrofina S.A. of Brussels v. Compagna Italiana Transporto Olii Minerali of Genoa* (8) (1937), 53 T.L.R. 223, and (on appeal) 650; and *Newton Abbot Develcpment Co. v. Stockman Bros*. (9) (1931), 47 T.L.R. 616. In the *Petrofina* case (8) the appellants had chartered a steamer from the respondent shipowners for the carriage of a cargo of oil. The charter-party contained a clause to the effect that the steamer was in every way fitted for the voyage and a clause (cl. 16) providing that the captain was bound to keep the tanks pipes and pumps of the steamer always clean. It also contained a clause:

> "(27) Steamer to clean for the cargo in question to satisfaction of charterer's inspector."

The inspection was carried out and the ship accepted by the charterers as fit to load. The oil having become soiled on the voyage, the charterers alleged that the discolouration was due to the condition of the ship's tanks. The owners contended that their liability in the charter-party was to clean the tanks to the satisfaction of the charterers which they did, and that they were protected by the terms of the charter-party from liability for any such discolouration. Singleton, J., held that cl. 27 was a clause which was super-added for the purpose of the charterers: it did not cut down the express warranty of seaworthiness contained in the earlier clauses or relieve the ship from responsibility: if the shipowners desired to exclude themselves from the express warranty, they should have used terms much more express, pertinent and apposite than they had done. On appeal, the judgment of Singleton, J., was upheld. The Master of the Rolls said (53 T.L.R. at p. 653):

> "So far, on this assumption of fact, there can be no question as to the liability of the shipowners. But Mr. Devlin has argued that cl. 27 has the effect of excluding this fundamental obligation and substituting for it an obligation merely to clean–that means to clean the holds before loading the cargo in question–to the satisfaction of the charterers' inspector. His argument is that that is a clause which is inserted for the owners' benefit, in this sense, that it cuts down what would otherwise be their general obligation to have the holds fit to receive the cargo at the time when they are loading. I find it impossible to accept that contention.
>
> "We are dealing with a contract of affreightment, and it is necessary to bear in mind the well-established view which has been so often stated, that if it is sought to effect a reduction of the over-riding obligation to provide a seaworthy ship, whether that is express or implied for this purpose does not matter, by other express terms of the charter-party or contract of affreightment, that result can only be achieved if perfectly clear, effective, and precise words are used expressly stating that limitation. I think that the language of cl. 27 here is not sufficient. To make it sufficient I think it would need to be amplified in something like this manner. It would have to run: 'Steamer to clean for the cargo in question to the satisfaction of the charterers' inspector and if that is done that shall be treated as fulfilment of the obligations under cl. 1 and cl. 16.' Clause 27 does not say so. I think, on the contrary, it has a much more limited effect. It gives, as I think, an added right to the charterers. They are entitled before they load the cargo to have an inspection, and to have a certificate, or whatever the form of the evidence is, that their inspector is satisfied. But, without express words, the satisfaction of the inspector cannot be relied on by

> the owners as a discharge and fulfilment of their obligations. From the point of view of the charterers this super-added right is something which it is worth their while to have. It gives them some sort of guarantee against their being involved in questions such as this, where, unfortunately, notwithstanding the inspection, there had been a failure to provide tanks sufficiently clean and in proper condition."

Romer, L.J., said at p. 654:

> "It is inherent in construction to give effect, where it is possible, to every part of a written document, nonetheless because the document happens to be a charter-party. In the present case, therefore, we must give effect both to cl. 16 and to cl. 27 of this charter-party, if it be possible. In my opinion, it is possible. In cl. 16 the owner undertakes to keep the tanks, pipes and pumps of the steamer always clean. In construing cl. 27 you must do so with the knowledge of the fact that by cl. 16 that obligation has been undertaken in plain terms by the owner. That being so, it is plain that the true construction of cl. 27 is this–that the owner is saying: 'I have by cl. 16 undertaken in plain terms the obligation of keeping the tanks clean. Not only will I keep the tanks clean, but I will keep them clean to the satisfaction of the charterers' inspector.' The result is that the owner can only discharge his obligations in respect of cleaning under the charter-party by cleaning the tanks, keeping them clean, and doing so to the satisfaction of the charterers' inspector. If he keeps them clean, and does not obtain the approval of the charterers' inspector, he has not fulfilled his contract. Nor has he fulfilled his contract if he fails to keep them clean but the charterers' inspector has expressed his approval of the state of the tanks."

That was a case of a contract of affreightment, but the same principle has been applied to a building contract. In *Newton Abbot Development Co. Ltd. v. Stockman Bros.* (9) the defendants agreed to build eighteen houses for the plaintiffs. The houses were to be built in accordance with plans and specifications attached, and the work was to be carried out to the satisfaction of the surveyor and the sanitary inspector of the Newton Abbot Urban District Council. The houses were completed to their satisfaction and sold to purchasers. It was argued that an express agreement relating to cement and the implied agreement that the work should be properly done had been broken. Roche, J., said (47 T.L.R. at p. 617):

> "It was contended that as the surveyor and the sanitary inspector had expressed satisfaction with the houses there was nothing more to be said. But there was nothing in the contract to say that their approval was to be final and conclusive, and he held that that provision in the contract was only a super-added protection."

There is an old case on a double obligation which may be in point: *Bird v. Smith* (10) (1848), 12 Q.B. 786; 116 E.R. 1065. In that case, on a contract for sale to the plaintiffs of iron rails in which it was provided that the rails were to be inspected and certified before delivery by an agent of the plaintiffs who was to be at liberty to approve and accept for the plaintiffs as he should think fit and certify as he should think fit, and that the rails were to be in quality equal to any rails made in Staffordshire, it was held that a plea that the rails had been inspected, certified and accepted in performance of the agreement was insufficient, as it dealt only with the provision for inspection and not with the warranty of quality. Denman, C.J., said (116 E.R. at p. 1068):

> ". . . each stipulation is in its terms distinct, and in its nature, as an absolute warranty for quality, may well be required in addition to a

provision for inspection and approval, to guard against defects which inspection cannot discover."

Mr. O'Donovan, for the respondent, dissented from the proposition that the provision requiring work to be done to the satisfaction of the engineer was only a super-added obligation. He contended that the satisfaction of the engineer was the required criterion and that if that had been obtained, it was conclusive. He relied principally on *Bateman* (*Lord*) *v. Thompson* (11) (1875), 2 Hudson on Building Contracts (4th Edn.) 36; and also on *Dunaberg Railway Co. v. Hopkins* (12) (1877), 36 L.T. 733.

It will be necessary to examine *Lord Bateman's* case (11) at some length. In that case a contract was entered into in the year 1856 for building work to be done by the defendant's firm on Lord Bateman's residence in Herefordshire. In the contract deed were, *inter alia*:

(B) a covenant by the contractors that they would

"... in a good and substantial and workmanlike manner and with the best materials of their several kinds (to be provided in part by the contractors and in part by Lord Bateman) ... but in every event and particular to the satisfaction in all respects of the architect and of the said Lord Bateman ... make, execute and complete the ... works described in the specification and drawings";

(C) a covenant by the contractors that they would carry out any alterations desired by Lord Bateman on the written instructions of the architect;

(E) a provision whereby it was agreed by the parties

"that the decision of the architect with respect ... to the completion of the said works or any portion thereof respectively and also with respect to every question which may arise concerning the construction or effect of the said specification, drawings, plans, designs, and instructions, or any of them, shall at all times be final and conclusive on the contractors";

(F) a provision requiring the contractors during the progress of the work or within twelve months thereafter upon notice in writing from the architect (which might be given notwithstanding any certificate previously given by him as to the due execution of the works) to take down and replace unsound work, and if the contractors failed to do so, a provision empowering Lord Bateman to take down and replace the work at the cost of the contractors.

(G) a proviso in the following terms:

"... if at any time within a period of twelve months from the date of the final certificate of the architect that all the works have been well and truly performed to his satisfaction ... and either before or after the contractors ... shall have received ... the sum of money hereinbefore contracted to be paid ... it shall appear that the contractors have used any unsound materials or have in any other way not performed the said works ... in a substantial, workmanlike and proper manner ... it shall be lawful for the said Lord Bateman ... notwithstanding ... any certificate which may have been given by the architect of the due completion of the said works ... to institute any action ... against the contractors ... for the damage which shall have been sustained in consequence of the use of any unsound materials by the contractors ..."

The works were completed and approved by Lord Bateman and the architect in 1861, and were paid for.

Much more than six years having elapsed and certain defects having appeared, due mainly to the use of unsuitable stone some of which had been sanctioned

by the architect and some not, Lord Bateman brought an action for damages against the contractors. It was found as facts that bad materials had been used and that there had been bad work on the part of the contractors, but it was held that, as both the architect and Lord Bateman had approved of them, the action failed.

The passage relied upon by Mr. O'Donovan is in the judgment of Lord Coleridge, C.J., in the Common Pleas Division–

> "The question is whether there was any breach of this contract. I am of opinion that even without the proviso, upon the true construction of this contract, no action lies. The contractor is to perform the work in a good, substantial and workmanlike manner, and with the best material of their several kinds, and to the satisfaction of the architect and Lord Bateman. That I think is the true construction of that contract. They are to be good, substantial, and workmanlike, and to his satisfaction–that is to say, he is to be satisfied that they are good, substantial and workmanlike materials and work. He was so satisfied, and within the terms of this contract both he and his architect, the architect by his certificate and Lord Bateman by his conduct, as a matter of fact, were satisfied within the words of the contract, and accordingly the covenant in this deed was in its term performed by the defendant, and having been performed by the defendant clearly no action lies upon it. I must say the matter is clear to my own mind upon the construction of the contract irrespective altogether of the proviso.
>
> "If there could be any doubt about it, it appears to me that it is taken away altogether by the proviso, because the proviso says if in spite of the certificate of the architect of the works having been well and duly performed, which I already assume has been given, and in spite of the works having been certified as having been completed, which I have already said has been certified as having been done, if in spite of that Lord Bateman within a year after the giving of the certificate, finds out such a thing as has been suggested by Mr. Matthews, although I did not find it stated in this case that there has been a conspiracy between the architect and the builder, he may set the certificate aside, and that if he finds there is a gross defect disclosed twelve months after the certificate has been given, that he may then bring his action."

Grove, J., inclined strongly to the construction that there was not a double covenant to supply the best materials and to satisfy the architect, but that the supply of the best materials was to be subordinated to the satisfaction of the architect and of Lord Bateman and that if after proper inspection they were satisfied, the covenant was to be taken as complied with; and he said that even if he were to take it otherwise, the proviso (*G*) when read with the covenant showed that the parties intended to limit any right against them to twelve months after the final certificate of the architect. Grove, J., relied heavily on that proviso on which, he said, that the decision of the case mainly depended, and also on the provision ("E" above) that the decision of the architect with respect to the state and condition and completion of the works should be final and conclusive on the contractors. He said:

> "Therefore I agree with my lord, although I do not think it is absolutely necessary to the decision of the case that the question of soundness or unsoundness is to be decided by the certificate of the architect, and that if it were not for this proviso there would not be an action for breach of covenant. I think on the true construction of the deed, taking it altogether, the plaintiff's right of action continues up to the end of the twelve months after the certificate of the architect has been given of the completion of the

> works, but that after that time the certificate is final and conclusive, therefore I think our judgment should be for the defendant."

Archibald, J., agreed that judgment must be for the defendant. He said:

> "Now the covenant of which the important part provides that the work is to be done in a good, substantial, and workmanlike manner, and with the best materials, goes on to specify that there are some materials to be provided by Lord Bateman and some to be provided by the contractor, but in every event and particular to the satisfaction in all respects of the architect and of the said Lord Bateman. I read that as meaning that this work is to be done in a good and workmanlike manner so as to satisfy Lord Bateman and the architect, and that is what the contractors have stipulated to do, and upon the covenant alone I confess and incline very strongly to the opinion that if that is done, and if that satisfaction is expressed in the way provided that that is a performance of the covenant on the part of the contractor, and that except for the proviso which comes afterwards with regard to the year, no action would be maintainable against him, but if there were any doubt as to whether that was the true construction it would be entirely disposed of, it seems to me, when we look at the other portion of the deed, and, as my brother Grove has already pointed out, the true mode of construing a document of this kind is to look at all the provisions of it and see how they bear upon each other, and to see what light each part reflects upon the rest."

He relied upon cl. (*E*) and the proviso (*G*) as throwing light on the intention of the parties.

I do not see how, upon the construction of the deed which was under consideration in *Lord Bateman's* case (11) the judgment could have been otherwise than for the defendant. But the provisions of the deed under consideration in *Lord Bateman's* case (11) were so different from the provisions of the contract documents in the present case that I cannot derive from it so much assistance as I could wish. In *Lord Bateman's* case (11) there was a provision that the decision of the architect with regard to completion of the works was to be final and conclusive on the contractors. It is true that this applied only to the contractors. So far as the owner was concerned, there was a proviso that Lord Bateman, notwithstanding any certificate by the architect of satisfactory completion, could within twelve months from the date of such certificate institute an action for damages for defects appearing within that time. As all the learned judges pointed out, there would have been no point whatever in that provision if Lord Bateman could institute an action for defects whether or not appearing within that time. These are very different from the provisions of the contract documents in our case. To my mind the only assistance to be derived from *Lord Bateman's* case (11) is that the learned judges who decided that case either held the view or inclined to the view that a covenant to construct in a good and workmanlike manner and with the best materials, but to the satisfaction of the architect and the building owner, was complied with if those persons were satisfied. Lord Coleridge would have held this view without the proviso. The proviso was what finally determined the other two learned judges. Whether it would have made any difference if the covenants had, as in our case, been independent, it is difficult to say.

The learned author of the article on building contracts in Halsbury (3rd Edn.), Vol. 3, p. 454, para. 867, quoted above cites *Bateman's* case (11) as applying to patent defects and the approval of the employer. But, with respect, it does not appear to me that all the defects in *Bateman's* case (11) were patent. (See para. 17 of the case stated.) I find Lord Coleridge's opinion in *Bateman's* case (11) and the opinion to which the other learned judges inclined as to the obligation being single and not double very difficult to reconcile with the

judgments of Singleton, J., and of the Court of Appeal in the *Petrofina* case (8) and of Roche, J., in the *Newton Abbot* case (9) quoted above. In the last resort each case must depend upon the construction of its own contract documents and the contract in *Bateman's* case (11) was very different from the one which I have to consider.

I do not think *Dunaberg and Witepsk Railway Co. Ltd. v. Hopkins Gilkes & Co. Ltd*. (12), on which Mr. O'Donovan relied, is of any assistance. In that case there was express provision that the decision of the engineer on any point of doubt or dispute should be final and binding on all parties. It was held that an action for damages for breach of contract could not be maintained, as the engineer had given a final certificate and the contract showed that the parties intended the final expression of the engineer's satisfaction with the entire contract to be conclusive. There is no such express provision in our contract.

A case which does seem to me to assist the respondent and which was not cited, is *Harvey v. Lawrence* (13) (1867), 15 L.T. 571. By a building contract, a builder agreed to repair a house with the best materials of their kind in a perfect and workmanlike manner according to the drawings and specifications, and to the satisfaction of the architect, the work to be done under the architect's directions. The architect certified his satisfaction of the completion of the works. It was held in an action by the builder against the owner of the house for money agreed to be paid by the latter, that no evidence could be received from the defendant that the work was not done according to the plans and specifications. Coleridge, Q.C. (as he then was), made the point that the words of the contract were

> "according to the drawings, specifications and directions, and to the full satisfaction"

of the owner or his architect and that the word "and" could not be rejected from the sentence. Bovill, C.J., however, did not deal with this argument: he decided purely on the fact that the works were to be carried out under the superintendence of the architect and said that that provision precluded the defendant from producing evidence of any variation from the specifications. Smith, J., said that the defendant's intention evidently was that the architect should direct the building, and that the work should be completed to the full satisfaction of himself or his architect. Halsbury (3rd Edn.), Vol. 3 at p. 465, cites this case as one of two authorities for the proposition:

> "Where the contract provides that work and materials shall be of some prescribed quality, and also that they shall be to the satisfaction of the architect, then, unless the covenants are independent, the description of quality is mere surplusage and the certificate of the architect is conclusive as to the quality."

The other authority cited is a Scottish case which is not available here. For what that is worth, the covenants in the present case are independent.

There seems, therefore, to be some conflict of authority on the question whether an obligation to complete work according to specified standard and to the satisfaction of the owner's agent is a dual obligation or merely a single obligation which is answered by proof of acceptance of the work by the agent. On this point, certainly where the covenants are independent, I prefer to follow the high and comparatively recent authority of the Court of Appeal in England in the *Petrofina* case (8). In particular, if I may respectfully so say, the words of Romer, L.J., quoted above seem to me to be sound law and of universal application. These words were spoken of a charter-party; but they are equally applicable to any other contract. The learned Lord Justice said that it is inherent in construction to give effect where possible to every part of a written document and he proceeded to hold that cl. 16 and cl. 27 of the charter-party

imposed separate obligations, and that the shipowner could only discharge his liability by keeping the tanks clean and by keeping them clean to the satisfaction of the inspector. Similarly, in the present contract effect must be given, if possible, both to general condition 2 (i) and to general condition 3 and I should not, unless forced to do so, treat general condition 2 (i) as surplusage. Under general condition 2 (i) the contractor assumed an express obligation to do the work in a good and workmanlike manner and with the best materials and workmanship; and I think that, as was held in the *Petrofina* case (8), that undertaking could only be curtailed by words much more "express, pertinent and apposite" than those contained in general condition 3. It is possible in the present case, as it was in the *Petrofina* case (8), to give effect to both provisions of the contract. In my opinion, the contractor could only discharge his obligations under the contract by doing the work to the specified standards with the specified materials and doing it to the satisfaction of the engineer. I think that he would fail to fulfil his contract if he failed to do work to the required standards notwithstanding that the engineer might have accepted the work. In the *Petrofina* case (8) and the *Newton Abbot* case (9) the defects were latent and not patent, but I do not think that this is material on the question whether the contract imposes a double or a single obligation.

I proceed now to consider whether the acceptance in writing and taking over by the Council by its agent for that purpose, the city engineer, of the eleven blocks is, as the respondents strongly contend, conclusive, so as to prevent the Council from setting up a claim for defects in respect of those blocks. The answer must depend upon the construction of the contract documents in this case. We have here a contract which:

(*a*) contains two clauses, the first requiring the contractor to complete the work to certain standards and the second requiring that the engineer shall be satisfied;

(*b*) contains no express provision making the satisfaction of the engineer or the acceptance of the works by him on completion final or conclusive;

(*c*) contains provisions (condition 7 (iv) and specification 15) to the effect that when the works have been executed according to the provisions of the contract and to the satisfaction of the engineer, the date of such completion shall be certified by the engineer, upon which date a six months' period of maintenance is to start and the contractor is to be entitled to a certificate for nine-five per cent. of the value of the work properly executed and the remaining five per cent. on the expiration of the maintenance period, but contains no provision for a final certificate or final acceptance at the expiration of the maintenance period;

(*d*) contains provisions (condition 9 (ii) and (iii)) requiring the contractor to make good, when directed, defects appearing during the maintenance period and in default empowering the engineer to make them good, thereby clearly indicating that there may be defects for which the contractor is to be liable after the acceptance and taking over of the buildings by the Council and the issue of the certificate for payment of ninety-five per cent., and, accordingly, that taking over by the Council is not conclusive as to the absence of defects for which the contractor is liable;

(*e*) contains no express provision limiting the ordinary right of the Council to sue for damages for bad materials or workmanship after the expiry of the maintenance period;

(*f*) contains no provision such as that in the *Bateman* case (11) expressly conferring on the building owner a right to sue limited to the maintenance period, thereby implying that there was no such right beyond that period;

(*g*) contains a provision (condition 9 (iv)) which appears to contemplate that claims in respect of defects may be made after the full amount due to the contractor has been paid on the expiry of the maintenance period;

(*h*) contains a provision (condition 16) to the effect that no payment certificate is of itself to be considered conclusive so as to relieve the contractor of his liability to make good all defects. A payment certificate for ninety-five per cent. is to be issued on satisfactory completion, and I find it very difficult to believe that the Council would have inserted an express provision to the effect that this should not relieve the contractor of liability for defects, if it was intended that he should have already been relieved, or be relieved from such liability by the letter of acceptance which would ordinarily precede or accompany the certificate for payment of ninety-five per cent.

I think that all these matters indicate that the letters of acceptance by the city engineer and the taking over by the Council of the eleven blocks were not conclusive so as to prevent the Council exercising any rights which they might have to sue for damages for defects arising from the sub-standard work or materials, notwithstanding that such defects might appear and suit might be brought after the expiration of the maintenance period, and, upon the construction of this contract, I so hold.

Neither, as Roche, J., said in the *Newton Abbot* case (9), would the clause which allowed the retention of part of the contract price for a certain time interfere with the right to claim damages for defects discovered after that time. Nor would condition 9 (ii) have this effect: *Robins v. Goddard* (14), [1905] 1 K.B. 294, 303. *Marsden U.D.C. v. Sharp* (15) (1931), 47 T.L.R. 549, is distinguishable as, in that case, the contract contained express words limiting claims to defects appearing within a five-year period.

Mr. Stewart Brown (if I understood him correctly on this point) submitted that waiver implied a new contract and that in the case of such corporations (e.g. the Council) as can only execute contracts pursuant to a resolution or by-law no parol or implied contract can be proved: the only binding form of new contract is one executed in pursuance of s. 41 (2) of the Municipalities Ordinance. I think that this, though rather technical, is correct: Halsbury (3rd Edn.), Vol. 3, p. 478. But this would not prevent a written or oral waiver by an agent not under seal binding a corporation, if the contract provided for this and the agent acted in accordance with the contract. In holding that the letters of acceptance by the engineer did not amount to waiver binding the Council, I have depended on the construction of the contract and not on this argument.

I have held that the letters of acceptance of the city engineer in respect of the eleven blocks were not final or conclusive or a waiver of the Council's right to sue for defects. Clearly, having regard to condition 16, the ninety-five per cent. payment certificates were not conclusive or a waiver. A fortiori the interim payment certificates issued in respect of the other six blocks were not conclusive or a waiver. I have also indicated my opinion that the architect and the clerk of works had no actual authority from the Council to accept orally from time to time sub-standard work and materials. The only authority under the contract documents to sanction deviations from the specified work and materials was that given to the city engineer himself and writing was required. He was a delegate and could not, I think, delegate that power; but if he could, he certainly

could not extend the authority so as to allow the architect or clerk of works to sanction orally what he, the engineer, could only sanction in writing. There is no evidence and no finding that the contract was ever varied in this respect or that the powers of the engineer or the architect were ever extended by the Council.

These findings deal with actual authority. The question of ostensible authority must now be considered. The learned judge has said that there was evidence that the standard was deliberately relaxed on account of difficulties arising from the emergency and anxiety that the work should not be delayed. The judge has not, I think, made a definite finding that they were relaxed by the Council or by the city engineer; but has found that they were relaxed orally by the architect, Mr. Tanner, and the clerk of works. In any event, the learned judge did not apply this to matters which amounted to variations from the specification. In regard to those he says:

> "The position is more difficult as regards work which amounts to a variation from the terms of the specification. This was permitted, or in some cases, directed, by the architect for the same reasons, but as I have said, under the contract variations were required to be in writing, and to be authorised by the city engineer personally. Nevertheless, in view of the conflict between the provisions of the contract and the general conditions, and of the fact that the general conduct of the contract was left in the hands of the architect, I consider that the architect was held out as having authority to waive strict compliance with details of the specifications, and that such waiver by the architect is therefore binding on the Council."

This passage the appellant strongly challenged. There is some conflict (resolved, however, by cl. 4 of the deed) between cl. 2 of the deed and general condition No. 1 as to the authority of the architect to direct or approve deviations from the provisions of the contract; but there is no conflict as to the provisions requiring a direction or approval involving any deviation from any of the provisions of the contract to be in writing, and, with respect, it is difficult to see how the fact that the general conduct of the contract was left in the hands of the architect would amount to a waiver of this express provision of the agreement between the parties. To leave the general conduct of the contract in the hands of the architect is in no way inconsistent with the provision requiring written permission of the city engineer for departures from the specification. It is true that the learned judge refers to "details" of the specification and it may well be that the architect had some discretion as to those; but it could hardly be suggested that this would extend, e.g. to authority to weaken seriously the cement or mortar mix or to sanction a deviation from the specification in respect of the hardcore filling which would inevitably cause settlement and cracking of the floors.

The section of the Indian Contract Act which in Kenya governs "holding out" and the ostensible authority of agents is s. 237:

> "237. When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority."

The question is whether the Council by its words or conduct induced the contractor to believe that the architect had authority orally to accept sub-standard work and materials. This is not the ordinary case where the third party is dealing with an agent only and has no, or little, knowledge of the scope of the agent's authority. This is a case of a contract between the contractor and the Council in which the limits of the agent's authority are in terms

laid down. The contractor had only to look at the contract to see that only the engineer himself had power to consent to deviations from any of the provisions of the contract, and, if there was any doubt about what this meant, there could be no doubt about the provision that neither the engineer himself, nor the architect, had power to approve work or materials otherwise than in writing. (Clause 2 of the deed and condition 1 (ii).) The contractor must be taken to have had actual notice of this limitation of the architect's authority. And, in fact, on three occasions when he was asked to deviate from the provisions of the contract and do extra work which would cost him money he applied for and obtained written variation orders. In Pollock and Mulla on the Indian Contract Act (6th Edn.) at p. 269 the learned authors say:

> "With regard to contracts and acts which are not actually authorised, the principal may be bound by them, on the principle of estoppel, if they are within the scope of the agent's ostensible authority; but in no case is he bound by any unauthorised act or transaction with respect to persons having notice that the actual authority is being exceeded."

The rule is the same in English law:

> "Where a principal, in conferring authority upon his agent to act on his behalf, imposes conditions or limitations on its exercise, no act done by the agent in excess of the conditional or limited authority is binding on the principal as regards such persons as have, or ought to have notice of such excess of authority . . ." Halsbury (3rd Edn.), Vol. 1, p. 209, para. 477.

Mr. O'Donovan founded an argument on s. 40 of the Municipalities Ordinance (which deals with the validity of acts of officers of the Council notwithstanding defects in appointment) and s. 49 (which empowers the Council from time to time to prescribe by resolution the duties of its officers). He said that the city engineer, the architect and clerk of works were all officers of the Council, the extent of their powers was a matter solely within the knowledge of the Council and there was no evidence of any limitation of their authority: he invoked the omnia praesumuntur rite esse acta maxim and argued that the contractor was justified in assuming that the architect and clerk of works had been given any authority which they purported to exercise. I disagree. There were the express provisions of cl. 2 of the deed and condition 1 (i) to show the limits of the authority of the architect and clerk of works and in face of this, the contractor was not entitled to assume without inquiry that they had some authority in excess of those limits. I cannot agree that the architect or clerk of works either had authority, or was held out as having authority, to waive orally departures from the provisions of the specification.

For all these reasons, I would answer issue No. 6 in the negative.

As to issue No. 7, the particulars of the alleged estoppel pleaded may be summarised as (*a*) inspection of the works; (*b*) approval and taking possession thereof after the contractor had been required to, and had done, repairs and alterations; (*c*) the issue of interim payment certificates; and (*d*) thereby inducing the contractor to believe that the works had been approved so that alterations and repairs would be more expensive than they would have been if objections had been taken and the alterations and repairs effected during the progress of the work or within a reasonable time thereafter.

As to (*a*) and (*b*), it has been pointed out that acceptance and taking possession of the works even with knowledge of defects does not, unless there has been actual waiver of due performance, prevent an employer from showing that the work has not been completely performed: Halsbury (3rd Edn.), Vol. 3, p. 454; Hudson (7th Edn.), p. 236, quoted above. As to oral approval from time to time by the architect or clerk of works of departures from the specification,

there could be no estoppel if the contractor knew the extent of their authority and knew that it was being exceeded. He did know, or should, from the terms of his contract, have known, this. As to (*c*), estoppel could not be founded on the issue of interim payment certificates which are only estimates of what it is safe for the owner to pay the contractor, and are not conclusive of anything. As to (*d*), the contractor was bound to put right defects appearing during the maintenance period (condition 9 (iii)); but I think that if defects were patent before the commencement of the maintenance period and the Council by their officers knowingly stood by and did not ask for these to be corrected at or before acceptance of the building (when the contractor was on the site and could have remedied them more easily and cheaply), thereby causing the contractor to believe that he had no further liability in respect of these defects, there may be a case for relieving the contractor of the additional expense (if any) caused by such standing by. The Council had a duty to mitigate damage in respect of defects which were patent or could, with reasonable standards of inspection, have been discovered. This is dealt with when the measure of damages is considered hereafter. Mr. O'Donovan cited *Hughes v. Metropolitan Railway Co*. (16) (1877), 2 App. Cas. 439, 448; and *Birmingham and District Land Co. v. London and North Western Railway* (17) (1889), 40 Ch.D. 268, as authority for the proposition that if A. has contractual rights against B., and has by his conduct induced B. to believe that those rights will not be enforced, A. will not be allowed subsequently to enforce those rights or at least will not be allowed to do so without restoring B. to his former position. I do not think, however, that that principle is wholly applicable to the facts of the present case. It could, in any event, apply only to the eleven blocks and to defects which were patent when they were taken over. As has been pointed out, the contract provided for the contractor to make good defects appearing during the maintenance period and he cannot, or should not, have been induced merely by directions to do some repairs and approval and acceptance of the blocks to believe that those rights or the right of the Council to sue for defects appearing after the commencement of the maintenance period would not be enforced. I revert to this when the question of mitigation of damages is considered. With this reservation I would answer issue No. 7 in the negative.

Issue No. 8 will be dealt with later.

As to issues 9 and 10, I agree with the findings of the learned judge and would award the contractor Shs. 78,850/- on this head. The contract contains power in the city engineer to order extras and his orders in so far as they were given in accordance with the contract, are binding on the Council: Halsbury (3rd Edn.), Vol. 3, p. 478, para. 929 and cases there cited.

I come now to issue No. 8–damages–which is, in my opinion, the most difficult part of the case. Generally speaking, the measure of damages for failure to carry out a building contract in accordance with the specification is the difference between the value of the buildings as they ought to have been and as they were left by the contractor, and this difference is usually calculated by the cost of making the defects good. *Newton Abbot Development Co. v. Stockman Bros*. (9); *Hoenig v. Isaacs* (5). It is to be noted that the diminution in the value of the works due to the existence of the defects is the measure of damages envisaged by para. (iv) of general condition 9 for defects to which that paragraph applies. The value of the buildings as completed by the contractor was estimated by Mr. Wevill at p. 414 of the record on a comparative maintenance basis, at £35,000 to £40,000. Deducting £40,000 from the contract figure of £85,000 (though in fact Mr. Wevill valued the buildings if finished according to the specification at a higher figure than the contract price) the difference between the value of the buildings as they were left by the contractor, and as they ought to have been would, on this basis, be £45,000. The Council, however, is not now claiming that amount. The schedule of claims now put

in by the Council is based on the estimated cost of making defects good and totals Shs. 527,540/90 or approximately £26,370. This is more favourable to the contractor than Mr. Wevill's estimate of the difference in the value worked out on comparative costs of maintenance. I will, therefore, discard any other basis of calculation and will assess the diminution in value between the buildings as they were left by the contractor and as they should have been by calculating the cost of making good the defects.

I have already indicated my opinion that the right of the Council to sue for defects is not limited (as the learned judge held in regard to the eleven blocks taken over) to defects appearing during the maintenance period. (See, e.g. *Newton Abbot Development Co. v. Stockman Bros*. (9)).

Claims for damages now made by the Council are summarised under six headings:

I. Foundations and foundation walling.

II. Floors and hardcore fill underneath.

III. Superstructure walling, door frames, etc., damp course.

IV. Joinery–hinges.

V. Loss of rent.

VI. Cost of survey and report.

As to I–Foundations and foundation walling, the findings of the learned judge are:

> "I find that there was a proportion of this concrete which was not up to specification or was badly mixed and therefore unduly weak and that the Architect and clerk of works were not aware of the fact that this weak concrete had gone into the buildings."
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> "My finding is that a proportion of the cement used" [i.e. in the foundation walling] "was not up to specification or was badly mixed or laid and that this was not known to the architect or clerk of works."

The learned judge held that the Council could only recover, as regards the eleven blocks taken over, for defects discovered within the maintenance period. Being unable to find evidence as to the extent of the defects discovered within the maintenance period, he was reluctantly unable to assess a figure for damages. Having held that the Council's right to recover is not limited to the defects discovered within the maintenance period, I am not under the same disability. As regards the six blocks not taken over, the learned judge accepted Mr. Wevill's report and awarded 6/17ths of the whole sum (Shs. 38,967/20) assessed by Mr. Wevill for excavation, underpinning, raking out joints and repointing. The bulk of this was for excavating to expose the external face. The learned judge awarded 6/17ths of the whole assessment, notwithstanding that he had only found that a proportion of the concrete and cement was defective. He may reasonably have considered that the cost of excavating to discover what proportion was defective would in any event have to be allowed and that the cost of testing each joint to find out which were defective would be likely to amount to as much as, or more than, the cost of raking them all out and replacing with new mortar. I do not propose to disturb this finding, except to make it apply to seventeen blocks instead of to six, that is to say I would allow the whole sum of Shs. 38,967/20 plus Shs. 9,741/80 extra for work done by contract, i.e. Shs. 48,708/-. I do not think that the Council is bound to do the remedial work departmentally or to recover damages on the basis that it will be so done. There is no evidence that their departmental officers and labour are or could

be made available for this work. I suppose that the Council is entitled, instead of doing the work, to accept inferior buildings with compensation. If, however, the remedial work is actually done, I would allow a further Shs. 10,000/- (as estimated by Mr. Wevill) for pumping and baling to keep the foundations clear of water during the work.

As to II–Floors and hardcore fill underneath: The Council claims the whole cost of hacking up all floors, digging out filling, filling back with hardcore in six-inch layers and ramming and relaying concrete floors and screed to a total of Shs. 309,639/10 plus Shs. 77,409/80 if the work is done by contract.

The learned judge found (*a*) that the absence of small filling between the larger boulders was not a failure to comply with the specification or drawings; that hardcore filling without such small material was unlikely to be satisfactory, but that that appeared to have been the provision of the specification, accepted as such by Mr. Tanner; (*b*) that ramming of a sort was undertaken but that ramming would not be very effective in the absence of small material; (*c*) that the boulders put in were larger than would go into six-inch layers and that there had been a breach of the specification in this respect; but (*d*) that both Mr. Tanner and Mr. Stone saw the hardcore filling which was being put in and approved both the type of stone used and the method of filling.

As to the concrete floors on top of the fill, the learned judge found that a proportion of the concrete was either not of the correct mix or not properly mixed or laid and that the defect was unknown to the clerk of works and the architect.

With regard to the hardcore fill, Mr. Stewart Brown did not suggest that the contractor was under an obligation to import smaller rubble, but he did argue that if the stone had been broken small so as to go into six-inch layers and the broken fragments had been put in, there would have been enough small stone to enable much better consolidation in layers not exceeding six-inches and the ramming would have been much more effective. This would appear to be reasonable. There was nothing, however, in the specification (except perhaps para. 2 of the first part of the specification) binding the contractor to break up the stone on the spot and put in the resulting fragments, though this was the method adopted and one of the contract drawings shows small filling between the stones.

Mr. O'Donovan argued that the Council had not proved their damages because they had not proved how much, if at all, a better result would have been achieved if the large boulders had been broken down and the resulting fragments put in. Moreover, he contended that the Council were under a duty to mitigate damages and that they could not recover damages resulting from a failure to take reasonable steps at the time to have this done. He contended that they could have insisted on the blocks being broken down to the proper size when it would have been easy and cheap to do this, and that they cannot recover the greatly enhanced cost of taking up all the floors to do the work now. Mr. O'Donovan relied on *Re Trent and Humber Co., Ex parte Cambrian Steam packet Co*. (18) (1868), L.R. 6 Eq. 396. In that case the Trent Co. had built a ship for the Cambrian Co. which was defective. The defect was not discovered until nearly a year after the delivery of the ship and after the ship had returned from a voyage. Expensive repairs were then necessary. It was held that the defect could easily have been discovered by the representatives of the Cambrian Co. at or before the day that the ship was delivered and that, in those circumstances, the maximum amount recoverable was the amount which it would have cost to rectify the defect at the date of delivery. Mr. O'Donovan argued that, by analogy, the most the Council could recover was the amount which it would have cost to rectify the hardcore fillings at the times that they were put in.

Mr. Stewart Brown in reply contended that, though the Council could have demanded rectification of the hardcore fillings at the time, the fact that they had not done so did not affect their right to damages: a building owner is not under an obligation to exercise an optional remedy and does not lose his right to damages if he does not do so (*Robins v. Goddard* (14), [1905] 1 K.B. 294, 303). Moreover, Mr. Stewart Brown pointed out, in the *Trent* case (18) the Cambrian Co. was held to be entitled to damages at the date of completion, and in the present case the damages had not increased since the date of completion: the floors had already been put down.

I do not think that a building owner loses his right to damages if he does not exercise an optional power to have the work rectified when he discovers or ought to have discovered the defects; but it may be that his damages will be calculated at the date at which he ought to have acted to mitigate them, and that if he chooses to lie by an do nothing, he may not be entitled to recover the greatly enhanced cost of remedying the defects later. When the actual amount of damage has been affected by the conduct of the plaintiff or his agents, if that conduct was unreasonable, damages may be diminished on that account: *Wilson v. Hicks* (19) (1857), 26 L.J. Ex. 242. A party is bound to act not only in his own interests, but in the interests of the party who would have to pay the damages, and to keep down the damages so far as it is reasonable and proper, by acting reasonably in the matter: *Smailes & Son v. Hans Dessen & Co.* (20) (1906), 94 L.T. 492, 493. The *Trent* case (18) differs from the present case in that it was not shown that the Cambrian Co. had any representative on the job supervising the work or that the defect was known to any officer of the Cambrian Co. before completion. In fact it was not discovered until nearly a year after completion. If a date before completion had been established at which an officer of the Cambrian Co. had discovered the defect, the damages might have been related to that date and not the completion date.

As I have said, generally speaking, the measure of damages for failure to carry out a building contract in accordance with the specification is the difference between the value of the buildings as they ought to have been and as they were in fact, and is normally measured by the cost of making the buildings good. (I omit, for the present, consideration of loss of rent, profits, etc.). But the cost of making good is not always the measure. For instance, as Mr. Stewart Brown conceded, the measure of damages for building a house thirty feet, instead of thirty-five feet, back from a road would not be the cost of demolishing and rebuilding the house, certainly not if the owner could have discovered what was being done but did not do so, or did so and made no objection, until the house had been completed. He could not then recover the whole cost of making good as at the date of completion (I have assumed in this example that no building by-law was contravened). Similarly, I think that here the Council or its agent, the city engineer, could and should have known the type of hardcore and the method of filling which was being used. Mr. Tanner knew. It is in evidence that Mr. Tanner was not agreeable to incurring the extra expense of small rubble and took no notice when the practical difficulty occasioned by attempting to ram large stones without the voids being filled was explained to him. Mr. Tanner should have reported to the city engineer. The fill should then have been corrected and the damages mitigated. There is no evidence of what it would have cost at that stage (*a*) for the contractor to break down the fill to the specified size and (*b*) for small rubble, if still required, to be put in; but clearly the cost would have been much less than the cost of hacking up the floors, digging out the fill, filling back and relaying the floors which is now said to be the only satisfactory remedy. No doubt the architect was at fault, and, perhaps the city engineer also; but the contractor was by no means free from blame. The breach of contract was primarily his. He put in, in breach of para. 26 of the specification,

stone, not approved in writing, of a size which could not go into layers not exceeding six inches and could not be effectively rammed. He could have avoided this trouble if he had observed the terms of the specification or, when approached by the clerk of works to make a good job of the filling by adding small rubble he had not said that he was not going to, as it was not in the specification. (See the evidence of Mr. Stone, whose evidence the learned judge accepted, at p. 290). Even if the contractor was not under an express obligation to put in small rubble, he must have known that boulders with little or no small filling in the voids and no proper compaction would cause uneven settlement and cracking of the floor and would not be sound building construction practice within para. 2 of the specification. He should have obtained a written direction and could, if he contended that small filling was outside the specification, have asked to recover the cost of small filling as an extra. In any event, he was bound by cl. 26 of the specification read with general condition 1 (ii) to get the type of filling which he was using approved in writing and this he did not do. It seems to me that both the parties acted unreasonably and were about equally to blame for the work going forward with defective hardcore filling and for the results which flowed therefrom.

As to the concrete floors, the learned judge found that a proportion of the concrete in the floors was (unknown to the architect and clerk of works) not of the correct mix or not properly mixed or laid; but he has not said what proportion. The learned judge said that he found it impossible to reach any estimate as to the figure of damages attributable to faulty concrete in the floors. If damage has been proved, however, and there is any evidence upon which an assessment of it can be made, the court must not be deterred by difficulty in assessing it.

> "Difficulty in assessing the damages is no reason for refusing damages, or for awarding only nominal damages:"

Mayne on Damages (11th Edn.), p. 610; *Chaplin v. Hicks* (21), [1911] 2 K.B. 786 (C.A.). I consider that there is some evidence upon which an assessment of damages under head II above could have been based. The facts that precision cannot be arrived at and that certainty is impossible are no grounds for not making an assessment: *Chaplin v. Hicks* (21) at p. 792. It is stated in Mr. Wevill's report, which the learned judge seems to have accepted in those instances where he gave damages, that all the floors have cracked, leading, as Mr. Wevill says, to the reasonable assumption that the type of filling which was exposed where the floors were opened up is similar throughout and that the cause of cracking, irrespective of possible weakness in the concrete, lies in the filling. Mr. Wevill's oral evidence and that of Mr. Stone support that inference. Mr. Wevill stated further that no matter what repairs were made to the floors themselves, no permanent cure could be effected until they were all taken up, the filling removed, all black cotton soil dug out and new filling which conforms to the specification done and the floors re-laid. The Council would, on the basis which I have stated above and apart from any question of mitigation of damages, be entitled to the cost of making the buildings good including the cost of having new filling put in of a size which conforms to the specification. For the purpose of rectifying the filling underneath, the floors would have to be removed and replaced. Mr. Wevill estimated the cost of hacking up the floors, digging out the fill, back-filling and making new floors at Shs. 387,048/90 if the work were done by contract. I think that the damages under this head should be assessed at that sum less whatever proportion ought to be deducted by reason of the failure of the servants of the Council to act reasonably in mitigating the damages. It is impossible, as it was in *Chaplin v. Hicks* (21), to make an accurate assessment, but damage is proved and the court must make some assessment or order an inquiry as to damages. I have

considered whether an inquiry as to damages should be ordered, but that would only involve further protracted and expensive litigation, and it is probable that no precise assessment could be achieved. Accordingly, I would allow Shs. 387,048/90, diminished by the proportion which the Council ought to bear by reason of their servants' part in allowing the work to go forward with defective hardcore filling, which, having regard to the figures and all the circumstances, I asses at fifty per cent. That is to say, I would allow the Council Shs. 193,524/45 on this head.

As to III–Superstructure walling. The finding of the learned judge is:

> "I have reached the conclusion that the complaint is justified with regard to some proportion of the cement mortar and that this defect was not known to the architect or clerk of works."

The learned judge allowed 6/17ths of the sum (Shs. 18,573/20) assessed by Mr. Wevill for external rectification, i.e. Shs. 6,564/-. This was because the learned judge held that the Council could only recover in respect of six of the seventeen blocks. For the reasons already given, I think that the Council can recover in respect of all seventeen blocks, and that, accordingly, the whole sum, Shs. 18,573/20, should be allowed for external treatment, plus a further Shs. 4,643/30 the cost of having the work done by contract, making a total of Shs. 23,216/50. A similar sum, i.e. Shs. 23,216/50, will be recoverable in respect of similar internal treatment. Total Shs. 46,433/-.

As to door frames and windows:

> The findings of the learned judge are:
>
> "It is further complained that door frames were not properly set or fixed. Once again there seemed to be some divergence of evidence on this subject. It appears to me that the architect and clerk of works were aware of what was being done in general though in particular cases it may be that the door frames were badly set without this being noticed at the time. This would seem to be a matter which it should be easy to pick up either during inspection of the buildings prior to taking over or during the maintenance period. Nevertheless it probably does constitute a breach of contract for which the contractor is responsible."
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> "It is complained that door and window frames were not fixed with metal cramps, that door hinges were not as specified and were fixed with screws without any bolts. The evidence indicates that there was not a compliance with the specification in that screws and not bolts were used but it is also clear in the evidence that the variations were known to and accepted by the architect and clerk of works."

The learned judge allowed nothing on this head because he had held that the Council could not recover for patent defects. If, however, I am correct, the Council is entitled to recover on this head. It is not shown that the cost of taking out and replacing defective door frames, shutters and louvres is more now than it would have been had each defective door frame, etc., been required to be replaced immediately after it was put in, except that the contractor has now left the site. I cannot allow for this. He should not have left defective work behind him. The Council are entitled to the cost of making these matters good, which, following Mr. Wevill's figures in exhibit K, I would assess at Shs. 8,430/- plus twenty-five per cent. for work done by contract, i.e. Shs. 10,537/50.

Damp course. The learned judge allowed 6/17ths of Shs. 500/- for defects in the damp course. On my findings the whole of the Shs. 500/- should be allowed.

As to IV–Joinery–hinges.

One of the findings is quoted above. Another is:

> "It appeared that types of spring closing device were used on these" [the ablution] "doors and that as a general rule the doors were not set so as to close on their own account. This is an apparent failure to comply with the specification but is not a matter which can be concealed. Both the architect and clerk of works must have been aware of what was done."

I think that the same reasoning applies as for door frames and windows and that the Council are entitled to recover the cost estimated in exhibit K for carrying out this work, namely, Shs. 7,252/50.

As to V–Loss of rent. The claim on this head is now reduced to Shs. 10,967/- (see schedule of claims, p. 4). The learned judge did not feel able to award anything on this head because the Council had not succeeded in establishing their claim in respect of the bulk of the alleged defects. I think that a claim for loss of rent should only be allowed if the loss is in fact incurred. Accordingly, if the Council does the remedial work indicated under paras. I to IV above or any of it and in so doing the buildings concerned have to be evacuated so that rents are lost, the actual loss so incurred will be recoverable by the Council as damages provided the remedial work is put in hand and completed with reasonable despatch.

As to VI–Cost of survey and report. The Council claimed Shs. 9,881/- on this head. The learned judge on the basis of his findings allowed Shs. 2,000/-. On the basis of my findings I would allow Shs. 6,000/-.

To summarise, I would allow damages under issue 8 as follows:

I. Foundations and foundation walling. Shs. 48,708/-; plus, if the remedial work is actually done, Shs. 10,000/- for pumping and baling.

II. Floors and hardcore fill underneath. Shs. 193,524/45.

III. Superstructure walling. Shs. 46,433/-.

Door frames and windows. Shs. 10,537/50.

Damp course. Shs. 500/-.

IV. Joinery–hinges. Shs. 7,252/50.

V. Loss of rent. The Council may recover the amount of rent actually lost by reason of doing the remedial work mentioned or any of it.

VI. Cost of survey and report. Shs. 6,000/-.

As to the retention money, the contractor is not entitled to any of it until he has satisfactorily completed the work, which he has certainly not done to date. Only if and when the contractor has discharged his liabilities to the Council enumerated above, so that it can be said that the defects for which the contractor is liable have been remedied or damages paid in lieu, will he be entitled to receive payment of the retention moneys and of the sum of Shs. 50,000/- deposited by way of security. He is not yet entitled to either.

I would allow the appeal and set aside the decree dated September 6, 1957, and substitute a decree to the effect (1) that subject to para. 2 of the decree, the Council do pay to the contractor, in Civil Case No. 170 of 1956, the sum of Shs. 70,850/- in respect of extras; and (2) a declaration that the Council is entitled in Civil Case No. 1314 of 1956 to the damages set out under heads 1 to VI above and an order that the contractor do pay the same accordingly. As to the sums awarded for pumping and baling under head I and for loss of rent under head V, judgment may be signed for these upon proof to the satisfaction

of the registrar of this court (subject to reference to the court) that the work has been done. The amounts payable by and to each party under para. (1) and para. (2) may be set off. The Contractor will also be entitled to set off the retention moneys and the Shs. 50,000/- deposited by way of security. The decree had better be settled in chambers and the parties must have liberty to apply from time to time as the decree is worked out.

As to costs, having considered the issues upon which the Council has succeeded and the extent to which they have been successful financially, and following the principle in *Cinema Press Ltd. v. Pictures and Pleasures Ltd*. (22), [1945] K.B. 356, I would order that two-thirds of the costs of both suits below and of the appeal be taxed and paid by the contractor to the council. There should be a certificate for two counsel on each side of the appeal.

Gould JA: I have had the opportunity of considering the judgment of the learned President in this appeal. I am in full agreement with it both as to reasoning and conclusions and I have nothing to add.

Sir Owen Corrie Ag JA: I also agree.

Appeal allowed.

For the appellants:
Stewart Brown QC and *JA Mackie Robertson*
Kaplan & Stratton, Nairobi

For the respondent:
B O'Donovan, QC and *SR Cockar*
Cockar & Cockar, Nairob